

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).

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.

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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 (primary)
3. Keywords of the alphabetical index (supplementary)
4. Headnotes
5. Summary
6. Supplementary information
7. Cross-references
8. Languages

G. Buquicchio

Secretary of the European Commission for Democracy through Law

THE VENICE COMMISSION

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- 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.

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Secretariat of the Venice Commission
Council of Europe
F-67075 STRASBOURG CEDEX
Tel: (33) 3 88413908 - Fax: (33) 3 88413738
Venice@coe.int

Editors:

Sc. R. Dürr, D. Bojic-Bultrini

H. Moore, P. Greenhill

J. Farmer, M.-L. Wigishoff

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N. Sansonetis

Court of Justice of the European Communities

Ph. Singer

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Albania

Constitutional Court

Statistical data

1 January 2001 – 31 December 2001

Number of decisions: 213

- decisions as to admissibility: 207
 - admissible: 93
 - inadmissible: 114
- final decisions: 93
 - appeal dismissed: 53
 - appeals upheld: 40
- appeals withdrawn: 6

Effects:

- *ex tunc*: 0
- *ex nunc*: 213
- *erga omnes*: 213
- *inter partes*: 0
- immediate: 0
- deferred: 0

Types of provisions reviewed:

- Constitution: 2
- laws: 26
- international treaties: 0
- decisions of the Council of Ministers: 3
- judicial decisions: 111
- other administrative acts: 71

Constitutional review:

- preventive review (*a priori*): 0
- *a posteriori* review:
 - concrete review: 212
 - abstract review: 1

Types of litigation:

- fair trial: 166
- conflict of powers: 0
- electoral disputes: 58
- constitutionality of political parties: 0
- impeachment: 0
- constitutionality of acts by the executive: 3
- constitutionality of laws: 26
- interpretation of the Constitution: 2
- end of office of constitutional judge: 0

Proceedings initiated by:

- President of the Republic: 0

- Prime Minister: 1
- Group of Deputies: 0
- High State Council: 1
- People's Advocate: 2
- Ordinary Courts: 2
- Organs of Local Government: 9
- Organs of Religious Communities: 0
- Political Parties and other Organisations: 28
- Individuals: 166

Important decisions

Identification: ALB-2002-1-001

a) Albania / **b)** Constitutional Court / **c)** / **d)** 08.11.2001 / **e)** 178 / **f)** Legitimacy of Ombudsman to request the review of the constitutionality of the legislative act / **g)** *Fletorja Zyrtare* (Official Gazette), 52/2001, 1676 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.2.1.8 **Constitutional Justice** – Types of claim – Claim by a public body – Ombudsman.

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

1.3.5.13 **Constitutional Justice** – Jurisdiction – The subject of review – Administrative acts.

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

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

4.12.3 **Institutions** – Ombudsman – Powers.

Keywords of the alphabetical index:

Ombudsman, legislative act, challenging, *locus standi*.

Headnotes:

The People's Advocate (Ombudsman) is not among the subjects that may challenge legislative acts before the Constitutional Court. This institution enjoys the right only to make recommendations and not a general right to petition the Constitutional Court concerning such acts. It can refer questions concerning the constitutionality of a legislative act to the Court only when such an act affects its organisational structure or impedes the exercise of the institution's powers.

The People's Advocate may challenge acts of public administration when he considers that they infringe an individual's legitimate rights and interests.

Summary:

A commercial company petitioned the People's Advocate alleging the unconstitutionality of the statute applied by a court in a dispute between this company and another. The People's Advocate brought the case before the Constitutional Court. However, the Court rejected the application on the grounds that the applicant had no *locus standi*.

The Constitutional Court recalled that the People's Advocate may only address the Constitutional Court for cases regarding the abrogation of public administrative acts if he comes to the conclusion that these acts have led to the infringement of the individual's legitimate rights and interests. The People's Advocate was recognised as having standing in such cases in Constitutional Court Decision 26/01 (*Bulletin* 2001/2 [ALB-2001-2-002]).

Referring to Articles 134.2 and 60 of the Constitution, the Constitutional Court noted that the subject of the application submitted by the People's Advocate in the present case was not the abrogation of a public administrative act, but of a legislative act. This falls outside the scope of the People's Advocate's powers, as this institution is not one of the subjects entitled to challenge the constitutionality of legislative acts before the Constitutional Court.

The only case where the People's Advocate may challenge a legislative act before the Constitutional Court is when he considers that the act, or a clause, affects the organisational structure of this institution, infringes the People's Advocate's status, or impedes the exercise of the institution's powers.

As to the cases that fall under the jurisdiction of ordinary courts, when he or she does not have any interests involved, the People's Advocate cannot intervene as a party or challenge court decisions in such cases before the Constitutional Court. In these cases, it is the individual who has the right to initiate proceedings before these courts, including even the Constitutional Court, when during the ordinary proceedings his right to a fair trial has not been respected.

Languages:

Albanian, English (translation by the Court).

*Identification:* ALB-2002-1-002

a) Albania / **b)** Constitutional Court / **c)** / **d)** 12.12.2001 / **e)** 193 / **f)** Dunga v. decision of the Criminal Chamber of the Supreme Court / **g)** *Fletorja Zyrtare* (Official Gazette), 52/2001, 1676 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

5.3.13.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to a hearing.

5.3.13.20 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Adversarial principle.

Keywords of the alphabetical index:

Criminal law / Supreme Court, admissibility, decision, competence.

Headnotes:

The Criminal Chamber of the Supreme Court has the authority to rule an application inadmissible only after establishing that the submitted case does not include grounds provided for by the Criminal Procedure Code. The examination of the admissibility of the application may take place without the parties being present.

However, when it is established that at least one of these grounds exists, the case is to be passed to a court hearing. The court hearing is the only place at which the Criminal Chamber may decide whether the grounds on which the appeal is based are well founded in law.

Summary:

The applicant lodged an appeal before the Criminal Chamber of the Supreme Court against the decisions of the Court of first instance and the court of appeal declaring him guilty for the criminal act of murder and illegal bearing of weapons. The Criminal Chamber, constituted to decide on admissibility, ruled that the appeal was inadmissible, because it did not include grounds provided for by the Criminal Procedure Code, and that the criminal law had been correctly applied by the lower courts.

The applicant challenged the Supreme Court decisions, alleging violation of his right to a fair trial, since he was denied the right to be heard in a court hearing.

The Constitutional Court observed that the legal grounds on which the appeal was based could be found in the introductory part of the Supreme Court's decision, and that by declaring that the criminal law and the legal norm had been correctly applied, the Criminal Chamber examined whether the grounds on which the appeal was based were well founded in law. The Constitutional Court was of the opinion that the Supreme Court had followed the wrong approach, as the purpose of the examination of the admissibility of the appeal is quite different from that of its examination in a full court hearing.

It furthermore emphasised that an appeal should only be declared inadmissible if it is based on grounds that differ from those provided for by the law. This question of the admissibility of the appeal is decided without the parties being present. If it is found that one of the grounds for appealing exists, then the appeal must pass before the Criminal Chamber for a hearing. The question whether grounds argued on appeal are well founded in law may only be examined at a court hearing. The Criminal Chamber is not competent, in the context of its decision on admissibility, to examine the appeal on its merits or to pronounce itself as to the decisions made by other instances.

By assessing in its decision on admissibility the legal basis of the grounds presented, the Supreme Court thus exceeded its competences, thus infringing the applicant's right to be heard and defended in a court hearing.

For these reasons, the Constitutional Court held that the applicant's right to a fair trial, guaranteed by Article 42 of the Constitution, had been violated, and declared the decision of the Criminal Chamber of the Supreme Court unconstitutional.

Languages:

Albanian, English (translation by the Court).



Identification: ALB-2002-1-003

a) Albania / **b)** Constitutional Court / **c)** / **d)** 21.02.2002 / **e)** 28 / **f)** / **g)** *Fletorja Zyrtare* (Official Gazette), 5, 109 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.5.4.5 **Constitutional Justice** – Decisions – Types – Suspension.
 2.3.8 **Sources of Constitutional Law** – Techniques of review – Systematic interpretation.
 4.5.2 **Institutions** – Legislative bodies – Powers.
 4.5.7.2 **Institutions** – Legislative bodies – Relations with the executive bodies – Questions of confidence.
 4.5.7.3 **Institutions** – Legislative bodies – Relations with the executive bodies – Motion of censure.
 4.6.4.1 **Institutions** – Executive bodies – Composition – Appointment of members.

Keywords of the alphabetical index:

Government, head, method of appointment / Government, policy programme.

Headnotes:

Parliament may take a vote of confidence in the Council of Ministers not only because of the responsibilities of the Prime Minister, but also and above all, because of the government's policy programme presented and the composition of the Council of Ministers. For that reason, the approval of the Prime Minister by Parliament may not be separated in time from the approval of the programme and the composition of the Council of Ministers.

Summary:

A group of 29 parliamentarians requested the Constitutional Court to interpret Articles 96 and 97 of the Constitution, which lay down the procedure for the approval of the Prime Minister, and of the policy programme of the Council of Ministers and its composition. The applicants also requested the suspension of the procedure of approval until the final decision of the Constitutional Court. Taking into consideration that the approval of the Prime Minister, the policy programme and the composition of the Council of Ministers, prior to the final decision from the Court on the interpretation of the constitutional norms, might affect the national interest, the Constitutional Court decided to suspend the procedure of approval of the Prime Minister by Parliament.

The Constitutional Court noted that for an accurate interpretation of Articles 96 and 97 of the Constitution, these provisions must be seen in the context of Chapter V of the Constitution as a whole, and analysed on the basis of the doctrinal concepts of Albanian and foreign constitutional law.

In this respect, it was emphasised that the Prime Minister is the central authority of the executive, from the point of view of its political responsibilities to Parliament. The Constitution established accurate and quick procedures for approval of the Prime Minister and the Council of Ministers.

Furthermore, the Constitutional Court emphasised that it is the governmental programme and the composition of the Council of Ministers that are to be approved by the Parliament, which exercises important tasks in forming and controlling the Council of Ministers. Therefore, in accordance with Articles 104 or 105 of the Constitution, Parliament takes its vote of confidence in the Council of Ministers, not because of the qualities of the Prime Minister as such, but first of all because of the policy programme and the composition of the Council of Ministers, which the Prime Minister will represent and lead.

The Court concluded that the debate and the approval of the Prime Minister, according to Article 96 of the Constitution, cannot be seen separate from the presentation of the policy programme of the Council of Ministers and its composition.

Indeed, Article 97 of the Constitution provides for the obligation of the Prime Minister appointed by the President of the Republic to present, within 10 days, for approval to Parliament the policy programme and the composition of the Council of Ministers. In other words, the Prime Minister, the policy programme of the Council of Ministers and its composition are submitted to parliamentary supervision as a condition for political confidence.

Such an obligation cannot be seen as an action taken by the Prime Minister after his or her approval; being appointed Prime Minister, he or she addresses Parliament in order to fulfil the constitutional obligation deriving from Article 97 of the Constitution, and be approved by Parliament.

In the light of the above arguments, the Constitutional Court concluded that the Prime Minister appointed by the President of the Republic, has to present himself or herself to Parliament for approval along with the policy programme and the composition of the Council of Ministers.

The Court lifted the suspension of the procedures on debating the approval of the Prime Minister, the political programme and the composition of the Council of Ministers.

Languages:

Albanian, English (translation by the Court).



Identification: ALB-2002-1-004

a) Albania / **b)** Constitutional Court / **c)** / **d)** 11.03.2002 / **e)** 40 / **f)** Unconstitutionality of the law on restitution of properties gained from pyramid scheme companies to the administrators of those companies / **g)** *Fletorja Zyrtare* (Official Gazette), 26, 138 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
 3.10 **General Principles** – Certainty of the law.
 4.5.2 **Institutions** – Legislative bodies – Powers.
 5.2 **Fundamental Rights** – Equality.
 5.3.36.2 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Civil law.
 5.3.37.4 **Fundamental Rights** – Civil and political rights – Right to property – Privatisation.
 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.
 5.4.7 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Company, borrowing money / Contract, sale / Contract, nullity / Contract, private, control / Contract, parties, autonomy.

Headnotes:

The obligation of restitution of funds derived from pyramid scheme societies at prices higher than the market average to the administrators of those companies is unconstitutional, insofar it violates several constitutional principles and more particularly, the freedom to exercise economic activities, the principle of the application of the law in time, the equality before the law and the principle of balance between the state powers.

Summary:

The Constitutional Court was requested to pronounce itself on the constitutionality of the obligation of all legal and natural persons who have benefited from property sales at prices higher than the average market price, to reimburse the excess revenue to pyramid scheme societies.

The Constitutional Court considered that such an obligation is unconstitutional, insofar it violates amongst others, the principle of free private economic activity. This principle implies that the State has no right to intervene in the realm of the activity of private entities, as long as this does not infringe the law. Naturally, the State may intervene in the public interest, but only when the private activity has not yet started, or when it has already started there have been no legal consequences.

Furthermore, the Court noted that sanctions were inflicted upon sales of privatised properties, thus after legal relations had already entered into force in accordance with the laws applicable at the time of establishing those relations. Providing sanctions for sales of privatised properties would have brought about the breaking of relations which had already been established, which could create insecurity in civil law matters. Hence the reason why this act is supposed to be illegal.

The contested legal act also does not respect the principle of equality before the law, by dealing in different ways with the same situations. Actually, the sanctions are to be applied not to all subjects, but only to those who had established legal relations with banks and building societies. The application of the act prior to consulting the provisions of the Civil Code with regard to annulment of legal actions prompted the Court's decision in the case.

The Court concluded that the contested act exceeded the legislative authority, and interfered with the judicial sphere thus violating the principle of balance of powers guaranteed by Article 7 of the Constitution.

Languages:

Albanian, English (translation by the Court).



Identification: ALB-2002-1-005

a) Albania / **b)** Constitutional Court / **c)** / **d)** 19.04.2002 / **e)** 75 / **f)** / **g)** *Fletorja Zyrtare* (Official Gazette), 13, 387 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.1.4.2 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Legislative bodies.

1.3.4.13 **Constitutional Justice** – Jurisdiction – Types of litigation – Universally binding interpretation of laws.

2.3.8 **Sources of Constitutional Law** – Techniques of review – Systematic interpretation.

3.18 **General Principles** – General interest.

4.7.4.1.5.3 **Institutions** – Judicial bodies – Organisation – Members – Status – Irremovability.

4.7.4.3.3 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel – End of office.

5.3.13.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to a hearing.

Keywords of the alphabetical index:

Constitutional Court, interpretative decision, effects / Constitutional Court, jurisdiction, limits / Constitution, interpretation / Decree, presidential / Dismissal, proceedings, right to defend oneself / Prosecutor, responsibility.

Headnotes:

The interpretation that the Constitutional Court gives to constitutional provisions has the purpose of analytically identifying the criteria, basic concepts and principles on which the competent body should rely in the procedure for discharging the justices of the Constitutional Court or the Supreme Court or for removing the General Prosecutor. The actions or inactions that might constitute the reasons for their dismissal must be verified by the body that carries out this procedure of dismissal. The wrongful acts and undignified conduct committed should be so serious as to have discredited the position of the judge or prosecutor and to have lowered the dignity of the body they represent so seriously as to compel the competent body to take the measure of removing him or her from duty.

In cases when fundamental elements of the procedure for dismissing a judge or the General Prosecutor do not find detailed regulation in the Constitution or other laws, such procedural rules cannot be filled in through the Constitutional Court's interpretative decision. Parliament can adopt special rules for a concrete case, but must always ensure the respect for the constitutional principles of due process of law.

Summary:

A group of deputies requested the Constitutional Court to interpret Articles 128, 140 and 149.2 of the Constitution, which provide the grounds for the removal of a justice of the Constitutional Court, a justice of the Supreme Court or the General Prosecutor. Out of the grounds established in the above-mentioned articles, two of them, specifically the commission of a crime and mental or physical incapacity, are such that cannot be verified directly by Parliament, as they require a preliminary determination of the competent bodies.

The Constitutional Court underlined that it cannot perform the role of the positive legislator, contemplating all the grounds that might be included in the aforementioned constitutional articles.

The Constitutional Court considered that the meaning of the constitutional terms related to the reasons for dismissal should be seen as closely connected to the whole legal process that Parliament follows in cases when it initiates the procedures for the dismissal of judges of the Constitutional or Supreme Court or the General Prosecutor. This legal procedure of disciplinary adjudication, similar to investigative administrative procedures, has its own principles that are related to the verification, analysis and determination of the concrete reasons that lead to the taking of measures for the dismissal of a court officer.

Following this general conclusion, the Constitutional Court examines the existence of the reasons for dismissal. The Constitutional Court examines not only the procedure of dismissal, but also the merits of the case. In order to ensure that the decision of Parliament on the dismissal of the official in question is well grounded and constitutional, it has to meet all the essential elements of a fair procedure.

The Court noted that the expression “acts and behaviour that seriously discredit the position and reputation of a judge...” established by Articles 128, 140 and 149.2 of the Constitution comprises a number of elements, which may and must be identified on a case by case basis by the body competent to take a decision on the dismissal of judges of the Constitutional or Supreme Court or the General Prosecutor. The “behaviour” may have been committed not only during the exercise of the officer’s professional duty, but also outside of it.

On the other hand, in the expression “serious violation of the law during the exercise of his duties” committed by the General Prosecutor (Article 149.2 of the Constitution) the seriousness relates to the importance of the violation of the law, to the

consequences that ensued, to the duration of these consequences, as well as to the subjective position that the particular person holds towards it.

Two justices considered that the case was not within the competencies of the Constitutional Court for the following reasons: the Constitutional Court has the authority to give the final interpretation of constitutional provisions, namely after the competent body has made its interpretation by taking a certain decision. This was not the situation in the present case. Since there is no other previous interpretation by a competent body, the Constitutional Court cannot make a final interpretation of the Constitution. Furthermore, mentioning the principles of due process is not an interpretation of the procedures to be applied in such cases, but an unnecessary declaration that does not respond to the reasons for the application. The Constitutional Court cannot add other procedures by means of interpretation, because it would come outside the content of the respective constitutional provisions and, at the same time, outside its competencies.

Another judge considered that the Constitutional Court is not competent to examine the case submitted for the following reasons: the Constitution of Albania foresees the interpretative function of the Constitutional Court, but does not specify the cases when this Court can be called upon for the purpose of exercising this function. The reason for the interpretative function of the Constitutional Court was the existence of different interpretations given by Parliament of the provisions as to which the interpretation has been sought. However, this does not constitute a reason for putting the Constitutional Court into motion. The Constitutional Court can be asked to give the final interpretation of the constitutional provisions only in cases when different powers interpret these provisions in different ways. In the present case, the Constitutional Court has been requested to give an opinion of a consultative nature, which stems from the content of the application. Finally, taking into consideration the fact that, during the examination of the case in question, Parliament finalised the procedure for the dismissal of the General Prosecutor, the Constitutional Court should have refused to continue the examination of the case.

Supplementary information:

Following the pronouncement of decisions ALB-2002-1-005 and 006, high political representatives began a ferocious campaign of attacks and denigrations towards the Court and its President. Some suggested these decisions should not be applied, others went further in suggesting a reduction of the Court’s powers, or even its disappearance altogether. The

President of the Assembly resigned, describing these decisions as unconstitutional, while the President of the Republic stated his intent "... to advise the Prime Minister to consider a revision of the law governing the organisation and the operation of the Court".

In the beginning of June 2002, the Plenary Session of the Assembly of the Republic, ended the debates concerning the execution of decisions ALB-2002-1-005 and 006 by adopting a decision ordering the Parliamentary Commission on Immunities, Mandates and Rules of Procedure to draft "... an amendment project of the Assembly's rules of procedure with a view to improve the rules pertaining to the nomination and the destitution of high public officials... which must now be followed by the Assembly". This section of the Assembly's decision thus evidences that steps are taken towards the execution of these decisions. On the other hand, the Assembly remained silent the reopening of the destitution procedure of the General Prosecutor of the Republic. Moreover, the Assembly ordered the Council of the Ministers "... to promptly elaborate and deliver to the Assembly necessary amendments to Law no. 8577 of 10.02.2000 on the organisation and the operation of the Constitutional Court".

Languages:

Albanian, English (translation by the Court).



Identification: ALB-2002-1-006

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

Keywords of the systematic thesaurus:

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

1.3.5.6 **Constitutional Justice** – Jurisdiction – The subject of review – Presidential decrees.

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

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

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

3.18 **General Principles** – General interest.

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

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

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

5.3.13.8 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Public hearings.

Keywords of the alphabetical index:

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

Headnotes:

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

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

Summary:

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

From the very beginning, the Constitutional Court expressed its legitimacy to review the case arguing that it is within its authority to review the application of the General Prosecutor, who, after being discharged from duty, presents himself as an individual. The Constitu-

tional Court noted that it exercises constitutional control only over the implementation of the fundamental principle of the due process of law. The interested subject's claimed that not all legal remedies have been exhausted, which is a fundamental condition for the review of the case by the Constitutional Court, this was rejected by the Court since the decree of the President is indissolubly linked with parliamentary procedures. Thus, the dismissal is not a simple administrative act that can be reviewed by the ordinary courts.

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

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

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

the public posts does not infringe the constitutional rights foreseen by Article 131.f of the Constitution. In conclusion, Justice K. P. was convinced that the verification of procedures of dismissal of the General Prosecutor did not fall under the authority of the Constitutional Court, since there was not an unfair court trial from the constitutional point of view.

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

The rights that fall under the protection of due process are of a substantial nature and not of a procedural one. For this, the affected person should address himself to the Court of first instance. With regard to such cases, it has been noted by the European Court of Human Rights in the *Pellegrin v. France* case, that the only disputes exempted from the sphere of activity of Article 6.1 ECHR are those raised by public officials as far as they act as a public authority protecting the general state interest or other public authorities' interests. From this point of view, the application of General Prosecutor should not be treated according to Article 42 of the Constitution, which guarantees the respect for due process.

Supplementary information:

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

Cross-references:

- *Pellegrin v. France*, 08.12.1999, *Reports of judgments and decisions* 1999; *Bulletin* 1999/3 [ECH-1999-3-009].

Languages:

Albanian, English (translation by the Court).



Argentina

Supreme Court of Justice of the Nation

Important decisions

Identification: ARG-2002-1-001

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 27.09.2001 / **e)** A.671. XXXVII / **f)** Alianza "Frente para la Unidad" (elecciones provinciales gobernador y vicegobernador, diputados y senadores provinciales) s/ ofiliación listas de candidatos / **g)** *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 324 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

1.3.4.3 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between central government and federal or regional entities.

2.1.1.4.2 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Universal Declaration of Human Rights of 1948.

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

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

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

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

2.2.1.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and legislative acts.

2.3.9 **Sources of Constitutional Law** – Techniques of review – Teleological interpretation.

3.6 **General Principles** – Federal State.

4.8.8.3 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Supervision.

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

4.9.7.3 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Candidacy.

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

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

5.3.13.22 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Presumption of innocence.

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

Keywords of the alphabetical index:

Election, candidate, condition / Remand prisoner, electoral rights / Good faith, principle.

Headnotes:

Provisions barring persons detained under a warrant issued by the competent court from the register of electors until they have recovered their freedom are unconstitutional, as are provisions prohibiting remand prisoners from being elected as members of parliament or senators.

Summary:

A political party challenged the constitutionality of provincial legal rules (Constitution and Electoral Code of the Province of Corrientes) which prevented a person remanded in custody on criminal charges from standing for election.

The provincial courts did not allow the application. This prompted an extraordinary appeal to the Supreme Court, which set aside the disputed decision.

The Supreme Court held firstly that the 1994 constitutional reform had conferred constitutional status on several international treaties (Article 75.22 of the Constitution), including the 1969 American Convention on Human Rights.

Article 23.1.b of the American Convention on Human Rights provides that every citizen shall enjoy the right to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters. The Convention also provides that the law may regulate the exercise of this right and opportunity "only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings".

In interpreting treaties, reference must be made firstly to the principle of good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their object and purpose Article 31 of the 1969 Vienna Convention on the Law of Treaties, and secondly to the specific rules of interpretation contained, in this case, in Article 29 of the American Convention on Human Rights, which provides that it shall not be permitted to suppress the enjoyment of a right recognised in the convention or to restrict it to a greater extent than is provided for therein.

The phrase “sentencing by a competent court in criminal proceedings” is clear in that it does not include persons who are simply detained, even if they are remanded in custody.

The Supreme Court added that this is consistent with the principle of the state of innocence which protects every person accused of a criminal offence, as recognised by Article 8.2 of the American Convention and by Article XXVI of the American Declaration of Human Rights and Duties, Article 11 of the Universal Declaration of Human Rights of 1948 and Article 14.2 of the International Covenant on Civil and Political Rights of 1966, which are part of a single body of law – with constitutional status – whose purpose is to protect the fundamental rights of human beings.

Detention on remand is not a penalty, but a preventive measure. In support of its ruling, the Supreme Court cited the Inter-American Court of Human Rights, whose case-law, it added, must be a guide in interpreting the American Convention.

In other words, given the constitutional status of the American Convention, provincial rules conflicting with it must be declared unconstitutional.

Lastly, the Supreme Court declared inadmissible the statements made by the judges of the province to the effect that the American Convention does not apply in respect of provincial electoral rights, since those powers are confined to the provinces.

Five judges expressed separate opinions.

Languages:

Spanish.



Identification: ARG-2002-1-002

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 11.10.2001 / **e)** B.310.XXXIV / **f)** Bussi, Antonio Domingo c/ Estado Nacional (Congreso de la Nación – Cámara de Diputados) s/ incorporación a la Cámara de Diputados / **g)** *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 324 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.

1.3.4.7.3 **Constitutional Justice** – Jurisdiction – Types of litigation – Restrictive proceedings – Removal from parliamentary office.

2.1.3.3 **Sources of Constitutional Law** – Categories – Case-law – Foreign case-law.

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

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

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

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

Keywords of the alphabetical index:

Parliament, member, loss of office, conditions / Ethics.

Headnotes:

The validity of a decision whereby the Chamber of Deputies of the Nation refused to admit an elected member of parliament raises an issue which is subject to the jurisdiction of the courts.

Summary:

The Chamber of Deputies of the Nation refused to admit an elected member of parliament, basing its refusal on ethical points concerning him. The member of parliament filed an application to set aside this decision. The application was dismissed and the judgment upheld by the court of appeal. The latter held that there was no issue subject to the jurisdiction of the courts, since, under the national Constitution, the decision whether to deprive a person of the title of member of parliament or not rested exclusively with the Chamber of Deputies. The applicant therefore lodged an extraordinary appeal with the Supreme Court. The appeal was allowed.

The Supreme Court held firstly that the judicial authorities' most delicate task was to remain within their own jurisdiction, without encroaching on the functions of other authorities.

It added, however, that while it had for a long time refused to deal with a range of issues generically known as “political”, the significance of those issues was so broad and so vague that the Court had nevertheless been induced to dismantle that doctrine in a series of judgments.

Accordingly, the applicant had submitted that the Chamber of Deputies was not competent to decide as it had, since the refusal to admit him was based on conditions governing the loss of parliamentary office which were not laid down by the Constitution. In the Supreme Court's view, it was necessary in this case to establish the existence and limits of the powers conferred by the national Constitution on the Chamber of Deputies for the admission of members of parliament. This raised an issue subject to the jurisdiction of the courts because it concerned a “case” which also required clarification of the powers conferred on the Chamber of Deputies by the national Constitution.

The Supreme Court therefore set aside the disputed judgment and referred the case to the court of appeal so that it might continue to deal with it.

Three judges expressed separate opinions.

Supplementary information:

The Supreme Court based its ruling in particular on the *Powell v. McCormack* cases of the Supreme Court of the United States of America.

Languages:

Spanish.



Armenia Constitutional Court

Statistical data

1 January 2002 – 30 April 2002

- 19 referrals made, 19 cases heard and 19 decisions delivered including:
 - 19 decisions concerning the conformity of international treaties with the Constitution. All the international treaties were declared compatible with the Constitution.

Important decisions

Identification: ARM-2002-1-001

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 22.02.2002 / **e)** DCC-350 / **f)** On the conformity of obligations stated in the Convention for the Protection of Human Rights and Fundamental Freedoms signed on 4th November 1950 at Rome, in the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms signed on 20th March 1952 at Paris, in Protocol no. 4 “On certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, as amended Protocol no. 11”, signed on 16th September 1963 at Strasbourg, and Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 22nd November 1984 with the Constitution of the Republic of Armenia / **g)** *Tegekagir* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 1.3.5.1 **Constitutional Justice** – Jurisdiction – The subject of review – International treaties.
 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.
 2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments

– International Covenant on Civil and Political Rights of 1966.

2.1.1.4.7 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Economic, Social and Cultural Rights of 1966.

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

5.1 **Fundamental Rights** – General questions.

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

Keywords of the alphabetical index:

Treaty, obligation / Obligation, international / State, duty to protect / *Pacta sunt servanda*.

Headnotes:

The Constitution, providing for human rights and freedoms itself, does not restrict the right of individuals to also enjoy other rights and freedoms enshrined in international treaties on human rights.

Summary:

The Constitutional Court considered the issue of conformity of obligations stated in the European Convention on Human Rights and its several protocols with the Constitution. The Court's examination ascertained that some of the rights and fundamental freedoms stated in the Convention and said protocols correspond to those guaranteed by the Constitution, while some of the rights and freedoms are stated in the Constitution but in a different manner and formulation. On the other hand, some rights established in the Convention and its Protocols are absent from the Constitution.

The essence of the difference between constitutionally guaranteed rights and freedoms and those enshrined in the European Convention on Human Rights, is that the Conventional and Protocol norms protect human rights and freedoms more extensively.

Although at the first sight it may seem that there is a contradiction of a normative nature between the different legal instruments, such an impression is false if one considers the whole legislative system and the obligations of international treaties: a unique intercommunicated legal system.

In this regard, Article 6 of the Constitution states that, "International treaties that contradict the Constitution may be ratified after making a corresponding amendment to the Constitution". Furthermore, it

should also be adopted as an obligatory initial provision regulating the constitutional relations, as is required by Article 4 of the Constitution, which declares: "The State guarantees protection of human rights and freedoms based on the Constitution and the laws, in accordance with the principles and norms of international law". This constitutional provision means that the Republic of Armenia is obliged to conscientiously carry out its obligations arising from principles and norms of international law, including international treaty obligations (*Pacta sunt servanda*).

The International Pact of 16 December 1966 on Civil and Political Rights and the facultative protocol thereto, as well as the International Pact of 16 December 1966 on Economic, Social and Cultural Rights as international, all-encompassing documents providing for human rights and fundamental freedoms, as well as their possible limitation or derogation, are legally binding in the Republic of Armenia.

Thus, in accordance with Articles 4 and 43 of the Constitution, the provisions of the above-mentioned international instruments do form part of the legal system of norms and principles regulating constitutional-legal relations.

This condition may create the illusion of apparent contradiction between Articles 4 and 6.6 of the Constitution.

However, there is no contradiction as Article 43 of the Constitution provides that "the rights and freedoms set forth in the Constitution are not exhaustive and shall not be construed to exclude other universally accepted human and civil rights and freedoms". In other words, a citizen of the Republic of Armenia – or a person being under its jurisdiction – not only has the rights and freedoms guaranteed by the Constitution, but also such rights and freedoms which are the logical continuation of the rights and freedoms stated by the Constitution or an additional guarantee of the implementation of the latter.

The ground for this interpretation is that a possible collision of the provisions of the Constitution and any international treaty supposes that the Constitution either directly excludes the right, which is clearly determined by an international treaty, or imposes such a behaviour, which is categorically prohibited by a treaty. There is no such collision in the view of above-mentioned rights.

The Constitutional Court also considered that regardless of the norms of Public International Law, states are bound by mutual obligations, yet the approach towards the protection of human rights, formed in the system of Public International Law,

gives grounds to conclude that the human rights and fundamental freedoms, based on the system of multilateral conventions, are rather the objective standards of the behaviour of states, than their mutual rights and obligations. The obligations of states, stemming from international instruments, are rather directed to individuals under the jurisdiction of these states than to other participating states. In this regard, the Convention of 4 November 1950 is used to protect persons and non-governmental organisations from the organs of state power, which is an important sign of the rule of law, stated by Article 1 of the Constitution. Moreover, the Convention and its Protocols are based on such rights and standards, which conform to the spirit and letter of human rights and fundamental freedoms guaranteed by the Constitution and the international treaties to which the Republic of Armenia is party.

The whole legal regime of the Convention, including the principles on the possible limitation of the guaranteed rights, are constructed on that initial provision that the obligations adopted by the State are directed to the protection of all individuals, in accordance with the norms and principles of international law. Consequently, taking into account Article 4 of the Constitution, obliging the State to guarantee all internationally recognised rights and freedoms; Article 43 of the Constitution, stating that the rights and freedoms enumerated by the Constitution are not exhaustive, meaning that a citizen or other person do have other universally recognised rights and freedoms, and accepting the fact that the constitutional norms on human rights and freedoms do not have a prohibiting, but an authorising nature; it can be said that the issued conventional and Protocol norms conform to the norms and principles on human rights and fundamental freedoms, set forth in the Constitution.

Languages:

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



Austria Constitutional Court

Statistical data

Session of the Constitutional Court during March 2002

- Financial claims (Article 137 B-VG): 8
- Conflicts of jurisdiction (Article 138.1 B-VG): 3
- Review of regulations (Article 139 B-VG): 21
- Review of laws (Article 140 B-VG): 57
- Challenge of elections (Article 141 B-VG): 6
- Complaints against administrative decrees (Article 144 B-VG): 434
(310 were refused an examination)

Important decisions

Identification: AUT-2002-1-001

a) Austria / **b)** Constitutional Court / **c)** / **d)** 26.02.2002 / **e)** B 137/01 / **f)** / **g)** / **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.
- 2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
- 4.7.15.1.4 **Institutions** – Judicial bodies – Legal assistance and representation of parties – The Bar – Status of members of the Bar.
- 4.7.15.1.5 **Institutions** – Judicial bodies – Legal assistance and representation of parties – The Bar – Discipline.
- 5.3.13.12 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Trial within reasonable time.
- 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Ethics, professional / Lawyer, status / Lawyer, ethics / Justice, administration.

Headnotes:

The special status of lawyers gives them a central position in the administration of justice. They therefore are expected to contribute to the proper administration of justice. A statement of claim written by a lawyer has to be objective and moderate in tone whatever the tone of the current political discussions might be.

Summary:

A lawyer was fined for a breach of professional ethics by the Vienna Bar Council (*Disziplinarrat der Rechtsanwaltskammer Wien*) for having attacked the opposing party in a way that was neither objective nor showing proper respect. The lawyer had written in his statement of claim that the opponent had denied the justified claims of the lawyer's client "in the manner of a robber baron" (*Raubrittermanier*). The Appeal Bar Council (*Oberste Berufungs- und Disziplinarkommission für Rechtsanwälte und Rechtsanwaltsanwärter – OBDK*) confirmed this decision and stated that the incriminating passage was neither justified by the claim's contents nor that it could be recognized as a "humorous overstatement or exaggerated metaphor".

The lawyer lodged a complaint with the Constitutional Court alleging that this decision encroached on his right to freedom of expression (Article 10 ECHR). Additionally he complained about the length of the proceedings (Article 6 ECHR). The complainant argued that the incriminating words "in the manner of a robber baron" were clearly used only to colour the claim of his client and therefore must be seen in the context of the whole statement. The passage must clearly be regarded as a humorous and ironic remark which was made before a Carinthian judge and to a Carinthian lawyer and a Carinthian opponent. As is proven by statements of the Governor of Carinthia, arguments and discussions in Carinthia have a different style, and so expressions like the one in question are typical for that region.

The Court did not follow these arguments but dismissed the complaint. A comparison to the style of a political discussion or to words used by a politician cannot be successful due to the peculiar status of lawyers. The Court referred to the case-law of the European Court of Human Rights (see *Schöpfer v. Switzerland*, judgment of 20 May 1998, Appl. no. 56/1997/840/1046). Taking into account the circumstances of the case the length of the proceedings (three years and one month) did not violate Article 6 ECHR.

Cross-references:

- *Schöpfer v. Switzerland*, 20.05.1998, *Reports of Judgments and Decisions*, 1998-III.

Languages:

German.



Azerbaijan

Constitutional Court

Important decisions

Identification: AZE-2002-1-001

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 28.01.2002 / **e)** / **f)** / **g)** *Azerbaijan* (Official Gazette); *Azerbaijan Respublikasının Konstitusiyası Məhkəməsinin Məlumatı* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.4.13 **Constitutional Justice** – Jurisdiction – Types of litigation – Universally binding interpretation of laws.

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

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

Keywords of the alphabetical index:

Civil Code / Property, acquisition, condition / Property, immovable, ownership / Acquisitive prescription / Property, immovable, possession, *bona fide*.

Headnotes:

In conformity with the relevant articles of the Civil Code, civil legal acts do not have retroactive effect and apply only to relationships arising after their entry into force, with the exception of cases provided for by Article 149.7 of the Constitution, and if directly specified by law.

Summary:

The Supreme Court seized the Constitutional Court on the interpretation of Article 179 of the Civil Code. The question concerned more particularly the exact date from which the acquisitive prescription, provided by Article 179 of the Civil Code, should be calculated, taking into account the negative influence covering the formation of the unified court practice of adoption by courts of different decisions, connected with this kind of claim caused by the fact that neither the Civil Code nor the Law of the Azerbaijan Republic “On approval, entry into force of the Civil Code and issues

of legal regulation related to these issues” defined whether the acquisitive prescription should cover the period before this Code entered into force.

Article 179 indicates acquisitive prescription as a new institution established as a means for obtaining ownership of property. According to Article 179.1, a person who is not the owner of immovable property but openly and uninterruptedly possesses it for ten years as if it were his own, will acquire ownership on such property (acquisitive prescription). Paragraph 2 of the same Article specifies that the person referring to the acquisitive prescription can also add to his possession period the time period during which his predecessor possessed this property.

The Constitutional Court noted that one of the necessary requirements for obtaining ownership of immovable property is completion of ten years’ acquisitive prescription. Another important condition is *bona fide* possession of the immovable property. Such a condition was directed against unlawful misappropriation of property. The continuity of acquisitive prescription is another of the abovementioned conditions.

By guaranteeing the equal protection of various types of property, Article 13 of the Constitution stipulates that property cannot be used against human rights and freedoms, interests of the State and society and the dignity of individuals.

According to Article 7.1 of the Civil Code, civil legislation shall not have retroactive force and shall be applied to relationships arising after their entry into force, except for cases provided for by Article 149.7 of the Constitution. Furthermore, according to Article 7.2, acts of civil legislation shall also have retroactive force in cases where this is directly provided for by law.

From the analysis of the Law “On approval and entry into force of the Civil Code and issues of legal regulation related to these issues” and from the Civil Code it is evident that the legal force of provisions of Article 179 of Civil Code does not cover the period before 1 September 2000.

Therefore, the Constitutional Court concluded that the legal force of Article 179 of the Civil Code, determining the time period necessary for obtaining the ownership to immovable property, shall be applied with respect to legal relationships arising after 1 September 2000.

Languages:

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



Identification: AZE-2002-1-002

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 19.03.2002 / **e)** / **f)** / **g)** *Azərbaycan* (Official Gazette), *Azərbaycan Respublikasının Konstitusiyası Məhkəməsinin Məlumatı* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

2.1.2.3 **Sources of Constitutional Law** – Categories – Unwritten rules – Natural law.

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

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

5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to participate in the administration of justice.

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

5.3.15 **Fundamental Rights** – Civil and political rights – Rights of victims of crime.

Keywords of the alphabetical index:

Criminal procedure, civil action / Cassation, proceeding.

Headnotes:

Granting of the right to lodge a complaint via additional cassation to the convicted person and, on request, to his counsel, while depriving the victim and civil plaintiff of such a right, represents an unlawful restriction of the procedural rights of the victim, who is a party to the criminal procedure, and of the civil plaintiff in comparison with the convicted person.

Summary:

The Supreme Court seized the Constitutional Court on the constitutionality of Articles 87.6.14, 89.4.12 and 422.3 of the Criminal Procedure Code.

The Constitutional Court examined the petition from two points of view: first, whether the victim and the

civil plaintiff, amongst other parties to criminal procedure, were enabled to lodge the complaint via the procedure of “additional cassation”. Second, whether they had the possibility to take part in the examination of a case via this procedure.

In the presence of the sufficient grounds imposing moral, physical or material damage to a physical person; moral and material damage to a legal person, or material damage to a civil plaintiff as a result of an act provided for by criminal legislation, these persons shall be recognised as a victim or a civil plaintiff on the basis of the decision adopted by the court, prosecutor, investigator or inquisitor.

Enjoying equal rights, all persons recognised as victims and civil plaintiffs shall – in the court proceedings and in inquisition and investigation procedure – be free to exercise their rights and where necessary, also the duties established by Articles 87.6, 87.7, 89.4 and 89.5 of the Criminal Procedure Code. According to Articles 87.6.14 and 89.4.12 of the Code they have the right to lodge appellate and cassation complaints against the decisions and acts of the mentioned law-enforcement bodies, and against the judgments and other decisions of the court relating to the claim. They also have the right, based on their complaints, to take part in the examination of the case via the procedure of cassation, additional cassation or where their complaints are challenged by other parties to criminal procedure (Articles 87.6.17 and 89.4.14).

However, Articles 422 and 427 of the Criminal Procedure Code do not establish either the right of the victim or civil plaintiff to lodge a complaint via the procedure of additional cassation nor the right to take part in the examination of the case via the procedure of additional cassation. On the other hand, according to Article 422.3 of the Criminal Procedure Code, the convicted person or his counsel does have the right, based on the request of the convicted person, to lodge a complaint via the procedure of additional cassation.

The Constitutional Court observed that the guarantee of the right of a victim and civil plaintiff to lodge a complaint via the procedure of additional cassation proceeds from the provisions of the Constitution and the international agreements.

According to Article 68.1 of the Constitution, “the rights of a person who is a victim of crime and also from usurpation of power are protected by law. The victim shall have the right to take part in the administration of justice and may demand compensation for his loss”. Article 25.1 of the Constitution envisages that everybody shall be equal before the law and the courts.

The principle of legal equality which is a constituent part of natural justice, provides for the obligation to create, for all parties, favourable conditions for presentation of their cases. Where the purpose of the State consists *inter alia* of ensuring the right to a fair trial, any inequality as to the right to apply to any judicial instance is provided for by legislation.

According to Article 11 of the Criminal Procedure Code, the criminal procedure shall be based on the principle of legal equality of all before the law, and no advantage should be given to anyone on the basis of an unlawfully adopted decision.

Item 4 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the UN General Assembly Resolution 40/34 of 29 November 1985 provides that the victims should be treated with compassion and respect for their dignity (the notion "victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights as a result of violation of national legislation). They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.

Taking into account the requirements of Articles 25, 68 and 127 of the Constitution and considering the limitations imposed by the provisions of Criminal Procedure Code upon the right of the victim and civil plaintiff to lodge a complaint via the procedure of additional cassation, and the right of participation at such proceedings (Articles 87.6.14, 89.4.12 and 422 of the Criminal Procedure Code) the Constitutional Court decided, in accordance with Article 94.1 of Constitution, to recommend to the Parliament to introduce relevant amendments into the Criminal Procedure Code.

Supplementary information:

According to the legislation of Azerbaijan, there are two ways to challenge court decisions: cassation and appeal. Both of them can be lodged by citizens. The "additional cassation" can be lodged *inter alia* by the Chairman of the Supreme Court (not by the parties). Having exhausted such remedies as appeal and cassation the parties can hope for an additional cassation to be lodged by the Chairman of the Supreme Court.

Languages:

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



Belgium

Court of Arbitration

Important decisions

Identification: BEL-2002-1-001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 09.01.2002 / **e)** 9/2002 / **f)** / **g)** *Moniteur belge* (Official Gazette), 19.03.2002 / **h)** CODICES (French, Dutch, 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.

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.

5.2 **Fundamental Rights** – Equality.

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

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

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

Keywords of the alphabetical index:

Appeal, time-limit / Judgment *in absentia*, appeal, time-limit / Criminal procedure, guarantees.

Headnotes:

A difference in treatment resulting from the application of different procedures before different courts in different circumstances is not, in itself, discriminatory. The principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) is violated only if different treatment is accompanied by disproportionate restriction of the rights of the parties concerned.

The right of access to a court, which is one aspect of the right to a fair trial, may be subject to conditions of

admissibility, particularly in respect of time-limits for lodging appeals. However, such conditions must not restrict the right in a manner which affects its very substance.

Summary:

The Mons Court of Appeal asked the Court of Arbitration for a preliminary ruling on questions raised by a provision in the Code of Criminal Procedure which gave persons sentenced *in absentia* – but not persons sentenced in the normal way – extra time to appeal.

The Court of Arbitration noted that the purpose of the appeal procedure applying to judgments given *in absentia* was to allow the person concerned to secure a second hearing, in his/her presence, before the same court which had given the first judgment.

The very essence and aim of this procedure was to allow a person judged *in absentia*, who might, for that reason, be unaware of certain aspects of the case, or at least have been unable to comment on them, to exercise his/her defence rights fully.

The purpose of an ordinary appeal, on the other hand, was to allow a person sentenced at first instance to challenge the decision, or certain aspects of the decision, before a higher court.

The Court had already ruled in several decisions that a difference in treatment resulting from the application of different procedures before different courts in different circumstances was not, in itself, discriminatory. The principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) was violated only if the rights of the parties were restricted to a disproportionate degree.

The Court further stated that the right of access to a court, which was one aspect of the right to a fair trial, might be subject to conditions of admissibility, particularly in respect of time-limits for lodging appeals. Such conditions must not, however, restrict the right in a manner which affected its very substance. Referring to the judgment given by the European Court of Human Rights on 19 December 1997 in the *Brualla Gómez de la Torre v. Spain* case, the Court further stated that the right to use a remedy provided for in law would be violated if the restrictions imposed did not pursue a legitimate aim, and if the means used were not in due proportion to that aim.

Referring to another judgment of the European Court of Human Rights on 28 October 1998, *Pérez de Rada Cavanilles v. Spain*, the Court added that the rules on

time-limits for appeals against ordinary judgments or judgments given *in absentia* were designed to ensure the sound administration of justice and prevent legal uncertainty. However, these rules must not prevent individuals from using the remedies open to them.

The Court concluded in this case that the time-limit for lodging an appeal did not unduly limit the rights of sentenced persons. It took account of the special rules applying to judgments given *in absentia*. The fact that the law did not provide for the same time-limit in both cases could not be regarded as discrimination.

Cross-references:

European Court of Human Rights:

- *Brualla Gómez de la Torre v. Spain*, 19.12.1997; Reports 1997-VIII;
- *Pérez de Rada Cavanilles v. Spain*, 28.10.1998; Reports 1998-VIII.

Languages:

French, Dutch, German.



Identification: BEL-2002-1-002

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 20.02.2002 / **e)** 41/2002 / **f)** / **g)** *Moniteur belge* (Official Gazette), 22.05.2002 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.

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

2.1.1.4.7 **Sources of Constitutional Law** – Categories – Written rules – International instruments – International Covenant on Economic, Social and Cultural Rights of 1966.

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

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

5.2 **Fundamental Rights** – Equality.

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

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

5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.

5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.

Keywords of the alphabetical index:

Profession, access, conditions / Trade, access, conditions / Professional aptitude / Civil right, determination / Professional competence / Profession, authorisation.

Headnotes:

Making access to certain regulated professional activities conditional on managerial and professional skills is not incompatible with the Constitution or with international law. Disputes concerning compliance with these conditions can be submitted to the administrative courts, even if the right to exercise a professional activity on a self-employed basis is considered, as the European Court of Human Rights has consistently ruled, a civil right within the meaning of Article 6 ECHR.

Summary:

An act of 15 December 1970 regulates the exercise of professional activities in small and medium-sized commercial and craft trade firms in Belgium. This law empowers the King to lay down certain requirements concerning the managerial and professional skills of persons wishing to engage in certain professional activities on a self-employed basis, the aim being to protect the self-employed sector and also those who avail of its services. Such persons must apply to the relevant trade guilds for a certificate. If this is refused, they may appeal to the council of the guild concerned and possibly, on a point of law, to the State Council (*Conseil d'État*, highest Administrative Court).

A. Ceressia was refused a certificate to work as a self-employed glazier, and appealed unsuccessfully to the council of the guild concerned. He then appealed to the State Council, but complained at being unable to take his case to the ordinary courts, and claimed that he had suffered discrimination in respect of his right to exercise a professional activity freely. The State Council asked the Court of Arbitration for a preliminary ruling on the compatibility of the act of 15 December

1970 with the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution), taken in conjunction with other provisions of the Constitution and international treaties (see supplementary information below).

The Court of Arbitration re-worded the preliminary question for two reasons: firstly, the question, as worded, seemed to postulate violation; secondly, there were actually two separate issues: was it not discriminatory to limit access to certain independent trades: verification with regard to the constitutional principle of equality – Articles 10 and 11 of the Constitution, taken in conjunction with the right to the free choice of a professional activity – Article 23 of the Constitution, the right to gain one's living by work freely chosen or accepted – Article 6 of the International Covenant on Economic, Social and Cultural Rights and the right to own property – Article 1 Protocol 1 ECHR; and was it not discriminatory to refer the appeals in question to administrative rather than civil courts (verification with regard to the constitutional principle of equality) – Articles 10 and 11 of the Constitution, taken in conjunction with Article 144 of the Constitution, which states that the (ordinary) courts have sole jurisdiction to rule on disputes concerning civil rights?

On the first question, the Court found that there had been no discriminatory limitation of the right to choose a professional activity freely: “Considering both the purpose of the law and the practical arrangements adopted (particularly the involvement of the trade federations, the limited character and the nature of the conditions of knowledge likely to be imposed, and the existence of remedies), the impugned restrictions on free choice of professional activity are not without the requisite justification”. The Court also found that there had been no discrimination in respect of the rights guaranteed by Article 6 of the International Covenant on Economic, Social and Cultural Rights and Article 1 Protocol 1 ECHR.

On the second question, the Court again found that there had been no discrimination in respect of the right to bring complaints concerning civil rights before the (ordinary) courts: under the Constitution, the (ordinary) courts have sole jurisdiction in disputes concerning civil rights, but the legislator was entitled in this case to make disputes concerning political rights (Article 145 of the Constitution) a matter for the administrative courts, in view of the predominantly public-law character of the regulations applying to the self-employed professions. This was not affected by the fact that the European Court of Human Rights had consistently ruled that the right to work as a self-employed person was a civil right within the meaning of Article 6 ECHR. “Belgian law fulfils the require-

ments of this provision of the Convention, insofar as complaints concerning the conditions of access to such professions are heard by a judicial body having full jurisdiction, which is itself subject to supervision by the State Council.”

Supplementary information:

The Court of Arbitration's powers of review are limited to issues raised by the rules which determine the respective powers of the federal government and the communities, and by Articles 10, 11 and 24 of the Constitution. However, in verifying compliance with the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution), it may also refer indirectly to other provisions of the Constitution and even of international law, as it did in this case.

Languages:

French, Dutch, German.



Identification: BEL-2002-1-003

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

Keywords of the systematic thesaurus:

- 1.2.2.2 **Constitutional Justice** – Types of claim – Claim by a private body or individual – Non-profit-making corporate body.
- 1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
- 1.6.5.2 **Constitutional Justice** – Effects – Temporal effect – Limitation on retrospective effect.
- 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.
- 2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
- 3.10 **General Principles** – Certainty of the law.

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

3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.

3.16 **General Principles** – Proportionality.

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

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

5.2 **Fundamental Rights** – Equality.

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

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

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.

5.3.13.27 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to have adequate time and facilities for the preparation of the case.

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

Keywords of the alphabetical index:

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

Headnotes:

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

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

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

Summary:

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

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

The “*Ligue des droits de l'homme*” (“Human Rights League”), a non-profit association, applied to have the whole Act repealed. In view of its statutory aim (“to combat injustice and all arbitrary violations of individual or collective rights”) and of the nature of the impugned provisions, the Court decided that it had an interest in repeal of the Act.

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

1. Firstly, the association argued that the Act violated the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), taken in conjunction with Articles 5 and 6 ECHR, since it failed to regulate the situation of accused persons who were not arrested or were conditionally released. The Court found that the difference in treatment between accused persons who were arrested by order of the investigating judge (procedure specified in the Act), and accused persons who were not arrested (no procedure specified) was unjustified.

2. Secondly, the association argued that summary proceedings violated the accused person's defence rights, by comparison with ordinary proceedings. The Court decided that the measures were justified in principle, but restricted the defendant's defence rights in two ways which were not commensurate with the aim pursued: first, the accused person was given very little time to prepare his defence; secondly, he was not allowed to have further investigations carried out.

3. Thirdly, the association argued that the Act made no provision for judicial review of the lawfulness of

detention. The Court noted that cases were heard, in principle, within seven days. This might be two days more than the five allowed in ordinary proceedings, but the measure was not a disproportionate encroachment on the right of persons arrested or detained to challenge the lawfulness of their detention under Article 5.4 ECHR.

4. The association also argued that there was discrimination between persons prosecuted under the summary procedure and persons punished for the same offences with administrative sanctions under Section 23 of the Act of 21 December 1998 on security at football matches. The Court noted that this first act punished a specific kind of crime, and that it was up to the law to decide whether criminal or administrative sanctions should apply.

5. The association objected to the fact that the same investigating judge who had issued the summary trial warrant might, in some cases, issue an arrest warrant later. This would violate the impartiality guaranteed by the general principles of Belgian law and by Article 6 ECHR. Referring to the *Imbrioscia v. Switzerland* judgment of 24 November 1993 (*Special Bulletin ECHR* [ECH-1993-S-008]), the Court confirmed that this article applied to the preparatory phase of criminal proceedings.

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

6. The association further argued that the scope of the summary procedure was not sufficiently clearly defined. The Court noted that the procedure was designed to combat certain "less serious or less organised" forms of crime, but that the offences covered carried prison sentences of one to ten years. It pointed out that, under Article 12 of the Constitution, criminal offences and punishments must be strictly defined in law, and found that the law in this case was not sufficiently specific about the cases in which exceptions to the guarantees offered by ordinary criminal law were permitted.

7. Finally, the association argued that the summary procedure discriminated between accused persons at first instance and in appeal proceedings. The Court took the view that, when the Act was interpreted in conformity with the Constitution, this allegation was unfounded.

It decided to repeal certain parts of the Act forthwith, but made use of the possibility (see Article 8 of the special Act of 6 January 1989 on the Arbitration Court – CODICES) of maintaining the effects of the repealed provisions, in order to avoid overloading the prosecuting authorities and courts, and to safeguard

the rights of victims. In other words, detentions and convictions already decided under these provisions could not be challenged.

Cross-references:

- *Imbrioscia v. Switzerland*, 24.11.1993, Vol. 275, Series A of the Publications of the Court; *Special Bulletin ECHR* [ECH-1993-S-008].

Languages:

French, Dutch, German.



Identification: BEL-2002-1-004

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 23.04.2002 / **e)** 72/2002 / **f)** / **g)** *Moniteur belge* (Official Gazette), 14.05.2002 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

- 1.6 **Constitutional Justice** – Effects.
- 1.6.6 **Constitutional Justice** – Effects – Influence on State organs.
- 3.4 **General Principles** – Separation of powers.
- 3.10 **General Principles** – Certainty of the law.
- 3.18 **General Principles** – General interest.
- 4.5.2 **Institutions** – Legislative bodies – Powers.
- 4.5.8 **Institutions** – Legislative bodies – Relations with judicial bodies.
- 5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Double degree of jurisdiction.
- 5.3.36 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law.

Keywords of the alphabetical index:

Decree, legislative validation / Military, status / Retroactivity, law, exceptional circumstances / *Res iudicata*.

Headnotes:

Laws may apply retrospectively only when this is essential to the smooth functioning or continuity of the

public service. If judicial proceedings are also affected, then only exceptional circumstances can justify retrospective application, which not only operates to the detriment of a specific group, but also undermines the legal guarantees provided for everyone.

Summary:

In Decision no. 52/99, the Court of Arbitration annulled a legal provision of 12 December 1997, which simply confirmed the royal decrees of 24 July 1997. Those decrees, without explicit authorisation by any special enabling act, regulated various important aspects of the status of military personnel, notwithstanding Article 182 of the Constitution, which states that these aspects are determined by law (see BEL-1999-2-005). Subsequently, the content of the decrees was reproduced almost word for word in three acts of 25 May 2000.

A number of individuals and an association of military personnel applied to have these acts repealed (we shall say nothing on admissibility here). Specifically, they complained that the binding character of the Court's above-mentioned decision had been ignored, and that the legislator had interfered in proceedings pending before the State Council (*Conseil d'État*, highest Administrative Court) concerning the aforesaid royal decrees.

The Court found that the legislator had not ignored its decision, but had, on the contrary, acted on it by regulating a matter which he had previously been criticised for failing to regulate.

Concerning interference in proceedings pending before the State Council, the Court noted that the legislator had been concerned, firstly, to avoid uncertainty of the law and, secondly, to avert the social, organisational, budgetary and accounting problems which annulment of the measures introduced on the basis of the royal decrees would have caused. The acts complained of did produce retrospective effects, but the Court thought this justified here: the acts had been passed simply to give effect to its case-law, in the general interest, and to protect the beneficiaries of earlier measures.

The Court further observed "that the present appeals show that, although the legislation in question may prevent the applicants from securing condemnation by the State Council of any irregularities in the royal decrees it confirms, it does not deprive them of the right to challenge before the Court the constitutionality of the legislation which now regulates matters previously regulated by royal decree. The applicants

have not therefore been deprived of their right to a judicial remedy".

Furthermore, "this retroactive substitution is not a source of legal uncertainty, since it reproduces the earlier provisions".

The Court dismissed this argument and others which it would take too long to summarise here.

Supplementary information:

See also Judgments nos. 52/99 of 26 May 1999 and 68/99 of 17 June 1999. Judgment no. 52/99 is summarised in [BEL-1999-2-005].

Cross-references:

See also [BEL-1999-2-005], and compare with [BEL-2000-3-012] and [BEL-1997-3-011].

Languages:

French, Dutch, German.



Bosnia and Herzegovina Constitutional Court

There was no relevant constitutional case-law during the reference period 1 January 2002 – 30 April 2002.



Bulgaria Constitutional Court

Statistical data

1 January 2002 – 30 April 2002

Number of decisions: 5

Important decisions

Identification: BUL-2002-1-001

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 28.03.2002 / **e)** 02/02 / **f)** / **g)** *Darzaven vestnik* (Official Gazette), 35, 05.04.2002 / **h)**.

Keywords of the systematic thesaurus:

1.3.5.6 **Constitutional Justice** – Jurisdiction – The subject of review – Presidential decrees.
 1.3.5.10 **Constitutional Justice** – Jurisdiction – The subject of review – Rules issued by the executive.
 1.3.5.13 **Constitutional Justice** – Jurisdiction – The subject of review – Administrative acts.
 3.18 **General Principles** – General interest.
 4.4.1 **Institutions** – Head of State – Powers.
 4.4.1.3 **Institutions** – Head of State – Powers – Relations with judicial bodies.
 4.7.4.1.2 **Institutions** – Judicial bodies – Organisation – Members – Appointment.
 4.11 **Institutions** – Armed forces, police forces and secret services.

Keywords of the alphabetical index:

Diplomat, appointment / Appointment, proposal / Dismissal, proposal / Act, preparatory.

Headnotes:

The proposal made by the Council of Ministers when diplomatic representatives and permanent representatives of the Republic of Bulgaria in international organisations and members of the high command of the armed forces are appointed or dismissed, and the proposal of the Judicial Service Commission in the appointment or dismissal of the president of the

Supreme Court of Cassation, the president of the Supreme Administrative Court and the Principal State Prosecutor, is a preparatory act in the complex process of appointing and dismissing officials whose status is defined in the Constitution.

As a preparatory act the proposal cannot be subject to judicial control. The officials concerned are appointed and dismissed by decree of the President of the Republic and these decrees may be challenged only before the Constitutional Court.

Summary:

Proceedings were instituted by the Principal State Prosecutor in order to obtain a binding interpretation of the constitutional provisions concerning the power of the President of the Republic to appoint or dismiss from office:

1. at the proposal of the Council of Ministers, diplomatic representatives and permanent representatives of the Republic of Bulgaria in international organisations and members of the high command of the armed forces,
2. at the proposal of the Judicial Service Commission, the president of the Supreme Court of Cassation, the president of the Supreme Administrative Court and the Principal State Prosecutor.

The Constitutional Court was asked to clarify the legal nature of the proposal of the Council of Ministers or the Judicial Service Commission, in particular whether the proposal was an administrative act proper and whether it was subject to the judicial control of the Supreme Administrative Court once the President of the Republic had issued a decree subsequent to the proposal.

The Constitutional Court ruled that the proposal permitted the various constitutionally defined bodies to co-operate and that it was a preparatory act in the complex process of appointing and dismissing officials whose status is defined in the Constitution. The proposal does not qualify as an administrative act and is therefore not subject to judicial control. The officials concerned are appointed and dismissed by decree of the President of the Republic and these decrees may be challenged only before the Constitutional Court.

The particular importance of the public functions performed by the officials concerned necessitates the stability of the decrees by which they are appointed or dismissed, which must not be subject to the

subsequent ruling of a court verifying the legality of the preparatory act (the proposal).

Languages:

Bulgarian.



Canada

Supreme Court

Important decisions

Identification: CAN-2002-1-001

a) Canada / **b)** Supreme Court / **c)** / **d)** 11.01.2002 / **e)** 27790 / **f)** Suresh v. Canada (Minister of Citizenship and Immigration) / **g)** Canada Supreme Court Reports (Official Digest), [2002] 1 S.C.R. / **h)** Internet: <http://www.lexum.umontreal.ca/csc-scc/en/index.html>; 208 *Dominion Law Reports* (4th) 1; 90 *Canadian Rights Reporter* (2d) 1; 18 *Immigration Law Reporter* (3d) 1; [2002] S.C.J. no. 3 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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

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

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

5.3.13.7 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right of access to the file.

Keywords of the alphabetical index:

Refugee, deportation / Fundamental justice, principles / Terrorism, notion.

Headnotes:

Barring exceptional circumstances, Section 7 of the Canadian Charter of Rights and Freedoms generally precludes deportation of a refugee to face a substantial risk of torture.

A refugee facing deportation to torture under Section 53.1.b of the Immigration Act must be informed of the case to be met. Subject to privilege and other valid reasons for reduced disclosure, the

material on which the Minister bases his/her decision must be provided to the refugee. The refugee must be provided with an opportunity to respond in writing to the case presented to the Minister, and to challenge the Minister's information. The Minister must provide written reasons for her decision dealing with all relevant issues.

These procedural protections apply where the refugee has met the threshold of establishing a *prima facie* case that there may be a risk of torture upon deportation.

Summary:

In 1995, the Canadian government commenced deportation against the appellant, a Convention refugee from Sri Lanka, on the basis that he was a member and fundraiser of the Liberation Tigers of Tamil Eelam, an organisation alleged to be engaged in terrorist activity in Sri Lanka, and whose members have been subjected to torture in Sri Lanka. The Minister of Citizenship and Immigration issued an opinion declaring the appellant to be a danger to the security of Canada under Section 53.1.b of the Immigration Act. The appellant challenged the Minister's decision on the basis that the procedures for deportation under the Immigration Act were unfair and the Immigration Act infringed Sections 7, 2.b and 2.d of the Canadian Charter of Rights and Freedoms. The Federal Court, Trial Division and the Federal Court of Appeal dismissed the appellant's challenge. The Supreme Court of Canada allowed the appellant's appeal and ordered a new deportation hearing.

Deportation to torture may deprive a refugee of the right to liberty, security and perhaps life protected by Section 7 of the Canadian Charter of Rights and Freedoms. Section 7 applies to torture inflicted abroad if there is a sufficient causal connection with Canadian government acts. In determining whether this deprivation is in accordance with the principles of fundamental justice, Canada's interest in combating terrorism must be balanced against the refugee's interest in not being deported to torture. Canadian law and international norms reject deportation to torture. Canadian law views torture as inconsistent with fundamental justice. The Charter affirms Canada's opposition to government-sanctioned torture by proscribing cruel and unusual treatment or punishment in Section 12. Torture has as its end the denial of a person's humanity; this lies outside the legitimate domain of a criminal justice system. The prohibition of torture is also an emerging peremptory norm of international law which cannot be easily derogated from. The Canadian rejection of torture is reflected in the international conventions which Canada has

ratified. Deportation to torture is prohibited by both the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. International law generally rejects deportation to torture, even where national security interests are at stake.

In exercising the discretion conferred by Section 53.1.b of the Immigration Act, the Minister must conform to the principles of fundamental justice under Section 7. Insofar as the Immigration Act leaves open the possibility of deportation to torture (a possibility which is not here excluded), the Minister should generally decline to deport refugees where on the evidence there is a substantial risk of torture. Applying these principles, Section 53.1.b does not violate Section 7 of the Charter.

The terms “danger to the security of Canada” and “terrorism” are not unconstitutionally vague. A person constitutes a “danger to the security of Canada” if he or she poses a serious threat to the security of Canada, whether direct or indirect, bearing in mind the fact that the security of one country is often dependent on the security of other nations. The threat must be “serious”, grounded on objectively reasonable suspicion based on evidence, and involving substantial threatened harm. Properly defined, the term “danger to the security of Canada” gives those who might come within the ambit of Section 53.1.b fair notice of the consequences of their conduct, while adequately limiting law enforcement discretion. While there is no authoritative definition of the term “terrorism” as found in Section 19 of the Immigration Act, it is sufficiently settled to permit legal adjudication. Following the International Convention for the Suppression of the Financing of Terrorism, “terrorism” in Section 19 of the Immigration Act includes any act intended to cause death or bodily injury to a civilian or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its very nature or context, is to intimidate a population, or to compel a government or an international organisation to do or abstain from doing any act.

Section 19 of the Immigration Act, defining the class of persons who may be deported because they constitute a danger to the security of Canada, as incorporated into Section 53 of the Immigration Act, does not breach the appellant’s constitutional rights of free expression and association. The Minister’s discretion to deport under Section 53 is confined to persons who pose a threat to the security of Canada and have been engaged in violence or activities directed at violence. Expression taking the form of violence or terror, or directed towards violence or

terror, is unlikely to find shelter under the Charter. Provided that the Minister exercises her discretion in accordance with the Immigration Act, the guarantees of free expression and free association are not violated.

Section 7 of the Charter does not require the Minister to conduct a full oral hearing or judicial process. However, certain procedural protections must apply where a refugee has met the threshold of establishing a *prima facie* case that there may be a risk of torture upon deportation.

In the present case, the appellant met this threshold. Since he was denied the required procedural safeguards and the denial could not be justified under Section 1 of the Canadian Charter of Rights and Freedoms, the case was remanded to the Minister for reconsideration.

Supplementary information:

In the companion case *Ahani v. Canada* (Minister of Citizenship and Immigration), the Supreme Court of Canada held that the appellant had not made out a *prima facie* case that there was a substantial risk of torture upon deportation and the Minister provided the appellant with adequate procedural protections. The appellant’s appeal was dismissed.

Languages:

English, French (translation by the Court).



Identification: CAN-2002-1-002

a) Canada / **b)** Supreme Court / **c)** / **d)** 08.03.2002 / **e)** 27427 / **f)** Lavoie v. Canada / **g)** *Canada Supreme Court Reports* (Official Digest), [2002] 1 S.C.R. / **h)** Internet: <http://www.lexum.umontreal.ca/csc-scc/en/index.html>; [2002] S.C.J. no. 24 (*Quicklaw*); CODICES (English, French).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
4.6.9.1 **Institutions** – Executive bodies – The civil service – Conditions of access.

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

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

5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Right of access to the public service.

Keywords of the alphabetical index:

Employment, hiring preference, citizens.

Headnotes:

The statutory preference for the hiring of qualified Canadian citizens over qualified non-citizens for federal Public Service employment is constitutional, insofar as the objectives behind the legislation namely, to enhance the meaning of citizenship as a unifying bond for Canadians, and to encourage and facilitate naturalisation by permanent residents, are sufficiently important to justify limiting the claimants' equality rights.

This is particularly so in an era of increased movement across borders, where citizenship provides immigrants with a basic sense of identity and belonging.

Summary:

Canadian citizens receive preferential treatment in federal Public Service employment by virtue of a provision in the Public Service Employment Act. Three foreign nationals who had permanent resident immigration status in Canada sought employment in the Public Service without having obtained Canadian citizenship, and were, in one way or another, disadvantaged by the application of the legislation. They challenged the provision as a violation of their equality rights under Section 15.1 of the Canadian Charter of Rights and Freedoms, which they contended was not justified under Section 1 of the Canadian Charter of Rights and Freedoms. Both the trial court and the Court of Appeal held that the legislative provision was constitutional. The Supreme Court of Canada affirmed that finding of constitutionality.

In two separate sets of reasons, a total of seven judges of the nine-member panel found that the distinction drawn between citizens and non-citizens found in the legislation was discriminatory under Section 15.1 of the Charter. They agreed that the impugned provision conflicts with the purpose of Section 15.1, which is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human

beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Whether the law perpetuates the view that non-citizens are less capable or less worthy of recognition or value as human beings or as members of Canadian society is the overarching question. Four of the seven found that the distinction places an additional burden on non-citizens, an already disadvantaged group, and the nature of the interest involved – employment – is one that warrants constitutional protection. They noted that freedom of choice in work and employment are fundamental aspects of Canadian society and, perhaps unlike voting and other political activities, should be, in the eyes of immigrants, as equally accessible to them as to Canadian citizens. Three of the seven held that a law which bars an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status and without consideration of the qualifications or merits of individuals in the group, violates human dignity.

In separate reasons, the remaining two judges found that the impugned provision does not violate Section 15.1 of the Charter and is therefore constitutional. In their view, a reasonable person in circumstances similar to those of the claimants would, upon consideration of various contextual factors, conclude that the provision does not offend the essential human dignity of the claimants and therefore does not discriminate. They warned that in an understandable eagerness to extend equality rights as widely as possible, stripping those rights of any meaningful content must be avoided. Otherwise, the result will be the creation of an equality guarantee that is far-reaching but wafer-thin, leaving equality rights at the mercy of a diluted justificatory analysis under Section 1 of the Charter in almost every case.

On the issue of Section 1 of the Charter, four of the seven judges who found that the legislative provision infringes Section 15.1 of the Charter held that the government had demonstrated that the citizenship preference is a reasonable limit on equality that can be demonstrably justified in a free and democratic society under Section 1 of the Charter. Moreover, parliament has attempted to achieve the goal of enhancing Canadian citizenship in a manner that respects cultural diversity. As such, parliament is entitled to some deference as to whether one privilege or another advances a compelling state interest. In upholding the impugned provision under Section 1 of the Charter, these four judges also found that parliament's view is supported by common sense and widespread international practice; that, while there may be ways to accomplish the legislative objectives that would impair the equality right less than is the case under the current legislation,

parliament has conscientiously considered alternatives and has chosen not to pursue them. The role of the Supreme Court of Canada is not to order that parliament should have decided otherwise. It was also noted that dual citizenship is permitted in Canada, such that Canadian law does not burden non-citizens with a choice between renouncing their foreign citizenship and entering the Public Service. Finally, this group held that the infringing effects of the provision do not outweigh the importance of the objective sought, as the disadvantage to non-citizens relative to citizens does not appear significant. Since the infringement of the Charter is justifiable, the impugned legislation is constitutional.

The remaining three judges of the seven-member group found that the infringement of the equality right resulting from the statutory hiring preference for Canadian citizens is not justified under Section 1 of the Charter. In their view, assuming that enhancing citizenship and encouraging a small class of civil servants to become Canadian citizens are pressing and substantial objectives, the discrimination complained of is not rationally connected to either of these objectives.

Languages:

English, French (translation by the Court).



Croatia Constitutional Court

Important decisions

Identification: CRO-2002-1-001

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 04.10.2001 / **e)** U-III-634/1998 / **f)** / **g)** *Narodne Novine* (Official Gazette), 89/2001 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

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

4.7.1.3 **Institutions** – Judicial bodies – Jurisdiction – Conflicts of jurisdiction.

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

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

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

Keywords of the alphabetical index:

Employment, dismissal / Complaint, admissibility / Administrative review scheme / *Manuduction*, obligation / Help, individual, obligation to help.

Headnotes:

When receiving an application for which it does not have a competence, an administrative body has a duty to deliver the application received without delay to the competent body, and to inform the interested party thereof. If a non-competent body cannot determine a body competent for dealing with the application, it shall without delay render the conclusion on rejecting the application due to its non-competency and inform the party thereof.

Summary:

The Administrative Court rejected the applicant's complaint related to administrative inaction, with the explanation that, due to a change of legislation, the applicant should have submitted his proposal for a

renewal of the proceedings in the case of his dismissal as a tourism official, to the body in charge according to provisions of the Law on civil servants, in particular to the County Prefect or the person authorised by the County Prefect. Since the applicant omitted to act in the stated manner, the Administrative Court concluded that as the presumptions for the renewal of proceedings have not been fulfilled, thus the presumption for submission of an appeal or complaint regarding the administrative inaction had not been fulfilled either.

Article 13 of the Law on general administrative procedure establishes the principle of giving help to lay persons, which is also reaffirmed in the provision of Article 66.4 of the same law. The latter principle regulates the procedure of administrative bodies in cases of receiving an application which it is not authorised to receive, no matter whether the application was submitted in person or sent by mail.

Furthermore, Article 256.1 of the Law on General Administrative Procedure (LGAP), and Article 56.2 of the Law on administrative disputes, regulate the obligation of a competent administrative body, the Administrative Court of the Republic of Croatia, to reject the proposal for a renewal of the proceedings if the proposal is submitted by a non-authorised person, if the proposal arrived late or if there are no probable grounds for a renewal.

The Constitutional Court noted that the Administrative Court of the Republic of Croatia gave a decision to reject the proposal since it had not been submitted to a competent body.

Because of the misapplication of procedural regulations, the applicant was prevented from submitting his proposal for a renewal of the proceedings, and therefore was entitled to, in the framework of the law, participate in the proceedings and present the facts and evidence important for deciding on the proposal.

Therefore the Constitutional Court of the Republic of Croatia found that the Administrative Court had exceeded its jurisdiction defined by the provisions of Article 256.1 and 256.2 LGAP, when it rejected the applicant's proposal because of the reasons not defined by this provision.

This standpoint does not derogate from the defined right of the Administrative Court to decide, as opposed to the competent bodies in cases of administrative inaction, whether the reasons and circumstances of the proposal on the renewal of the proceedings are fulfilled (Article 256.1 of the LGAP).

The Constitutional Court found that the constitutional rights from Article 14.2 of the Constitution (equality before law), Article 18 of the Constitution (right to appeal against individual acts), Article 19.2 of the Constitution (guarantee of the judiciary's control of the legality of individual acts of administrative authorities and bodies vested with public authority) and Article 26 of the Constitution (equality before courts, government bodies and other bodies vested with public authority) of the Constitution had been violated.

Languages:

Croatian.



Identification: CRO-2002-1-002

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 31.10.2001 / **e)** U-III-487/2001 / **f)** / **g)** *Narodne Novine* (Official Gazette), 100/2001 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Contract, nullity / Proceedings, identical, impossibility / Procedural autonomy.

Headnotes:

A final condemnatory decision on performance does not exclude the possibility of submitting a counter-claim seeking the establishment of the validity of legal transaction (from which the performance arises).

Summary:

In the first instance proceedings the applicants' claim for the annulment of a credit contract was rejected.

The claim was grounded on the statement that the contract was a usurious one. The Court of first instance rejected the claim, citing *res iudicata*. During the preparatory hearing it was established that by the previous final *ex parte* decision, in the case of creditor's claim against the applicants, the Court judged that the applicants were due to allocate to the creditor the assets defined by the contract.

Contested rulings of the courts are grounded on the provision of Article 288.2 of the Law on Civil Procedure (hereafter LCP). According to this provision, the president of the courts' chamber is authorised to decide to reject the claim: if it was ascertained that another set of proceedings has already been set in motion in the same matter; if the claim has been decided as final; if the Court settlement has been concluded; or if the claimant does not have *locus standi* for raising a claim.

The appellate court was of the opinion that the material and procedural law had been correctly applied, and that in this case, concerning the subjective and objective identity of the case regarding the possible contradiction of the two claims in which the reasoning of one casts doubt on the other, *res iudicata* was correctly established.

The Constitutional Court found that there were no grounds for the application of the provision of Article 288.2 of the LCP since the court was asked to establish the non-existence of the particular legal relationship (i.e. it was a declaratory claim).

This point of view derives from Article 187 (which defines claims and presumptions for submission of claim for establishment) and Article 189 of the LCP (defining conditions under which the counterclaim is allowed).

According to Article 187.1 of the LCP, a claimant may ask the court to establish only the existence or non-existence of a right or legal relationship or to establish whether the documents are true or false. Article 187.2 of the LCP allows such claims to be raised when this is foreseen by special regulations; when the claimant has a legal interest to establish the existence or non-existence of a right or legal relationship; to establish whether the documents are true or false before the claim is payable; or when the claimant has a legal interest in raising a claim.

Article 189.1 of the LCP prescribes that a claimant can raise a counterclaim with the same court before the conclusion of the main hearing if the counterclaim is connected with the claim; if the claims can be set-off; if he or she asks for the establishment of a right or legal relationship on which the existence or non-

existence depends, in whole or in part, on a decision about the main claim.

Taking into account the claimant statements from the constitutional complaint the Constitutional Court found that in the procedure concluded by the final *ex parte* decision, the claim was condemnatory (as it related to the fulfilment of the obligation to pay a contracted sum of money). However, it noted that the final condemnatory decision on performance does not also affect the validity of the legal reasoning from which the performance derives because the validity of the legal ground was not the subject of the previous trial. Therefore those claims are not identical, so the presumptions of Article 288.2 of the LCP (for rejection) were not fulfilled.

By the rejection of their claim, the applicants were prevented from conducting the civil trial before the same court, and therefore their constitutional right guaranteed by Article 29 of the Constitution, was violated. That article states that everyone has the right to an independent and fair trial provided by law which shall, within a reasonable time, decide upon his rights and obligations, or upon the suspicion or the charge of a penal offence.

Languages:

Croatian.



Identification: CRO-2002-1-003

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 19.11.2001 / **e)** U-III-239/1998 / **f)** / **g)** *Narodne Novine* (Official Gazette), 106/2001 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

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.

Keywords of the alphabetical index:

Search, body / Police, officer, under cover / Police, defective exercise of duty / Misdemeanour, proceedings / Currency, foreign, illegal trade.

Headnotes:

When prescribed circumstances for misdemeanour are not found, personal search without a court warrant and presence of witness is illegal, as is the confiscation of items found in such searches as well as usage of such objects and information.

Summary:

The applicant was found guilty of an offence under Article 16.2 in connection with Article 11 of the Decree on conditions and methods of maintaining liquidity in foreign payments, because he was caught buying and selling foreign currency by a police officer who confiscated all the domestic and foreign currency found in his possession.

The material facts were established by a direct sighting of the offence by the police officer (who was not in uniform at the time), who presented his observations and further proceedings in the raid in a written report. On the grounds of the policeman's written report and his oral statement as a witness, the Commission for misdemeanours, according to Article 47 of the Law on misdemeanours found the applicant guilty.

On appeal, the appellate court did not accept the applicant's claims since it found that they were not backed up with any relevant and convincing evidence. According to special regulations on competencies of bodies of internal affairs the appellate court concluded the personal search during the raid was legally executed.

The Constitutional Court found the applicant's claims, about the incompatibility of established material facts and description of the deed from Article 11 of the decree, to be correct.

The provision of Article 11 of the decree forbids buying, selling and borrowing of foreign currencies between domestic person and domestic and foreign persons (natural and legal) in Croatia, except (as described under Article 2.1 of the decree) between authorised banks with a registered office in Croatia and other domestic persons, or between authorised banks and the Croatian National Bank (*Narodna banka Hrvatske*).

In the policeman's written report it was stated that the applicant was caught buying and selling a large amount of foreign currency at a higher rate than that prescribed by the National Bank. Other persons involved in the misdemeanour were not identified. The main evidence of the misdemeanour, besides of the oral statement of the policeman, was the foreign currency found in the applicant's clothes.

Therefore the Constitutional Court concluded that from established material facts it was obvious only that at the moment of personal search of the applicant a quantity of foreign and domestic currencies was found: thus the other key facts from Article 11 of the decree had not been established. The Court accepted another applicant's claim regarding the statement that the investigating authorities did not establish all material facts in a complete and correct manner (those burdening the applicant as well as those in his favour), which was deemed essential for making a correct legal decision. Non-acceptance of the applicant's defence violated the provision of Articles 45.1 and 47 of the Law on misdemeanours (assessment of evidence by discretion).

Given the omissions in the process of establishment of key material facts, the fact that the personal search was done without a search warrant, and without witnesses, and the search involved confiscation of currencies, the search was held not to have been based on law. The Court decided on the basis of the following legislation: Article 195.1 of the Law on Criminal Procedure; Article 101.2 of the Law on Misdemeanours and Article 319.1.2 of the Statute on the ways of the procedure of public security service.

The Constitutional Court found that the constitutional rights from Article 29.1 (right to the independent and fair trial), Article 29.4 (evidence illegally obtained shall not be admitted in court proceedings) as well as Article 34.4 (search without a presence of witness and court warrant) of the Constitution had been violated.

Languages:

Croatian.



Identification: CRO-2002-1-004

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 28.11.2001 / **e)** U-III-302/1997 / **f)** / **g)** *Narodne Novine* (Official Gazette), 111/2001 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.

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

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

Keywords of the alphabetical index:

Dismissal, obligatory period / Worker, conditions, collective settlement / Employment, notice of termination.

Headnotes:

In cases concerning alleged arbitrary displays of public power (e.g. no reasons given, relevant considerations ignored etc) and violations of the principle of equality guaranteed by Articles 14 and 26 of the Constitution, the Constitutional Court may exceptionally decide for itself on the correct application of the substantive law, despite the fact that it is the Supreme Court which is defined by the Constitution as the highest court in the country, competent to ensure the uniform application of laws and equal justice for all.

Summary:

The applicant in a constitutional complaint was a company whose headquarters were in Skopje. In the previous civil trial, the Court annulled the disputed act of the applicant, and ordered him to re-employ two workers (who were claimants in the previous trial) and enable them to perform their previous job.

The applicant claimed that in the meantime Croatia as well as “The Former Yugoslav Republic of Macedonia” had become independent states; that the Court did not respect the rules of the Law on Civil Procedure (LCP), according to which the court is obliged to stay within the limits of its jurisdiction during the procedure; and that the provisions of Article 55 of the Law on Resolving Disputes on

Conflicts of Law in Particular Relationships (LRDCLPR) were violated. These provisions provide that the Croatian court has jurisdiction if a foreign legal person (i.e. the defendant) has its representative office or agency in Croatia, or if the legal person who acts in favour of the foreign legal person is based in the country.

Furthermore, the applicant pointed out that the court did not apply the relevant provisions of the Law on Basic Rights in Labour Relations and Collective Agreements that were in force at the time. He claimed that the relevant provisions provided that in case of dismissal due to incapacity for performing a particular job, and the failure to achieve set results, the employer is not obliged to give a dismissal period. This point of view is also supported by the current practice of the Court of Appeal and the Supreme Court.

The Constitutional Court rejected the applicant's complaints regarding the lack of jurisdiction of the Croatian courts and based its considerations on the application of the substantive law.

The contested judgments were adopted on the basis of the incorrect application of the substantive law, according to which the courts concluded that the dismissal period was not in question.

Since the obviously relevant provision of the substantial law was not applied, the Constitutional Court found that there had been a violation of the constitutional rights guaranteed by Articles 14 and 26 of the Constitution, which state that court and other bodies should judge similar cases equally.

Languages:

Croatian.

**Identification:** CRO-2002-1-005

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 05.12.2001 / **e)** U-III-1162/2001 / **f)** / **g)** *Narodne Novine* (Official Gazette), 111/2001 and 01/2002 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

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

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

4.7.14 **Institutions** – Judicial bodies – Arbitration.

5.2 **Fundamental Rights** – Equality.

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.

5.4.7 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Contract, international / Conflict of laws / Law, application, incorrect, equality, right / Constitutional right, violation, remedy.

Headnotes:

In the case of a dispute regarding the execution of an international contract, the court shall apply the domestic rules on conflict of laws, in order to establish whether it has jurisdiction to deal with the submitted case, and which is the applicable law.

Summary:

The Commercial Court rendered a final decision by which the ceding of rights and obligations, from a contract dated 10 August 1998 between FIMA (a Croatian company), the German applicant and the German company Damast GmbH was found valid, as was the ceding of rights to the German company Albrecht Schleicher KG. Therefore Albrecht Schleicher KG was established as a party to the contract of 10 August 1998, having also the right to fiduciary transfer of shares in the Croatian companies given as a collateral.

In his answer to the claim, the applicant again challenged the competence of the Croatian court and stated that the contract specified that German law be used. He disputed the validity of the cession of rights.

However, based on the fact that the allocation of a major part of the contracted amount was done briefly after the applicant's statement on transfer of the contractual position to Damast, and that Damast was late with the statement of acceptance, the Croatian courts considered that the claimant would not have allocated such a great amount without knowing the

purpose of the payment or to be without the guarantor for repayment of debt.

It was therefore decided that the allocation had to be connected only to the cession of the rights from the credit contract.

The appellate court found that the applicant's supplementary appeal was not submitted on time, and thus deliberated only those parts of the appeal which were received by the court by telegram. However, the appeal was refused and the court held that there were no grounds for appeal.

In the constitutional complaint, the applicant explained and documented his reasons for finding the jurisdiction of the Croatian courts and the application of Croatian legislation in the particular case as incorrect.

The Constitutional Court established numerous violations of the civil and material provisions of law, made during the proceedings, which violated fundamental human rights and freedoms. Therefore, the constitutional complaint was considered justified.

The international character of the dispute was clear since every legal person involved in the cession of rights and obligations from the contract was a foreign legal person. Therefore the relevant legislation to be applied was conflict of law regulations specified in Croatian legislation – mostly incorporated in the Law on Solving the Conflicts of Laws with Foreign Legislation (“the law”).

According to the provisions of the law, the courts or other competent bodies establish *ex officio* the content of the applicable foreign law, respecting the contractual autonomy of the parties, and if the parties have not specified a foreign legal regime to be used, if not differently defined by the law or treaty or if the special circumstances of the case do not point to a specific law, the applicable law will be the law of the country where the provider is based. Furthermore, as regards the effect of cession of rights *vis-à-vis* third party debtors and creditors, the applicable law is the one relevant for the claim or debt.

The Constitutional Court discovered from the stated conflict of law regulations that the applicant's claim should be accepted in relation to choosing the German law as the applicable one for the credit contract and the contract of cession of rights. If those rules were applied for the disputes arising from the contract in matter, the arbitration would have been competent.

There were many violations of the Law on Civil Procedure, some of them major, and some repeated

by the Appeal Court. In addition, the Appellate Court had, without giving reasons, deviated from the judicial common practice regarding the appeal sent by telegraph.

The constitutional complaint was accepted due to the violation of Article 14.2 (equality before the law), Article 18 (right to appeal against decisions made by courts or other authorities), Article 26 (equality before the courts, government bodies and other bodies vested with public authority), and Article 29 (right to an independent and fair trial).

Languages:

Croatian.



Identification: CRO-2002-1-006

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 19.12.2001 / **e)** U-I-55/2001 / **f)** / **g)** *Narodne Novine* (Official Gazette), 5/2002 and 11/2002 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

4.7.4.1.4 **Institutions** – Judicial bodies – Organisation – Members – End of office.

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

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

Keywords of the alphabetical index:

Judge, retirement age / Judge, relief of duty / Judge, law governing the profession / Judicial Council, competences.

Headnotes:

Having regard to the constitutional provision giving the National Judicial Council the exclusive competence to decide on relieving a judge of his duty after reaching a certain age, the legislator may not provide otherwise by law.

Summary:

The Constitutional Court was requested to review the constitutionality of the part of Article 35 of the Law on Revisions and Amendments of the Judiciary Act (hereinafter LRAJA), related to Article 67.a.2.2 of the Law.

The applicant claimed the non-compliance of the stated provision of the Law with Article 122.3 of the Constitution in connection with Article 123.1 of the Constitution, regarding the procedure of the retirement of judges.

The part of the provision of Article 35 of the LRAJA in question provides that a judge shall be relieved of his duty in the court to which he was appointed, if *inter alia* he reaches 70 years of age. It is the president of the court where the judge served who is competent to take such a decision, and submit it to the National Judicial Council and the Ministry of Justice.

The applicant also maintained that if the compulsory retirement of a judge reaching a certain age is to conform to the Constitution, the National Judicial Council is the only body which may effectively relieve the judge of his duty. Indeed, the right to appeal against the decision of the National Judicial Council to the Constitutional Court is also guaranteed by the Constitution. Therefore, applying the stated provision would unconstitutionally prevent the judge of the right guaranteed by Article 122.4 of the Constitution.

The Constitutional Court considered that reaching 70 years of age is undoubtedly the constitutional ground for the compulsory retirement of a judge, and that the National Judicial Council (NJC) is competent for deciding this. Consequently, the part of the provision of Article 35 of the LRAJA, stipulating that the president of the court where the judge served takes the decision determining the retirement, is unconstitutional. Through this provision, the legislator prevents the judge from exercising his constitutionally guaranteed right to appeal against the NJC's decision (e.g. if the NJC had incorrect information as to the judge's age). Therefore, the part of the provision of Article 67.a.2.2 was repealed (when the judge reaches 70 years of age).

As regards the constitutionality of Article 35 of the LRAJA in connection with Article 67.3 of the same Law, the Constitutional Court did not find unconstitutional the provisions on the other situations for the relief of duty of the judge (death, taking up office in another court, judiciary or state body) upon which the president of the relevant court may decide, and deliver the decision to the NJC.

Since it was finally decided on the contents of the proponent statements by the rendered decision, the Court did not separately deal with the proposal to temporarily postpone the execution of individual acts or activities connected to Article 35 of the LRAJA.

Languages:

Croatian.



Identification: CRO-2002-1-007

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 19.12.2001 / **e)** U-I-137/2001 / **f)** / **g)** *Narodne Novine* (Official Gazette), 3/2002 and 11/2002 / **h)** CODICES (Croatian).

Keywords of the systematic thesaurus:

1.1.4.2 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Legislative bodies.

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.

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

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

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

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:

Constitutional Court, decision, execution / Pension, adjustment, minimum, maximum / Pension, system, harmonisation / Precedent, improper application.

Headnotes:

The legal consequence of decisions of the Constitutional Court, by which a law, a regulation or some of their provisions are repealed is that they lose their legal force on the day of publication of the Constitutional Court decision. The legislator is free to decide how to fulfil the legal void created following such a decision of the Constitutional Court.

However, former decisions of the Constitutional Court cannot be the legal foundation for the review of constitutionality of a disputed act with the Constitution.

Summary:

In the proposal to institute proceedings to review the constitutionality of a law on the increase of pensions to eliminate the differences in the level of pensions realised over different periods of time (hereinafter the Law), the following provisions had been reviewed:

- the provisions of Article 1 which determine that the purpose of the Law is to eliminate the differences in the levels of pensions realised over different periods of time (before and after 1 January 1999) by which the Constitutional Court decision no. U-I-283/1997 from 12 May 1998 is carried out according to the relative economic strength of the Republic of Croatia;
- the provision of Article 3.2 of the Law which defines the basis for the increase of the minimum pension as the amount that would belong to the beneficiary of the pension on 31 December 2000 without application of the provision on the minimal pension;
- the provisions of Article 4.1 and 4.3 of the Law according to which the “pension protective supplement”, the minimum pension and maximum pension determined according the regulation in force until 31 December 1998 are excluded from the increase;
- the provisions of Article 5 of the Law which determine that pensions of military pensioners, representatives of the Croatian Parliament and individual farmers are excluded from the increase; and
- the provisions of Article 6 according to which the increase of pensions should be done by increasing the beneficiary's personal points, defined on 1 January 2001 and determined by the Croatian Pension and Disability Fund, without rendering a decision, *ex officio*.

The constitutional claim was based upon number of constitutional provisions, which by their contents correspond to provisions of Article 89.4 and 89.5 of the Constitution (non-retroactivity of regulations except for certain provisions only in specially justified cases), Article 117 of the Constitution (courts administer justice according to the Constitution and law) and Article 140 of the Constitution (presumption for application of the treaties in the internal legal order).

In their claim, the applicants maintained that:

- the disputed Law only partially adjusts the pensions realised under the same conditions in different periods of time;
- the Constitutional Court decision is not being executed by the disputed Law regarding the adjustment of pensions with wage increases in the period from 1993-1997;
- by referring to economic power of the State, fundamental constitutional rights and principles are violated.

Some of the applicants maintained that the State interferes unconstitutionally with the work of courts and administrative bodies, regulating retroactively the elements for computing the increased pensions and thus putting some categories of pensioners in a privileged position.

The Constitutional Court found the claim unjustified and decided not to institute proceedings for the review of constitutionality of the provisions of the Law with respect to Article 41 of the Constitutional Act on the Constitutional Court.

The Constitutional Court noted that the Law removes the differences between pensions realised in different periods of time. It also considered that it had no competence for ordering the legislator as to how it should fill in the legal void created after removal of the legislation from the legal system. In fact, the legislator is free to do so respecting the constitutional criteria as well as, among other things, the economic strength of the country.

The Constitutional Court did not find the disputed provisions of the Law to have a retroactive effect. Furthermore these provisions do not prescribe to the beneficiaries of pensions any other legal regime with respect to the one in force until the beginning of application of the disputed Law. It is the legal regime in force which continues to be applied and which refers to the particular categories of pensioners.

The computing and payment of increased pensions is to be executed in the same way as any other regular pension adjustment, and the common practice is to do this without rendering any special rulings. The dissatisfied party can initiate respective proceedings, demand the rendering of the ruling and use legal remedies and if necessary seek court protection.

The proponents' argument on initiated civil procedures connected to the Constitutional Court decision and unconstitutional interference of the legislator into

the jurisdiction of judicial power was refused with the explanation that the Constitutional Court reviews the validity of law only from the constitutional point of view, and that in that case would not deal with the request for a review of the constitutionality regarding legality of the individual acts of judicial bodies.

Languages:

Croatian.



Identification: CRO-2002-1-008

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 23.01.2002 / **e)** U-I-39/2002 / **f)** / **g)** *Narodne novine* (Official Gazette), 10/02 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

1.1.1.1.1 **Constitutional Justice** – Constitutional jurisdiction – Statute and organisation – Sources – Constitution.

1.1.1.1.3 **Constitutional Justice** – Constitutional jurisdiction – Statute and organisation – Sources – Other legislation.

1.2.4 **Constitutional Justice** – Types of claim – Initiation *ex officio* by the body of constitutional jurisdiction.

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.

1.3.4.5 **Constitutional Justice** – Jurisdiction – Types of litigation – Electoral disputes.

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

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

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

Keywords of the alphabetical index:

Constitutional Court, jurisdiction, legal regulation / Local self-government body, election.

Headnotes:

The Constitution and the Constitutional Act on the Constitutional Court are the only legislation regulating

the organisation and jurisdiction of the Constitutional Court.

Summary:

The Constitutional Court, under Article 36.2 of the Constitution, initiated proceedings for the review of constitutionality of Articles 7.4 and 58 of the Law on the election of members of local and regional government bodies; hereinafter: the Law on Election.

The disputed provision of Article 7.4 of the Law on Election prescribes that the mandate of a member of a representative body shall expire on the day when the Constitutional Court decision was rendered, and if, among other things, it is subsequently discovered that there were reasons preventing his election.

The provision of Article 58 stipulates that if it is established, during the mandate of a representative body, that some of its members during the period of candidacy or elections did not fulfil some of the candidacy or electoral conditions prescribed by this law, the Constitutional Court shall, within the term of 30 days from the day the request was received, render a decision establishing the termination of the body's mandate. The petition to the Constitutional Court may be submitted by a political party and by anyone with an independent electoral role who participated in the elections for the representative body.

Analysing the constitutional provisions, especially Article 128 of the Constitution (jurisdiction of the Constitutional Court); Article 128.8 of the Constitution (Constitutional Court jurisdiction regarding the electoral procedures); Article 131.1 and 131.2 of the Constitution (conditions and time limits for instituting constitutional proceedings are regulated by the Constitutional Act; the Constitutional Act is passed in accordance with the procedure determined for amending the Constitution), the Constitutional Court established that the jurisdiction of the Constitutional Court may be determined only by the Constitution; and that its organisation and jurisdiction are determined by the Constitution and the Constitutional Act.

The organisation and jurisdiction of the Constitutional Court cannot be affected either by law or by any other regulation which does not have the significance of the constitutional law.

The disputed provisions of the Law on Elections unconstitutionally enlarged the jurisdiction of the Constitutional Court to the decision on the proposal i.e. rendering the decision, outside the time limits prescribed by the Constitution and Constitutional Act – to the period after the expiration of 30 days from the official publishing of the results of the elections (this

being contrary to the Part IX, Articles 84 to 92 of the Constitutional Act on the Constitutional Court).

For the reasons mentioned above, the Constitutional Court repealed the disputed provisions of the Law on Elections.

Languages:

Croatian, English.



Identification: CRO-2002-1-009

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 06.02.2002 / **e)** U-III-1876/2000 / **f)** / **g)** *Narodne novine* (Official Gazette), 15/02 and 18/02 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

1.3.5.13 **Constitutional Justice** – Jurisdiction – The subject of review – Administrative acts.
 4.6.2 **Institutions** – Executive bodies – Powers.
 4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
 4.7.9 **Institutions** – Judicial bodies – Administrative courts.
 5.1.1.4.2 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Incapacitated.
 5.4.13 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Disabled, war / Pension, disability / Pension supplement, disability benefit.

Headnotes:

An administrative act raising a matter which falls within the courts' jurisdiction is null and void.

Summary:

A constitutional complaint was lodged in the Constitutional Court by a disabled veteran, who disputed the judgment of the Administrative Court, by which the applicant's claim regarding the ruling of the

Croatian Government and of the Governmental supervision Committee had been dismissed. The Administrative Court annulled the ruling of the Ministry of Homeland War Veterans and all legal consequences of the ruling in the matter, and it was ordered that the first instance tribunal in the renewed proceedings should execute the return of the illegally accepted amount of compensation after the ruling becomes legally valid.

In the constitutional complaint the applicant emphasised he was granted the status of a "Level II" disabled veteran with 100% physical disability, and thus he should have the right to a personal disability pension and also the right to a supplement to pay for a carer. He was prevented from obtaining this supplement and thus he deemed that the constitutional right arising under Article 57 of the Constitution was violated (that article declares that the State shall ensure the right to assistance for weak, needy and other citizens unable to meet their basic needs owing to unemployment or incapacity to work; the State shall devote special care to the protection of disabled persons and their integration into social life; and receiving humanitarian aid from abroad must be allowed at all times).

On the facts established in the administrative proceedings as well as on the grounds of provisions of material and procedural law applied in the conducted proceedings, the Constitutional Court established that the competent body behaved in accordance with the relevant legal provisions. The Administrative Court instructed the applicant to demand from the competent Ministry the change of the final decision, since he alleged that he had been denied the right to a carer's supplement by incorrect application of material legislation.

However, with respect to the item 2 of the dictum ordering the applicant the return of the amount of 76,318.15 HrK, the Constitutional Court established that according to the provision of Article 96 of the Law on protection of disabled civil and war veterans, this request may only be realised through a claim to a competent court.

Because of the consequences of annulment, prescribed by the provision of Article 267.1 of the Law on general administrative procedure, and Article 40.2 of the Law on administrative disputes, according to which the court has to supervise the annulment of an administrative act, and having in mind the fact that by item 2 of the dictum the disputed ruling had been decided over the issue from the court jurisdiction, the Constitutional Court adopted the constitutional complaint because the provision of Article 19.2 (judicial review of decisions made by administrative

agencies and other bodies vested with public authority shall be guaranteed), and Article 57.2 (the State shall devote special care to the protection of disabled persons and their integration into society) of the Constitution had been violated.

Languages:

Croatian, English.



Identification: CRO-2002-1-010

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 20.02.2002 / **e)** U-II-1993/2002 / **f)** / **g)** *Narodne novine* (Official Gazette), 19/02 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
 4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
 5.1.1.4.2 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Incapacitated.
 5.3.32 **Fundamental Rights** – Civil and political rights – Right to family life.
 5.4.13 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Child, disabled, care by parents / Child, care, leave, conditions / Labour law.

Headnotes:

Giving a competent minister the power to render by-laws regulating conditions and ways of establishment of the rights defined by law, does not authorise him to regulate such by-laws in a manner contrary to the purpose for which the right has been defined by law.

Summary:

The subject of the review was the provision of Article 3.1 of the Rules on acquiring the right to parental leave until a child reaches 7 years of age

and to shorter working hours in order to care for a severely disabled child. The rules were rendered by the Minister of Work and Social Care with consent of the Minister of Health, on the grounds of the provision of Article 66.6 of the Labour Law. The disputed provision stipulates that the right to parental leave and to shorter working hours until the child reaches the age of 7 can be acquired only by one parent if both parents are employed full time, e.g. if a single parent is caring for a child with major disabilities.

In the particular case the applicant was the mother of a disabled child, and her husband was a self-employed barrister. She emphasised that the disputed provision is not in accordance with the purpose and the reason for establishing the right to parental leave to care for a disabled child, since providing the necessary care to such a child is of essential importance to his or her mental and physical development and to meeting his or her basic needs.

The disputed provision was, according to the applicant, not in accordance with the following provisions: Article 14 of the Constitution (equality before the law); Article 16 of the Constitution (freedoms and rights may only be restricted by law, and restrictions shall be proportional to the nature of the necessity for restriction in each individual case), Article 56.2 of the Constitution (rights connected to birth, maternity and child care shall be regulated by law); Article 57.2 of the Constitution (the State shall devote special care to the protection of disabled persons and their integration into society); Article 61.1 of the Constitution (legal relations in marriage, common law marriage and families shall be regulated by law); Article 62 of the Constitution (the State protects expectant mothers, children and young people and creates social, cultural, educational, material and other conditions promoting the right to a decent life); Article 63.3 of the Constitution (physically and mentally disabled and socially neglected children shall have the right to special care, education and welfare); and Article 64.1 of the Constitution (everyone shall have the duty to protect children and disabled people), as well as with Articles 1 and 66.1 of the Labour Law.

The Constitutional Court found the proposal to be grounded, bearing in mind the provisions of the Constitution regulating family relations (Articles 61 to 64 of the Constitution) from which the general constitutional duty of the State derives: to specially take care of children and young people, creating social, cultural, educational, material and other conditions enabling parents to fulfil their constitutional obligation from Article 63.1 of the Constitution. Among other conditions for the realisation of special care for a disabled child,

the most important one is to enable one parent to have enough time for taking care for such a child.

Those principles are also shown in the provision of Article 66.1 of the Labour law: that article, without any restrictions, defines one of the parents as a holder of the right to parental leave, and it also authorises one of the parents to demand the right to leave. This right is established in favour of a severely disabled child. This provision does not prescribe the conditions and procedure for establishing the existence of presumptions for the realisation of the right to parental leave of a parent of a severely disabled child, and so paragraph 6 of this article authorises the competent minister to regulate the subject. However, this provision does not give the authorisation to the competent minister to prescribe such conditions that are not in accordance with the purpose for which the relevant right is determined by law. In the concrete case, the Constitutional Court found that the minister is not authorised to prescribe which one of the parents of disabled child would have the right to present a request for obtaining the right to leave, and that the right to choose is left to the parents.

The Constitutional Court found that the disputed provision of the Rules excluded self-employed parents from exercising the right to demand leave, and that such a limitation is contrary to the legal purpose of Article 66.1 of the Labour law, respectively the constitutional principles of Articles 61 to 63 of the Constitution, and also, that the competencies from Article 17 of the Law on state administration have been overstepped.

Languages:

Croatian, English.



Identification: CRO-2002-1-011

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 20.03.2002 / **e)** U-I-597/2000 / **f)** / **g)** *Narodne novine* (Official Gazette), 36/02 and 44/02 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.

3.18 **General Principles** – General interest.

5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.

5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Fire, insurance, contribution / Insurance, company, fund / Legal person, different treatment as a tax payer / Tax, fire service.

Headnotes:

It is unconstitutional to define only one or only some of the economic subjects who are liable to help fund public interest expenditure.

Summary:

The Croatian Insurance Office submitted a proposal to review the constitutionality of Article 46.2 of the Law on fire-fighting because of alleged violations of Article 49.2 of the Constitution (the State shall ensure all entrepreneurs an equal legal status on the market; abuse of the monopoly position defined by law shall be forbidden) and Article 51.1 of the Constitution (everyone shall participate in the funding of public expenses in accordance with his or her economic capabilities).

The disputed provision of the law in its entirety read as follows:

“Insurance companies are to set aside funds in the amount of 5% of fire insurance premiums which are allocated as follows: 30% goes to a special account of the Croatian fire-fighting community, 30% to a special account of the fire-fighting communities of the regions and to the account of the fire-fighting community of the city of Zagreb on the territory of which the insured asset is located, and 40% is allocated to the account of fire-fighting community of the unit of local and regional self government, i.e. to the account of regional fire-fighting community on the territory of which the insured asset is located.

Insurance companies are to pay 1% of their collected insurance functional premium from liability insurance in road traffic, river transport, maritime transport, air traffic and rail road traffic on the territory on which the insured asset is located in the following manner: 30% is allocated to the special account of the Croatian fire-fighting community, 30 % to the special account of the fire-fighting communities of the counties and to

the account of the fire-fighting community of the city of Zagreb on the territory of which the insured asset is located, and 40% to the account of fire-fighting community of the unit of local and regional self government i.e. to the account of regional fire-fighting community on the territory of which the insured asset is located.

The assets from paragraphs 1 and 2 of this article are to remain separate, and may be used only for purchasing equipment and goods for fire-fighting use, for education and training of fire fighters or for lending support to fire-fighting in areas entitled to special state assistance, according to the measures determined by the competent body of the Croatian fire-fighting community.

The insurance companies are to decrease the calculated amount of the fire insurance premium by 30% of the amount defined in paragraph 1 of this article to legal persons who have their own professional fire-fighting division or voluntary fire-fighting society defined by law, but only for the property which their divisions secure according to the fire protection plan.”

After a detailed study of legislation regulating fire-fighting and insurance, and bearing in mind the constitutional principles guaranteed by Article 16 of the Constitution (freedoms and rights may only be restricted by law in order to protect the freedoms and rights of others, public order, public morality and health; every restriction of freedoms or rights shall be proportional to the nature of the necessity for the restriction in each individual case); and the above-mentioned Article 50.2 of the Constitution, the Constitutional Court accepted the proposal and repealed the disputed provision of the law.

In its statement of reasons, the Constitutional Court noted that defining the sources and ways of financing fire-fighting as a public activity is the legitimate right of the legislator with respect to the provision of Article 2.4.1 of the Constitution.

However, obligations from the law which the legislator imposes on economic and other legal subjects have to be defined in a proper manner, and therefore not by questioning rights guaranteed by the Constitution, as the proponent emphasised. Burdening insurance companies with the “fire-fighting contributions” is not justified given the fact that insuring for fire damage is covered by a separate property insurance policy against fire.

The Constitutional Court considered that in the particular case, for the benefit of the public interest, the fire-fighting fund allocation obligation should be

prescribed for all economic subjects, in accordance with their economic capabilities. The fact that fire-fighting divisions had not charged for their activities does not justify implementing the disputed norm.

Moreover, the Constitutional Court found, with respect to automobile liability insurance, that the damages to third persons are reimbursed by the insurance community through the insurance contract. In other cases connected to outlays from fire insurance premiums and allocation to the fire-fighting communities, this legislative initiative would be justified since those fire-fighting communities would, as a rule, intervene.

Languages:

Croatian, English.



Identification: CRO-2002-1-012

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 26.03.2002 / **e)** U-I-2270/2001 / **f)** / **g)** *Narodne novine* (Official Gazette), 38/02 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.

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

Keywords of the alphabetical index:

Border, crossing, goods / Criminal offence, elements, essential / Customs / Law, application, incorrect.

Headnotes:

Punishment for an act which before its commission was not defined by criminal law as a punishable offence is unconstitutional.

Summary:

A decision of a first instance court was partially changed by the decision of a second instance court and the applicant was sentenced to imprisonment for 8 months, with two years' probation, for the criminal offence defined in Article 298.1 of the Criminal Code (*Narodne novine* 110/97). This criminal offence involves exporting more than the maximum value of goods and avoiding customs. The offence is punishable by a fine or imprisonment for up to three years.

The applicant emphasised that he was, by incorrect application of substantive law, punished for an act which at the time of its commission was not defined as a punishable offence by the Criminal Code then in force (*Narodne novine* 32/93, 38/93, 16/96, 28/96). He also pointed out that the committed act is better defined by the provisions of Article 334.1 of the Customs Act which prescribed that everyone who transports goods across the border avoiding customs being armed or who transports goods across the border being armed or using force or threats shall be punished for a criminal act by a fine or imprisonment of between one and five years.

The Constitutional Court determined that at the time when the applicant committed the act, a provision was in force in the then Criminal Code which had not prescribed the criminal offence later on prescribed as Article 298.1 of the subsequent Criminal Code. There was also no identical description of the deed in the Criminal Code and Customs Act.

The Court also established that the first instance court, deciding on the responsibility of the accused, had not taken into account the obviously competent regulation, i.e. the competent regulation was improperly understood, and the second instance court did not correct that wrong conclusion.

The Constitutional Court established the violation of the applicant's constitutional rights prescribed in Article 31.1 of the Constitution and thus accepted the constitutional complaint.

Languages:

Croatian, English.



Identification: CRO-2002-1-013

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 04.04.2002 / **e)** U-I-1348/2001 / **f)** / **g)** *Narodne novine* (Official Gazette), 38/02 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

3.1 **General Principles** – Sovereignty.

3.18 **General Principles** – General interest.

3.25 **General Principles** – Market economy.

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

5.4.7 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Property, private, prohibition to dispose of / Property, of legal persons / State succession.

Headnotes:

The duty of the State to protect its economic interests until completion of the process of succession is defined by the Constitution.

Summary:

Applicants submitted proposals to institute proceedings to review the constitutionality of the Law prohibiting the disposal of assets and taking over the assets of certain legal persons on the territory of Croatia, with an explanation that by the disputed law the nationalisation of a legal person's estate ownership had been carried out. The consequence of this is the lack of a right of appeal against acts on the deprivation of ownership i.e. the impossibility of realising a sales contract concluded in respect of such assets.

The Constitutional Court reviewed the constitutionality of the law with respect to Article 5.1 of the Constitution (laws shall conform with the Constitution, and other rules and regulations shall conform to the Constitution) and Article 50.2 of the Constitution (the exercise of entrepreneurial freedom and property rights may exceptionally be restricted by law for the purposes of protecting the interests and security of the Republic of Croatia, the environment and public health). Article 16 of the Constitution stipulates that freedoms and rights may only be restricted by law in order to protect freedoms and rights of others, public order, public morality and health and that every

restriction of freedoms and rights shall be proportional to the nature of the necessity for the restriction in each individual case.

The Constitutional Court referred to the constitutional and legal grounds of Article 140.2 of the Constitution which stipulated that the public institutions of Croatia in the present period may, on the basis of the right to self-determination and the sovereignty of Croatia established by the Constitution, make the necessary decision for the protection of the sovereignty and interests of the Republic, and to the purposes of the disputed law. The Court therefore considered that the law does not violate the stated provisions of the Constitution but protects the economic interests of the Republic until the relations between members of the former Federal Republic of Yugoslavia are completely defined.

Bearing in mind that before the law was passed these issues had been regulated by Governmental decrees and that in former constitutional proceedings identical decisions had not been established as unconstitutional and also that the Treaty on issues of succession of the states of the former Federal Republic of Yugoslavia (Vienna, 29 July 2001), has not been ratified by the member states, the Constitutional Court found the proposals not grounded.

Languages:

Croatian, English.



Cyprus

Supreme Court

Important decisions

Identification: CYP-2002-1-001

a) Cyprus / **b)** Supreme Court / **c)** Plenary / **d)** 08.05.2001 / **e)** 9931 / **f)** Yiallourous v. Nicolaou / **g)** to be published in *Cyprus Law Reports* (Official Digest) / **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.

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

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

5.3.34.2 **Fundamental Rights** – Civil and political rights – Inviolability of communications – Telephonic communications.

Keywords of the alphabetical index:

Compensation, damages, non-economic loss / Compensation, determination / Fundamental right, protection, effectiveness / Telephone tapping / Remedy, effective / Civil right, notion / Right, notion.

Headnotes:

Violation of the right to a private life and the right to respect for, and to secrecy of, correspondence and other communications, guaranteed by Articles 15 and 17 of the Constitution, entitles the victim of the violation to claim compensation from the wrongdoer although the violation does not rank as a civil wrong under domestic law.

Summary:

Article 15 of the Constitution guarantees the right to a private and family life. Article 17 of the Constitution safeguards the right to respect for, and to secrecy of, correspondence and other communications if such communications are made through means not

prohibited by Law. Under Article 35 of the Constitution the legislative, executive and judicial authorities of the Republic “shall be bound to secure, within the limits of their respective competence, the efficient application of the provisions of the Constitution” which safeguard the fundamental rights and liberties of the subject.

The appellant was the Director and the respondent a sewage engineer of the Sewage Board of Nicosia. During a period of one year, the appellant tapped the telephone conversations of the respondent. The latter sued the appellant for damages emanating from the violation of the aforesaid two rights. The trial Court held that the violation of the above rights establishes an actionable right and awarded £ 5,000 damages as “equitable compensation”.

The appellant appealed contending that the violations of the fundamental rights of the respondent, which do not constitute civil wrongs under the Torts Law Chapter 148, do not give a right to damages or to protection through the civil jurisdiction of the court.

The Supreme Court dismissed the Appeal. It held that the Constitution safeguards in a special Part – Part II – the Fundamental Rights and Liberties and imposes their respect. These human rights and liberties are of a universal character. Everyone is bound to respect them and to abstain from any act violating them. Restrictions to the guaranteed human rights and freedoms, other than those provided by Article 33.1 of the Constitution, are not allowed. The fundamental rights of the person are not defined by reference to his or her civil rights under domestic law. They are of a universal character and coincide with the nature and autonomy of a person in the social and state area. Article 35 of the Constitution renders the protection of fundamental rights and their efficient application the primary obligation of the State in all its functions. It imposes an obligation on each one of the three powers of the state, within the limits of their respective competence, to secure the efficient application of human rights. The ascertainment of violations of human rights and the granting of a remedy, fall, in view of their nature, within the sphere of judicial competence. The remedies that can be awarded are those provided by national legislation, the organic laws which govern the administration of justice (see *inter alia* the Courts of Justice Law 1960 (14/60) and the Civil Procedure Law, Chapter 6). Access to Courts is regulated by the Rules governing the Administration of Justice (see also Article 30.1 of the Constitution). The remedies that can be granted in the sphere of Civil Jurisdiction include damages for restoration of the affected rights, restitution of the injury that was caused, prohibitive and mandatory orders and remedies incidental to them. No safeguard of human rights is effective if it does not provide the

means for judicial protection by the remedies established by law. Without this protection, the rights would have lost not only their foundations but also their very character as rights, by being altered to declarations of good behaviour. The other dimension of the obligation imposed by Article 35 is the prohibition of every act involving violation or intrusion into the fundamental rights of the person.

The right to a private life is safeguarded by Article 8.1 ECHR, which also constitutes part of domestic law as a result of Ratification Law 39/62.

In Cyprus the provisions of Article 13 ECHR constitute part of the domestic law; they safeguard the right of granting effective remedy for the violation of the rights set forth in the European Convention on Human Rights (which to a great extent coincide with the rights safeguarded by Part II of the Constitution) by a competent court.

The Constitutional Court therefore concluded that the violation of the above two rights gives a right to legal protection through recourse to the judicial process for the granting of remedies provided by Law. This conclusion is consonant with the principle of law that where there is a wrong there is a remedy. Deviation from this principle constitutes an anomaly.

As regards the assessment of damages, the guiding principle is that of equitable compensation. Distress, grief, pain, loss of opportunity of employment, feelings of injustice, pain and suffering constitute acceptable heads of damage. The efficient application of human rights, dictated by Article 35 of the Constitution, imposes the award of compensation to the victim of the violation for any damage caused to his person, as a natural and social being. The amount of £ 5,000 which was awarded to the respondent is considered as just and in all respects equitable compensation for the consequences of the violation of his aforementioned rights.

Languages:

Greek.



Czech Republic Constitutional Court

Statistical data

1 January 2002 – 30 April 2002

- Judgments of the Plenum: 3
- Judgments of the Panels: 45
- Other decisions of the Plenum: 2
- Other decisions of the Panels: 787
- Other procedural decisions: 40
- Total: 877

Important decisions

Identification: CZE-2002-1-001

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 05.12.2001 / **e)** I. US 535/2000 / **f)** Conduct of state authorities / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

5.3.13.1.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Scope – Non-litigious administrative procedure.

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

Keywords of the alphabetical index:

Property, private, restitution / Restitution, conditions, citizenship / Restitution, claim, time-limit / Assistance, obligation.

Headnotes:

The constitutional principle of the rule of law implies that the conduct of the State towards its citizens is in conformity with obligations it has set for itself, while the citizen, on the basis of legal certainty, has the right to rely on the trustworthiness of the State when complying with its obligations.

A restitution claim received outside the requisite time-limit should be accepted when the delay is the consequence of the state's negligence, and when the applicant fulfilled all the conditions set by the law within the imposed time-limit.

Summary:

In its constitutional complaint the applicant claimed that, by the procedure of public authorities, the applicant's rights and freedoms guaranteed by the Constitution were violated.

After reviewing the files and considering all the circumstances, the Constitutional Court concluded that the constitutional complaint was justified. Even though the applicant had made a mistake, the conduct of public authorities was even more defective. The applicant's restitution claim was rejected due to a failure to comply with the conditions of citizenship, the certificate of which having not been issued by the competent authority within the due period of time.

The applicant acquired American citizenship by naturalisation and should have known that acquiring American citizenship causes the loss of Czechoslovak citizenship. After returning to Czechoslovakia, he asked for the citizenship again. The District Authority issued a document confirming that his citizenship rights were not affected; he even acquired an identity card. He applied a restitution claim, which was fully acknowledged. The applicant took over agricultural property and started to exercise his ownership title.

The applicant's cousin who subsequently disputed the existence of the applicant's citizenship also filed a claim for the restitution of the same property. The applicant therefore addressed the District Authority with an application for a certificate of citizenship and was assured that his application would be completed in an orderly and timely manner so that he could lodge his claim within the due period.

The applicant relied on the statement of the state authority confirming that he had not been released from his ties to the state; the subsequent issuance of the identity card and the further procedure of the state authorities substantiated his belief that he was in conformity with the citizenship conditions for the restitution, and that he was therefore undertaking steps that were reasonable and sufficient.

He subsequently relied on the administrative authority which should have issued the certificate within the period of time defined by the Administrative Code: a maximum of 30 days. However, the authority issued the document as late as 45 days after the filing of the

application, which was already after the deadline for the applicant's application for restitution claim had lapsed. The District Authority had caused this delay even though the application complied with all requirements and there was no reason to reject the application. Furthermore, the above circumstance caused the rejection of the claim of the applicant who otherwise complied with all conditions for the restitution.

The Constitutional Court noted the statement of the District Land Authority in which it pointed out that following the rejection made in the resolution of the Land Authority, this Authority could not have acted differently than to observe the previous legal opinion of the Regional Court; at the same time it emphasised that the Land Authority did not identify itself with this opinion. The Constitutional Court further noted that the applicant introduced his restitution claim at the time of the effectiveness of the amendment to the law where one provision orders "the relevant bodies of state authorities ... to provide assistance to a person who claims to be a beneficiary" and "to contribute to the clarification of a matter".

All negative consequences of state negligence would have been remedied if the District Authority had issued the citizenship certificate to the applicant in time. The fact that the State did not exercise its authority within the limits set by the law and in a way stipulated by the law was not a result of the applicant's conduct, but of the State itself; such a law cannot therefore be applied *ex post facto* as a tool for limiting the ownership title already previously recognised by the state, to which the protection pursuant to Section 11 of the Charter of Fundamental Rights and Freedoms is applicable.

In the instant case, the Constitutional Court ascertained the violation of Section 2.3 of the Constitution, according to which the purpose and objective of the state authority is to serve citizens, as well as of the provisions of Section 4.4 of the Charter of Fundamental Rights and Freedoms, according to which the use of provisions regarding limiting fundamental rights and freedoms must be based on their essence and meaning. Such limitations are not to be used for purposes other than those for which they were established. The Constitutional Court also noted that the way the State acted against the applicant not only caused damage to him, but also violated the constitutional principle of legal certainty. The Constitutional Court therefore cancelled the challenged decisions.

Languages:

Czech.



Identification: CZE-2002-1-002

a) Czech Republic / **b)** Constitutional Court / **c)** Third Chamber / **d)** 07.02.2002 / **e)** III. US 521/01 / **f)** Objective side of crime / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Criminal offence, elements, essential / Criminal charge, disproportionate.

Headnotes:

A crime is characterised by, amongst other things, its “objective” aspects, the obligatory signs of which are conduct, consequence, and a causal relationship between the two. In each specific matter before the Court, all these signs have to be proven. If they are not, it cannot be assumed that all signs representing an objective side of the qualified facts of the crime in question have been met.

From the point of view of the presumption of innocence, a legal conclusion regarding the offender's guilt must always be evidenced by the results of the evidence and has to logically arise from it.

Summary:

The claimant requested the cancellation of general court resolutions. He claimed that their issuing as well as the court's procedures preceding the contested resolutions affected his fundamental rights and freedoms.

The applicant was sentenced for disorderly conduct and attempted bodily harm. In its statement, the Municipal Court referred to the resolutions chal-

lenged. The Municipal Prosecution waived its position of an enjoined party. The Constitutional Court did not hold an oral hearing as both the applicant and the Municipal Court approved it and an oral hearing could not have further clarified the matter.

The Constitutional Court concluded that the constitutional complaint filed was partly justified because of the obvious discrepancy between the qualified factual conclusions and the legal assessments based on them. This particularly concerns depositions of the aggrieved persons who were heard in all stages of the criminal proceedings held against the claimant as undisclosed witnesses. From their individual depositions it was quite obvious that the claimant only attacked one of them.

The guilty verdict in relation to the claimant was solely and exclusively constructed on the depositions of these three witnesses (the aggrieved persons). Their depositions unambiguously showed that the claimant demonstrably attacked only one witness in the above way. Only in this part of both the challenged resolutions could it be deemed that the facts ascertained on which the courts based their conclusions were supported by the evidence, and in this part the adopted legal conclusion corresponded to them.

On the other hand, the first instance courts' conclusion that the claimant acted in a similar way towards the other two aggrieved persons, is not supported by the evidence. Although an attack by the claimant on one of the aggrieved was proved, it cannot be extended to other persons transferring a responsibility for their injuries to the claimant without any grounds. In the aforementioned part of the evidence, the courts reached legal conclusions that do not correspond to the status of facts ascertained; this reached such an extent so as not to be acceptable from the constitutional point of view.

An unequivocal conformity between the status of facts ascertained in a procedurally relevant way and a legal conclusion derived therefrom is a *conditio sine qua non* of a fair trial. The qualified facts of any crime are also characterised by its so-called objective side, the obligatory signs of which are conduct, consequence and a causal relationship between the two. Their existence must be evidenced. Otherwise all signs representing an objective issue of the qualified facts of the crime in question are not met. In the given case, a relationship between the claimant's conduct and the consequence derived therefrom was not proven beyond any doubt. The conclusion on the offender's guilt must always be evidenced by the results of the evidence and it has to logically arise therefrom. When observing these principles, it cannot

be said that the criminal proceedings against the claimant were held in a just way and allowed adopting a just resolution. Even if the suspicion is great, it cannot be extended to certainty, as certainty must rely on unambiguous evidence beyond any doubt. The first instance courts not only proceeded in a way conflicting the law, but their procedure reached the limits of unconstitutionality and breached the principles contained in the constitutionally guaranteed basic right for a fair trial.

As to other objections, the right of defence was not affected. As far as recognition is concerned, the Constitutional Court had no objections to the court's argumentation.

The Constitutional Court therefore cancelled the challenged provisions.

Supplementary information:

- See also II. ÚS 301/98, *Collection of Judgments, Rulings and Resolution*, vol. 14;
- III. ÚS 398/97, *Collection of Judgments, Rulings and Resolution*, vol. 11.

Languages:

Czech.



Identification: CZE-2002-1-003

a) Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 19.02.2002 / **e)** II. US 536/01 / **f)** A security interview / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.1.4.2 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Legislative bodies.

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

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

4.11.3 **Institutions** – Armed forces, police forces and secret services – Secret services.

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

5.3.13.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to a hearing.

Keywords of the alphabetical index:

State, security / State secret / Security, interview.

Headnotes:

A security interview is carried out if facts are ascertained that could represent an obstacle to issuing a certificate for dealing with secret information. In the interview the addressed person has an opportunity to give his or her opinion regarding the facts ascertained. Only in exceptional and justified cases can the interview be substituted by the addressed person's written statement including the facts that would otherwise be the subject of the security interview. The security interview may have only been limited as to its subject. The interviewee, however, cannot generally be prevented from expressing his opinion regarding the facts ascertained.

Summary:

In his complaint, the applicant claimed that the resolution of the National Security Authority (the "NBU") violated his basic rights. The NBU director informed the applicant that he did not comply with the conditions for issuing the certificate pursuant to the Official Secrets Act. According to the applicant, the resolution was not justified and no interview was made with him prior to its issuance.

The constitutional complaint was considered justified. The Constitutional Court referred to its finding dated 12 July 2001, file ref. Pl. ÚS 11/2000 (published under no. 322/2001 Coll.), *Bulletin* 2001/2 [CZE-2001-2-012], in which the Plenary Court cancelled parts of some provisions in the Official Secrets Act. The resolution not to issue the certificate enabling dealing with secret information represents a considerable intervention in the rules of duty or employment rules, and thereby also interferes with the basic right of a free choice of occupation according to the Charter of Fundamental Rights and Freedoms. This rather specific area comes under the guarantee of the right to a fair trial.

As regards the area of protection of secret information, the Constitutional Court admitted that it was not always possible to ensure all regular procedural rights of persons handling such information, and stated that it was necessary to prepare a new, special and differentiated procedural adjustment of such cases. Nevertheless, it ascertained that the current

legal status is unconstitutional. The Constitutional Court further stated that, when preparing new legal adjustment, it should be considered that exceptional cases are possible when the exclusion of judicial review may be constitutionally acceptable, as such specific cases may involve some operatives of specific categories of the armed forces or certain members of intelligence service.

The Constitutional Court therefore concluded that the Parliament of the Czech Republic should deal with the law in question in its complexity and, for this purpose, it adjourned the enforceability of the cancellation finding as of 30 June 2002.

The Constitutional Court took into consideration general conclusions contained in the above-mentioned plenary finding. The present case did not come under the exceptions as the applicant acted in the capacity of the district Procurator Fiscal. This is exactly the type of legal relationship which is affected by the quoted plenary finding (i.e. rules of duty or employment) and in relation to which it considered the application of this finding as unconstitutional. The conclusions of the plenary finding quoted must therefore be applied to the present case as well. In the case which had been heard, the applicant's rights were violated. The Constitutional Court also had reached the same conclusion in other similar cases.

An error was also made by the fact that the NBU proceeded to issuing the resolution without conducting a security interview with the applicant. The NBU responded to this objection by stating that the interview could not have been made considering the provisions of the law according to which the subject of the security interview must not include facts that could endanger national security. The security interview must neither affect the rights of third persons nor endanger the source of the information. The Constitutional Court noted that these provisions, however, cannot disable the performance of the security interview within a security check. The security interview is performed if facts are ascertained that could prevent the issuance of the certificate. In this interview the person concerned has an opportunity to express his or her opinion regarding the facts ascertained. Only in exceptional and justified cases can the interview be substituted by the addressed person's written statement including the facts that would otherwise be a subject of the security interview. The security interview is always performed except when it is substituted by the written statement indicated. This, however, was not carried out in the current case. The security interview may only be limited as to the subject of the interview. The addressed person, however, cannot be generally

prevented from expressing his or her opinion regarding the facts ascertained.

The Constitutional Court further deemed it necessary to express its opinion regarding the situation which should occur after NBU resolutions challenged by the constitutional complaint have been cancelled. The Constitutional Court adjourned the enforceability of its finding until 30 June 2002. This meant that the marked unconstitutional provisions of the law should cease being part of the legal order of the Czech Republic on that day, and until then it shall be necessary to follow them in other cases. Should, however, the NBU in this situation again have to make a decision on issuing a certificate enabling secret information to be passed the applicant, and should it have to follow the stated unconstitutional provisions of the law quoted, a repeated violation of basic rights and freedoms would follow as a final consequence.

The Constitutional Court therefore ascertained that the constitutionally correct solution to this specific situation is a procedure whereby the NBU would issue a possible resolution regarding the issuance or non-issuance of the certificate enabling secret information to be disseminated only after 30 June 2002.

The Constitutional Court therefore cancelled the challenged resolution.

Supplementary information:

- See also Pl. ÚS 11/2000 – published in *Collection of law 322/2001*; *Bulletin 2001/2* [CZE-2001-2-012].

Languages:

Czech.



Identification: CZE-2002-1-004

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 06.03.2002 / **e)** Pl. US 11/01 / **f)** Czech law on railways / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

2.1.1.2 **Sources of Constitutional Law** – Categories – Written rules – Foreign rules.

2.1.1.3 **Sources of Constitutional Law** – Categories – Written rules – Community law.

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

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

3.16 **General Principles** – Proportionality.

3.18 **General Principles** – General interest.

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

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

Keywords of the alphabetical index:

Damage, obligation to avert / Property, owner, civil obligations / Railway, security zone.

Headnotes:

The regulation of the Czech railway law regarding the removal of a source of hazard at the costs of its owner or operator is too short, ambiguous and undifferentiated, and does not adequately deal with cases when the payment of the costs indicated cannot be justly required from the land owner.

Summary:

The Bench of the High Court in Prague appealed to the Constitutional Court to cancel a part of the provision in the Law on Railways. The general court concluded that the provision in question was unconstitutional.

The Chamber of Deputies and the Senate left the decision in this matter to the Constitutional Court. According to the opinion of the Ministry of Transport and Communications, the annulment of the challenged provision would favour private ownership.

The challenged provision contains the right and obligation of a railway administrative authority to ascertain possible hazards and order their removal; if this is not done, they can make a decision on such removal at the cost of the operator or the owner. The applicant claimed that no regulation imposes an obligation on a property owner to adopt necessary measures preventing a development which could potentially endanger the land of another; to submit to

intervention for protection from hazards, and to bear the costs of their removal.

The Constitutional Court noted the crystallisation of a social obligation of ownership pursuant to Section 11.3 of the Charter of Fundamental Rights and Freedoms, and Article 1.2 Protocol 1 ECHR, according to which the right to property protection does not prevent the State from passing legislation it finds necessary to regulate the use of property in conformity with the public interest. Such legal regulations are also applicable in the Czech Republic even though the limitations of using property in conformity with the public interest in the Civil Code and other Codes do not have the character of a list of individually specified obligations, but obligations which are generally formulated, but reasonably construable.

The Constitutional Court considered that the protective zone of the railways has a specific mode stipulated by public law in which the rights of owners of adjacent properties in the public interest are incomparably more restricted than those affected by rights imposed by forestry law. In the railway protective zone, constructions may be established and listed activities operated, only upon the approval of the railway administrative authority and under the conditions defined by it, while the railway operator and carriers may enter land of another to remove other obstacles restricting the operation of railway transport.

General provisions of the Civil Code also have their importance (the owner shall refrain from anything seriously endangering the performance of the rights of another; prevention of damage; obligation to avert damage). The law on roads limits the liability for endangering road transport and limits the removal of the source of endangerment at the cost of the owner or operator to the cases when this hazard arises from the acts of landowners in the neighbourhood of the actual roads.

Other laws (in the fields of construction, forestry, energy, mining, water, the environment and fire protection) also limit to a certain extent the execution of property rights. It is natural that a democratic state in the post-communist phase of development pays increased attention to the protection of ownership freedom which was suppressed by the former regime. This, however, does not mean that any restriction of the execution of a property right is a product or relic of the communist regime.

The regulation of the current law on railways is, to a certain extent comparable to the regulations of other European countries. Both the legislator in its

explanatory report concerning the law and the Ministry in its explanations refer to the directive of the Railway Development Council of the European Communities dated 29 July 1991 amended according to the directive of the European Parliament and the Council no.2001/12/EC which also include the principles of ensuring the safe operation of the railways. According to the German regulation, the railway operator and the carrier are entitled to enter the property of another in the protective zone for the purpose of removing sources of danger to public transport. Similar railway laws are applicable in Baden-Württemberg and in Switzerland.

The current regulation of the challenged provision affects in a comparable manner those cases during which the railway operations were endangered by the acts or negligence of the owner, in other words by violating obligations of an owner according to the Civil Code and the law on railways. In such a case the railway administrative authority may order the owner to remove the source of the danger and if this is not obeyed, make a decision to remove the source at his own cost. At the same time the law cannot define all individual steps. Failure to comply with this obligation may not only entail wrongful acting, but also negligence. The right of the railway administrative authority to impose necessary measures on the owner or to make a decision on removing the source of the danger at his or her own cost only represents a necessary operative guarantee of a priority protection of the railways' safe operation, and consequently of public interest.

For the benefit of the protection of ownership, the "favouring" of the public interest is compensated by certain rights of the owners which protect them against arbitrary behaviour of administrative authorities by the fact that the compensation for costs and damages arising from necessary measures to remove the source of railway endangerment is dealt with in conformity with the principle of adequacy.

The following provision of the Civil Code has fundamental importance: "Any person averting impending damage is entitled to compensation for costs and indemnification paid by way of damages incurred during this act, and also against the person in whose interest he acted, the maximum amount of which corresponds to the damage averted".

It is, however, possible to imagine a number of other situations in which a specific obligation of prevention of the owner of the property in the railway protective zone would exceed his actual capacity and his subsequent liability for the source of danger would be in contradiction with the principle of adequacy. These may not only involve "*vis maior*" situations. The law

on railways excludes such an approach as it generally imposes on the administrative authority the obligation to issue a resolution on the removal of the source of danger at the cost of its owner or operator.

The railway law of Baden-Württemberg on the one hand enables the railway authority to make a decision on removing overgrowth or other objects which are not fixed to the land at the cost of the owner. On the other hand, however, it sets forth the law on adequate indemnification of such owners or users on whom restrictions are imposed that represent an inadequate burden, which is unequal and unacceptable towards others. The law imposes an obligation to submit to intervention for the protection of railways against natural influences such as snowdrifts, rock falls, landslides etc., while in such cases the landowner affected is entitled to adequate financial reimbursement for the damage incurred. The landowner may also avoid liability for the source of danger if the specific procedure in the railway protective zone does not allow him to take due care of his property.

The Constitutional Court cancelled the challenged provision as of 31 December 2002.

Languages:

Czech.



Estonia

Supreme Court

Important decisions

Identification: EST-2002-1-001

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 06.03.2002 / **e)** 3-4-1-1-02 / **f)** / **g)** *Riigi Teataja III* (Official Gazette), 2002, 8, Article 74 / **h)** CODICES (English, Estonian).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
 4.10.7 **Institutions** – Public finances – Taxation.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Tax, value added / Tax, fraud / Payment, in cash.

Headnotes:

The prohibition on deducting input value added tax when the taxable value of goods or services is high and the payment for them is carried out in cash disproportionately restricts freedom of enterprise.

Summary:

A private limited company, SIVI, filed a complaint with an administrative court requesting the repeal of a precept of the Tax Board. The applicant claimed that the second sentence of Section 18.8 of the Value Added Tax Act (VATA) was unconstitutional. This provision does not permit the deduction of VAT if the taxable value of goods or services per transaction exceeded 50,000 kroons and the payment for them was carried out in cash. The Tallinn Administrative Court rejected the complaint, but the Tallinn Circuit Court satisfied the appeal. The Circuit Court declared the contested provision of VATA unconstitutional, and initiated constitutional review proceedings with the Supreme Court.

The Constitutional Review Chamber of the Supreme Court held that the freedom of enterprise (Article 31 of the Constitution) had been restricted by the contested regulation of VATA.

The Supreme Court considered that the restriction of the freedom of enterprise was disproportionate. The legislative intent was to prevent and detect tax fraud. The regulation, however, was unreasonable and manifestly unsuitable for that purpose. Section 18.8 of VATA does not prevent commission of a tax fraud. A purchaser who pays an invoice has usually no possibility – and no obligation – of checking whether the seller will actually pay the value added tax as shown in the invoice. Also, the seller might avoid paying the value added tax even in the case that the purchaser pays by bank transfer. If the purchaser acts in good faith, there is no ground to restrict the purchaser's right to deduct the input VAT.

The Supreme Court could not declare the disputed provision invalid, since by the time of its decision, the provision had already been changed by Parliament. The court declared the disputed provision of VATA unconstitutional.

Languages:

Estonian, English (translation by the Court).



Identification: EST-2002-1-002

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 03.04.2002 / **e)** 3-4-1-2-02 / **f)** / **g)** *Riigi Teataja III* (Official Gazette), 2002, 11, Article 108 / **h)** CODICES (English, Estonian).

Keywords of the systematic thesaurus:

3.20 **General Principles** – Reasonableness.
 4.7.8.2 **Institutions** – Judicial bodies – Ordinary courts – Criminal courts.
 5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Offence, criminal, repeated / Punishment, criminal offences, multiple / Criminal proceedings.

Headnotes:

All offenders who have committed several crimes before being convicted must be treated in an equal manner when imposing the final sentence for the aggregate of offences, not depending on whether the offences are heard by the same court in one set of proceedings, or by different courts at different times.

Summary:

The circuit court appealed to the Constitutional Review Chamber for the constitutional review of principles of imposition of criminal punishments for multiple criminal offences. The Criminal Code includes different provisions concerning instances when repeated criminal offences were committed prior to the conviction (Section 40 of the Criminal Code) or following it (Section 41 of the Criminal Code). Section 40 of the Criminal Code contains rules for two different situations: Section 40.1 deals with the instance when the court convicted a person for several crimes at the same time. In this case, a punishment has to be imposed for each of the crimes, but when imposing the final punishment for the aggregate of offences the court may consider the most onerous punishment as the final punishment, or add up the punishments in full or partly. Section 40.3 deals with the situation when the court establishes that the person convicted is also guilty of another offence committed before conviction for the first offence. In this case, only the part of the first sentence which had not been served yet can be taken into account.

The Constitutional Review Chamber of the Supreme Court considered that Section 40.3 of the Criminal Code treats the offenders differently without any reasonable justification. It may happen that the final sentence imposed on an offender depends not only on his or her behaviour, but also on the activities or omissions of the state institutions. This is also what had happened in the criminal case where the constitutional question was brought up. The three different criminal cases of the convicted person were not joined into one set of proceedings and the criminal offences committed by him were not heard jointly, although the courts were aware of that possibility and necessity. The Supreme Court declared Section 40.3 of the Criminal Code partly invalid (as far as this provision allowed the court only to take into consideration the unserved part of the sentence imposed by the first judgment, upon imposing the final punishment), as it was found to violate Article 12.1 of the Constitution.

Languages:

Estonian, English (translation by the Court).

*Identification:* EST-2002-1-003

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 10.04.2002 / **e)** 3-4-1-4-02 / **f)** / **g)** *Riigi Teataja III* (Official Gazette), 2002, 12, Article 120 / **h)** CODICES (English, Estonian).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
 4.6.2 **Institutions** – Executive bodies – Powers.
 4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
 4.8.7 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects.
 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Street, trading, charge.

Headnotes:

The government or an elder of a city district do not have the power to pass legislation of general application.

The imposition of a charge for a street stall by a local council without authorisation by law constitutes a violation of the freedom of enterprise.

Summary:

AS Liaania submitted a complaint with the Tallinn Administrative Court claiming that the orders of the elder of the Centre District of Tallinn unlawfully imposed upon it financial obligations. By these orders trading licences were issued to AS Liaania and charges were established for sales premises. The Administrative Court satisfied the complaint. The court also declared unconstitutional the underlying legal acts and provisions – Section 4.6 of “Rules for trading in markets and streets” approved by a regulation of the Tallinn City Council, an order of the Government of the Centre District of Tallinn (“Rates of charge for street vending premises in the Centre District”), and an order of the elder of the Centre District of Tallinn (“Rates of charge for street vending premises in the Centre District”). The court found that

these acts were in conflict with Articles 3.1, 31, 113 and 154.1 of the Constitution. Constitutional review proceedings were initiated with the Supreme Court.

The Constitutional Review Chamber of the Supreme Court found that although the disputed order of the Government of the Centre District of Tallinn and the order of the elder of the Centre District of Tallinn had been issued in the form of orders (with specific application, i.e. individual acts), these acts actually constituted legislation of general application (i.e. they were normative acts). These acts established the rates of charge for street vending premises in an abstract way, depending on the type of premises. The acts were held to be in conflict with the Local Government Organisation Act, since according to the latter the government or an elder of a city district do not have the power to pass legislation of general application. Therefore, these acts were in conflict with the requirement of legality derived from Articles 3.1 and 154.1 of the Constitution. One of the acts was invalidated by the Supreme Court, and the other was declared unconstitutional, since it had been invalidated by the local authorities before the case was decided by the Supreme Court.

According to Section 4.6 of the "Rules for trading in markets and streets" approved by a regulation of the Tallinn City Council, individuals who sell merchandise on the street had an obligation to pay for a stall pursuant to the prescribed procedure. The Supreme Court found that collecting such a charge constituted an interference with the right of freedom of enterprise. Article 31 of the Constitution provides that the conditions and procedure for the exercise of the freedom of enterprise may be provided by law. The law does not have to describe in detail every restriction, but it must set the framework, within which the executive power shall specify pertinent provisions of law. There is no law empowering local councils to impose a charge for street stalls. Therefore, Section 4.6 of the "Rules for trading in markets and streets" was declared invalid by the Supreme Court.

Cross-references:

- Decision 3-4-1-1-99 of 17.03.1999, *Bulletin* 1999/1 [EST-1999-1-001].

Languages:

Estonian, English (translation by the Court).

Finland

Supreme Administrative Court

There was no relevant constitutional case-law during the reference period 1 January 2002 – 30 April 2002.



Finland

Supreme Court

Summaries of important decisions of the reference period 1 January 2002 – 30 April 2002 will be published in the next edition, *Bulletin* 2002/2.



France

Constitutional Council

Declaration of 24 April 2002

On 24 April 2002 the Constitutional Council declared the results of the first round of the presidential election, held on 21 April.

The second round took place on 5 May, and the results were declared on 8 May.

Both decisions will be discussed in the next issue of the *Bulletin on Constitutional Case-law*.

Important decisions

Identification: FRA-2002-1-001

a) France / **b)** Constitutional Council / **c)** / **d)** 12.01.2002 / **e)** 2001-455 DC / **f)** Social Modernisation Act / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 18.01.2002, 1053 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

- 1.3.1.1 **Constitutional Justice** – Jurisdiction – Scope of review – Extension.
- 2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
- 3.12 **General Principles** – Clarity and precision of legal provisions.
- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 4.5.2.4 **Institutions** – Legislative bodies – Powers – Negative incompetence.
- 4.5.6.4 **Institutions** – Legislative bodies – Law-making procedure – Right of amendment.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2.2.1 **Fundamental Rights** – Equality – Criteria of distinction – Gender.
- 5.2.3 **Fundamental Rights** – Equality – Affirmative action.
- 5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.
- 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Employment, preservation / Panel, membership, gender equality / Redundancy, definition.

Headnotes:

It is for Parliament to exercise in full the powers conferred on it under Article 34 of the Constitution.

A definition of economic redundancy which clearly leads to excessive interference with free enterprise, regard being had to the objective of preserving jobs, breaches the Constitution.

However, lengthening redundancy procedures as a result of measures aimed at improving employee information and giving greater rights to employees' representative bodies does not amount to excessive interference with free enterprise.

Balanced representation of the sexes on a panel validating occupational experience must not be achieved to the detriment of its members' skills and qualifications.

Summary:

The government's Social Modernisation Bill, which was brought before the National Assembly as early as May 2000, was extensively supplemented through amendments tabled by Members of Parliament, adding over 150 sections to the initial 70. Important provisions on a variety of subjects (economic redundancies, bullying and sexual harassment in the workplace, landlord-tenant relations, etc.) were thus introduced without going through the usual filters of consultation and review by the advisory divisions of the Council of State (*Conseil d'État*). This led to serious difficulties during discussion of amendments and resulted in referral of the legislation to the Constitutional Council by both members of the National Assembly and members of the Senate.

The Members of Parliament who referred the legislation to the Constitutional Council pointed out that many of the provisions failed to make the law clear and intelligible. In this connection, the Constitutional Council reiterated that it was incumbent on Parliament to ensure compliance with the constitutional principle of intelligibility of the law and to exercise in full its powers under Article 34 of the Constitution. At the same time, it pointed out that the administrative and the judicial authorities were empowered to interpret the law.

Among the many provisions examined, special mention must be made of those amending the definition of economic redundancy (Article L.321-1 of the Labour Code) in very restrictive terms. The Council held that free enterprise could be limited only for constitutional reasons or in the public interest. Such limitation must not be excessive, regard being had to the objective pursued. Here, the Constitutional Council had to reconcile free enterprise, deriving from Article 4 of the Declaration of the Rights of Man and the Citizen of 1789, and the right to work, recognised in the Preamble to the Constitution of 1946. It held that the proposed provisions defining cases of economic redundancy resulted in interference with free enterprise, which clearly was not counterbalanced by preservation of the right to work and could even, in some circumstances, jeopardise that right.

The Constitutional Council reviewed a number of provisions *ex officio*. These included two articles of the Education Code making it possible to obtain qualifications through validation of occupational experience. Apart from lecturers/researchers, the panel taking the decision should include competent persons, in particular in the relevant occupations, who assessed the experience in respect of which validation was sought. On the subject of the panel's membership, concerning which the legislation required "balanced representation of the sexes", the Constitutional Council issued the following interpretative reservation: Although a balance must be sought in the sexes' representation on the panel, it would be contrary to the principle established in Article 6 of the Declaration of the Rights of Man and the Citizen of 1789 ("All citizens ... are equally eligible for all dignities and all public positions and occupations, according to their abilities, and without distinction, save that of their virtues and talents") to give gender equality precedence over concerns relating to skills, abilities and qualifications.

Languages:

French.

*Identification:* FRA-2002-1-002

a) France / b) Constitutional Council / c) / d) 17.01.2002 / e) 2001-454 DC / f) Act on Corsica / g) *Journal officiel de la République française – Lois et*

Décrets (Official Gazette), 23.01.2002, 1526 / h) CODICES (French).

Keywords of the systematic thesaurus:

3.8.1 **General Principles** – Territorial principles – Indivisibility of the territory.

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

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

4.5.6.5 **Institutions** – Legislative bodies – Law-making procedure – Relations between houses.

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

4.8.2 **Institutions** – Federalism, regionalism and local self-government – Regions and provinces.

4.8.4.1 **Institutions** – Federalism, regionalism and local self-government – Basic principles – Autonomy.

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

5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Joint Committee / Institution, power, transfer / Legislation, experimentation.

Headnotes:

Under legislative procedure, where the Joint Committee (composed of representatives of the two chambers of Parliament) has been unable to adopt a jointly agreed wording for a clause submitted to it, it may be deemed to have failed to reach agreement on all the provisions remaining under discussion.

The provisions governing proposals by the Corsican Regional Assembly to amend or adapt either regulations or legislation affecting the powers and responsibilities, organisation and functioning of the region's territorial authorities or its economic, social or cultural development are merely procedural in nature and do not themselves transfer any power in legislative or regulatory matters to that body.

Parliament may permit local authorities to determine, through by-laws, how legislation is to be implemented, provided that this power is exercised within jurisdictional limits and in the manner laid down by law and that essential conditions of exercise of public freedoms and fundamental rights are not affected.

However, it is unconstitutional for Parliament to grant a local or regional authority the possibility – even limited in time and experimental in nature – of taking law-making measures.

Instruction in a regional language cannot be compulsory for either pupils or teachers.

Summary:

On 17 January 2002 the Constitutional Council gave a decision concerning the Act on Corsica, following two referrals by more than sixty members of the National Assembly and more than sixty members of the Senate.

The Constitutional Council has a large body of case-law on the issue of free governance of local and regional authorities, in particular Corsica, which has special status. The Council has recognised that Corsica can be granted special status, which must be consistent both with the principle of free governance of local and regional authorities and with the particular powers of the state, whether those devolving on the government's representative (the Prefect), governmental powers exercised by making regulations or the powers of Parliament. But Corsica is at the same time an integral part of the Republic. Its status must respect the indivisibility of the Republic and the principle of equality for all.

Following lengthy negotiations (the “Matignon process”) between the government and the various parties interested in a solution to the Corsican problem, the Act of 2002, which gave rise to the decision of 17 January, conferred greater autonomy on the island.

Although the Constitutional Council approved most of the provisions of the new legislation, it disallowed the possibility, even on an exceptional, trial basis, of “experimentation”, which would have enabled the Corsican Assembly to take law-making measures. It also specified that instruction in the Corsican language could not be made obligatory without breaching the principle of equality for all.

Lastly, it gave a ruling on a question of parliamentary procedure which had not previously been brought before it. It held that failure by the Joint Committee to agree on a clause of a piece of legislation could be deemed to extend to all provisions of the legislation in question.

Cross-references:

- See Decision no. 82-138 DC of 25.02.1982 on the Act concerning the Special Status of the Region of Corsica, *Reports*, p. 41;
- Decision no. 94-350 DC of 20.12.1994 on the Act concerning the Tax Status of Corsica, *Reports*, p. 134; and

- Decision no. 91-290 DC of 09.05.1991 on the Act concerning the Status of the Regional Authority of Corsica.

Languages:

French.



Identification: FRA-2002-1-003

a) France / **b)** Constitutional Council / **c)** / **d)** 07.02.2002 / **e)** 2002-458 DC / **f)** Institutional Act Endorsing the Tax on Built Properties in French Polynesia / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 12.02.2002, 2783 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.8 **General Principles** – Territorial principles.
 3.10 **General Principles** – Certainty of the law.
 3.18 **General Principles** – General interest.
 4.5.2 **Institutions** – Legislative bodies – Powers.
 4.8.7 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects.
 4.10.7 **Institutions** – Public finances – Taxation.
 5.3.36.4 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Taxation law.

Keywords of the alphabetical index:

Tax, land / Organic Act, scope / Endorsing act / Overseas territory.

Headnotes:

Provisions relating to the tax on built properties in French Polynesia are organic in nature, since that tax constitutes a revenue of the territory of French Polynesia and the Territorial Assembly has authority to assess it. Article 74 of the Constitution indeed provides that the statutes of overseas territories shall be laid down by organic law.

An Endorsing Act (the purpose of which is to legalise collection of tax revenues) must be justified by a sufficient public interest, be limited in scope, refrain

from endorsing provisions annulled by court decisions constituting *res iudicata* and create no exception from the principle that legislation imposing a more severe penalty cannot be applied retrospectively. The Act was partly disallowed on the basis of these criteria.

Summary:

On 15 January 2002 the Prime Minister, acting in accordance with Articles 46 and 61 of the Constitution, referred to the Constitutional Council the Institutional Act Endorsing the Tax on Built Properties in French Polynesia.

In 1992 the Territorial Assembly of Polynesia had asked the Polynesian cabinet to determine the “practical rules of application of the direct assessment method”. The decision was taken only in 1999 and was found to be unlawful one year later by the Papeete Administrative Court on the ground that the territory’s statute did not permit the Territorial Assembly to delegate authority for defining the basis of assessment of a territorial tax to the cabinet.

Other appeals were already pending in the Administrative Court, and a significant number of further appeals was likely. Hence the need for an Endorsing Act.

On reviewing this Act, the Constitutional Council confirmed:

- the organic nature of the challenged provisions,
- the conditions to be fulfilled by the Endorsing Act.

The Act was disallowed for the period 1992 to 1999 on the ground that there was no sufficient public interest.

Languages:

French.



Georgia

Constitutional Court

Important decisions

Identification: GEO-2002-1-001

a) Georgia / **b)** Constitutional Court / **c)** Second Board / **d)** 17.07.2001 / **e)** 2/104/1 / **f)** Givi Iashevili v. President of Georgia / **g)** *Adamiani da Konstitutsia* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

1.3 **Constitutional Justice** – Jurisdiction.

1.3.5.6 **Constitutional Justice** – Jurisdiction – The subject of review – Presidential decrees.

1.4.10.4 **Constitutional Justice** – Procedure – Interlocutory proceedings – Discontinuance of proceedings.

5.4.20 **Fundamental Rights** – Economic, social and cultural rights – Scientific freedom.

Keywords of the alphabetical index:

Degree, scientific, application, requirements / Publication, scientific journal / Decree, presidential, amendments.

Headnotes:

In accordance with Article 11 of the Law of Georgia On Constitutional Legal Proceedings, the Court considers only the issues which fall within its competence under the Law On the Constitutional Court of Georgia, and it cannot discuss issues which are within the competence of other bodies of state authorities. In particular, the Constitutional Court may not make any amendments to a normative act.

Summary:

Under the Temporary Regulations of the Council of Learned Experts and the Instruction “On the Rules for Awarding Scientific Degrees in Georgia” approved by Decree no. 524 of the President of Georgia, the applicant for a doctoral degree has to publish at least 10 works after acquiring a degree of “candidate”, three of which are to be published in international scientific journals. He should also submit a solicitation

to the chairman of the Dissertation Council from the organisation at which he works. The organisation where the thesis was made holds a preliminary consideration of the thesis for a degree. The organisation makes a conclusion and gives it to the applicant within a week. Thereafter the thesis is submitted to the Dissertation Council together with the conclusion of the preliminary consideration. The Council makes a final decision after the applicant has conducted his defence of the thesis.

The Claimant considered that the Temporary Regulations of the Council of Learned Experts and the Instruction “On the Rules for Awarding Scientific Degrees in Georgia” were not consistent with international scientific and technical requirements and prevented the development of the national scientific and technical programme. He demanded that the Court recognise as unconstitutional the Temporary Regulations of the Council of Learned Experts and the Instruction “On the Rules for Awarding Scientific Degrees in Georgia”.

During the consideration of the merits of the case, the claimant, Givi Iashevili, asserted that he had worked on a piece of scientific research for several years, but that it was not considered by the Council of the Learned Experts, and this fact violated his constitutional rights as a citizen of Georgia granted by Articles 23, 34 and 35 of the Constitution. In particular, the claimant disputed Article 3.7 of the Instruction “On the Rules for Awarding Scientific Degrees in Georgia”, which envisages that the applicant for a doctoral degree has to publish at least 10 works after acquiring his “candidate” degree, three of which are to be published in international scientific journals. The claimant considered that this provision contradicted Article 23 of the Constitution. The claimant also considered as unconstitutional Attachment 7.3 to the disputed act, which envisages that the applicant for a degree should submit a solicitation to the chairman of the Dissertation Council from the organisation at which he works. The claimant considered that the above-mentioned clause contradicted Article 23.1, 23.2 and 23.3 of the Constitution. During the consideration of the merits of the case the claimant asserted that the above-mentioned norms contradicted Articles 23, 24 and 35 of the Constitution; however, he could not substantiate allegations of inconsistency in relation to Chapter II of the Constitution, or that his rights as those of an applicant were violated. He also asserted that the disputed acts mentioned by him required legal perfection and certain amendments. Furthermore, it was alleged at the Court hearing the claimant's right had been violated due to non-fulfilment of certain rules by the officials, and therefore, he required certain amendments to be made to them.

The defendant, the representative of the President of Georgia, considered that the disputed normative act did not contradict the Constitution of Georgia.

The Constitutional Court considered that legal proceedings on Article 3 of the Instruction "On the Rules for Awarding Scientific Degrees in Georgia" and Attachment 7 to the disputed act had to be terminated as under the Decree of the President of Georgia of 12 July 2001 some amendments to this articles had been already made by Decree no. 524 of the President of Georgia. Under the stated Decree Attachment 7.3 had been completely withdrawn, and material amendments had been made to Article 3. In accordance with Article 13.2 of the Law of Georgia On Constitutional Legal Proceedings, "revocation or invalidation of a disputed legal act by the moment of consideration of the case causes termination of the case in the Constitutional Court".

The claim was rejected in relation to Articles 3, 4 and 5 of the Temporary Regulations of the Council of Learned Experts and the Instruction "On the Rules for Awarding Scientific Degrees in Georgia"; the legal proceedings on the Instruction "On the Rules for Awarding Scientific Degrees in Georgia" were terminated due to the fact that certain amendments had been made to this act.

Supplementary information:

The "candidate's degree" is a pre-doctoral degree used in the former Soviet Union countries which is higher than a master's degree.

Languages:

Georgian, English (translation by the Court).



Identification: GEO-2002-1-002

a) Georgia / **b)** Constitutional Court / **c)** Plenum / **d)** 21.05.2002 / **e)** 8/177/2 / **f)** Constitutional Submission of a district court of Georgia / **g)** *Adamiani da Konstitutsia* (Official Gazette) / **h)**

Keywords of the systematic thesaurus:

- 1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
- 2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
- 4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
- 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
- 5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.

Keywords of the alphabetical index:

International organisation, immunity, from jurisdiction / International organisation, staff, fundamental rights, protection / International Committee of the Red Cross.

Headnotes:

Article 3 of the "Headquarters Agreement between the Republic of Georgia and the International Committee of the Red Cross" (ICRC) providing for the immunity of the organisation, its property and its assets from court and administrative activities, does not imply absolute immunity.

Indeed, such immunity does not apply to labour disputes between the ICRC and its local employees.

Summary:

The Didube-Chughureti District Court considered Shota Bitadze's claim relating to his return to work in the International Committee of the Red Cross. The applicant claimed that the respondent did not attend the court hearings on the basis of Article 3 of the "Headquarters Agreement between the Republic of Georgia and the International Committee of the Red Cross" approved by the resolution of the Parliament of Georgia of 16 October 1996, according to which the International Committee of the Red Cross enjoys immunity from any form of court and administrative activities.

The applicant considered that the above mentioned norm violated not only his own constitutional right to defend his labour rights in court but also the rights of other Georgian citizens, employed by the Red Cross. According to the submission, the disputed norm contradicted Article 42 of the Constitution stating that "Everyone has the right to apply to a court for the protection of his or her rights and freedoms" and Article 82 of the Constitution stating that "Acts of a court shall be binding for all state bodies and persons on the whole territory of Georgia".

Considering the above, the applicant sought a consideration of the constitutionality of Article 3 of the “Headquarters Agreement between the Republic of Georgia and the International Committee of the Red Cross” approved by the resolution of the Parliament of Georgia of 16 October 1996, with Articles 42.1 and 82 of the Constitution.

The expert witnesses invited to the hearing underlined that the immunity of the ICRC did not apply to employment disputes between the ICRC and its local employees. They considered that a Georgian Court has the right to consider these disputes, and that the ICRC does not have the right to invoke its right to immunity in this case. Thus, the experts concluded that such disputes were subject to Georgian jurisdiction.

The Constitutional Court therefore concluded that Article 3 of the “Headquarters Agreement between the Republic of Georgia and the International Committee of the Red Cross” does not imply an absolute immunity of the ICRC. As the immunity does not apply to employment disputes between ICRC and its local employees:

1. a local employee of the ICRC has the right to apply to a local court for protection of his or her violated employment rights;
2. Georgian courts are authorised to consider the above mentioned disputes;
3. the ICRC does not have the right to apply its immunity and to neglect the court hearings.

Thus, the Court decided that a disputed norm conformed to the Constitution as it did not restrict Mr Bitadze's constitutional right and the constitutional right of other citizens employed by the ICRC, to appeal to court. The norm furthermore does not exclude the imperative nature of the relevant acts for the ICRC.

Languages:

Georgian, English (translation by the Court).



Hungary Constitutional Court

Statistical data

1 January 2002 – 31 May 2002

- Decisions by the plenary Court published in the Official Gazette: 11
- Decisions by chambers published in the Official Gazette: 10
- Number of other decisions by the plenary Court: 35
- Number of other decisions by chambers: 6
- Number of other (procedural) orders: 27

Total number of decisions: 89

Important decisions

Identification: HUN-2002-1-001

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 20.03.2002 / **e)** 14/2002 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2002/36 / **h)**.

Keywords of the systematic thesaurus:

- 4.7.2 **Institutions** – Judicial bodies – Procedure.
 4.7.8.2 **Institutions** – Judicial bodies – Ordinary courts – Criminal courts.
 5.3.13.14 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Impartiality.
 5.3.13.19 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Equality of arms.
 5.3.13.26 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to be informed about the charges.
 5.3.13.27 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to have adequate time and facilities for the preparation of the case.

Keywords of the alphabetical index:

Court, prosecution, relations / Criminal procedure, guarantees / Indictment, widening.

Headnotes:

It is contrary to the right to a fair trial and the principle of separating clearly the functions of the court and the prosecution that the Code of Criminal Procedure orders the trial judge to inform the prosecutor when there is a possibility either of widening the scope of the indictment or of pressing charges against someone other than the accused based upon the facts contained by the indictment.

Summary:

A judge of a court of first instance who found that Article 171.2 of the Code of Criminal Procedure to be applied was unconstitutional stayed the proceedings and obtained a decision on the matter from the Constitutional Court. Under the first sentence of the challenged provision, during the trial the judge is obliged to draw the prosecutor's attention to the fact that widening the scope of indictment is possible. In the opinion of the initiating court, this rule infringes the right to an impartial court ensured by Article 57.1 of the Constitution.

The Code of Criminal Procedure prescribes that the functions of the prosecutor, the defence counsel and the court are separate from each other. The court decides on the criminal responsibility of the accused exclusively by reference to the facts contained in the indictment (Article 9). The Constitutional Court examined not only the first sentence of the contested provision, but also the second one according to which, during the trial the trial judge can draw the prosecutor's attention to the fact that based upon the facts contained in the indictment, it is possible to press charges against someone else.

In addition, the Constitutional Court reviewed Article 227 of the Code of Criminal Procedure, under which if there is a possibility of widening the scope of the indictment and the prosecutor is not present at the trial, the trial judge can postpone the trial in order to inform the prosecutor about it.

According to the Constitutional Court, after finishing the investigation it is only for the prosecutor to decide upon initiating criminal proceedings before the criminal court. The court proceeds based upon a lawful indictment and the court decides on the criminal responsibility of the accused exclusively by referring to the facts contained in the indictment. When informing the prosecutor about the possibility of widening the scope of the indictment, the court takes over the duty of the prosecutor. Consequently, the provision could be seen as questioning the impartiality of the judiciary.

It is also problematic that when the prosecutor is not present at the trial, the judge can postpone the trial to inform the prosecutor about the possibility of widening the scope of indictment. In this case the law did not even require the accused or his counsel to be notified about the steps made by the judge. It is an important guarantee for the defence to be aware of the nature and cause of the accusation against him, in order for him to prepare his defence to the new or at least widened charge.

Cross-references:

The Constitutional Court referred to its previous Decision 33/2001, in which it declared that the provision which regulates the cases involving the exclusion of judges in favour of the prosecution ensuring special rights for them, violates the right to a fair trial and the constitutional requirement of judicial impartiality (Decision 33/2001 of 11.07.2001, *Bulletin* 2001/2 [HUN-2001-2-007]).

Languages:

Hungarian.

*Identification:* HUN-2002-1-002

a) Hungary / b) Constitutional Court / c) / d) 29.03.2002 / e) 15/2002 / f) / g) *Magyar Közlöny* (Official Gazette), 2002/41 / h).

Keywords of the systematic thesaurus:

- 3.18 **General Principles** – General interest.
- 4.10.6 **Institutions** – Public finances – Auditing bodies.
- 5.3.13.7 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right of access to the file.
- 5.3.13.19 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Equality of arms.
- 5.3.31.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.

Keywords of the alphabetical index:

Bank secret, guarantees / File, confidential / Institution, financial, decision, judicial review.

Headnotes:

That provision of the Act on Financial Institutions which precludes a party to a case (generally the claimant) and his solicitor from obtaining access to the case files if those contain bank secrets violates the principle of equality of arms and through this the right to a fair trial.

Summary:

A judge of Budapest City Court initiated proceedings before the Constitutional Court in a pending case on the basis that the judge considered one of the provisions of the Act CXII of 1996 on Financial Institutions to be unconstitutional. The petition asserted the challenged provision of the Act was contrary to Article 57.1 of the Constitution, the right to a fair trial, because in judicial review cases when the court examines the decision by the Supervising Authority of Financial Institutions, the court may exclusively disclose the documents comprising bank secrets, submitted by the Supervisory Authority and required for supporting the decision. The court shall handle these files as confidential files, and it is not allowed to distribute any copies thereof.

According to the petitioner, this provision precludes one of the parties from obtaining access to the case files submitted by the defendant if it contains bank secrets. Therefore, the defendant does not have the opportunity to make copies of the files and to have detailed information of the case.

As the Constitutional Court held in its previous decision, everyone charged with a criminal offence has the minimum right to have facilities for the preparation of his defence. This includes the right of access to the case file, and also the right to possess the file (*Bulletin* 1998/1 [HUN-1998-1-003]).

In the instant case, the Court found that the parties involved in a trial, be it criminal or civil, have the right to a fair trial, and this right requires even in civil and administrative cases compliance with the principle of equality of arms. The Act on Financial Institutions, by restricting the parties' right of access to the case files and possessing of those files, violates an important procedural safeguard: the equality of arms. There is a public interest in maintaining the confidentiality of the relationship between the bank and the customer and keeping the bank secrets, but it should be emphasised

that those who possess banks secrets are obliged to observe secrecy under penal sanctions. The Constitutional Court held this a sufficient guarantee of keeping bank secrets in civil proceedings.

Cross-references:

- Decision 6/1998 of 11.03.1998, *Bulletin* 1998/1 [HUN-1998-1-003].

Languages:

Hungarian.



Israel

High Court of Justice

Important decisions

Identification: ISR-2002-1-001

a) Israel / **b)** High Court of Justice / **c)** Panel / **d)** 28.04.2002 / **e)** H.C. 2117/02 / **f)** Physicians for Human Rights v. IDF Commander in the West Bank / **g)** 56 Isr.S.C. 26 (Official Digest) / **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.
 3.3 **General Principles** – Democracy.
 3.17 **General Principles** – Weighing of interests.
 4.6.2 **Institutions** – Executive bodies – Powers.
 4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
 5.1.4 **Fundamental Rights** – General questions – Emergency situations.

Keywords of the alphabetical index:

Military, intervention / Medical service, protection / Medical establishment, protection / Medical unit, protection / Ambulance, protection / Humanitarian law, international / Geneva Convention, Wounded and Sick in Armed Forces in the Field / Guerrilla / Camouflage / Value, Jewish.

Headnotes:

International law provides protection for medical establishments and units against attack by combat forces. However, the Medical Service has the right to full protection only when it is engaged exclusively in the search for, collection, transport and treatment of the wounded or sick. Humanitarian requirements must be balanced with the dangers expected by fighters camouflaged as medical teams.

Article 21 of the First Geneva Convention provides that the protection of medical establishments shall

cease if they are being used to commit, “outside their humanitarian duties, acts harmful to the enemy”, on the condition that “a due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded”.

Commitment to humanitarian rules is appropriate not only according to international law, but in light of Israel’s values as a Jewish and democratic state.

Summary:

The case involved a petition brought by the Physicians for Human Rights. The group argued that the I.D.F. soldiers fired on Red Crescent ambulances and wounded medical teams during combat operations in the Palestinian Authority. The Court was requested to order the State to explain the shooting and order that it be stopped.

The Court asked the State to inquire about these claims. The State responded only in part because there was little time available and combat made inquiries difficult. It committed to continue its inquiry. While the State agreed that shots had been fired at a Palestinian ambulance, it claimed that this action was triggered by the behaviour of the Palestinians, who in the past had used ambulances to transfer explosives. However, the State re-emphasised the I.D.F.’s obligation to act in accordance with the international laws regarding morality and utility. The State claimed that combat forces had been and were being instructed to act within those laws.

The focus of the case involved the right under international law for the protection of those involved in medical activities. The Court looked to Article 19 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, 12 August 1949 (hereinafter, “The First Geneva Convention”). It forbids the attack on fixed establishments and mobile medical units of the Medical Service. This includes hospitals, medical warehouses, evacuation points for the wounded and sick, ambulances, etc.

The Court contrasted this with Articles 24 and 26 (which expands the protection to the Red Cross and other similar societies) of the First Geneva Convention, which apply the right of the Medical Services to protection only when it is engaged exclusively in the search for, collection, transport and treatment of the wounded or sick, and the like. The Court further contrasts this to Article 21 of the First Geneva Convention which provides that these protections end if they are being used to commit, “outside their humanitarian duties, acts harmful to the enemy”, on condition that “a due warning has been given,

naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded”.

The Court ruled that Israeli forces must follow the international humanitarian rules and the values of a democratic and Jewish state regarding the treatment of the wounded, ill, and deceased. It instructed the I.D.F. to provide concrete instructions to its forces to prevent, even in severe situations, activities which are against the rules of humanitarian aid. This includes the requirement to warn medical teams in a reasonable and fair time. But the Court also ruled that according to international law, these humanitarian requirements must be balanced with the dangers expected by the Palestinian fighters camouflaged as medical teams. The Supreme Court included in this balance, the extent to which the danger is immediate and severe.

Cross-references:

- H.C. 2936/02;
- H.C. 2941/02;
- H.C. 2936/02.

Languages:

Hebrew, English (translation by the Court).



Identification: ISR-2002-1-002

a) Israel / **b)** High Court of Justice / **c)** Panel / **d)** 02.05.2002 / **e)** H.C. 3451/02 / **f)** Almadani v. Minister of Defence / **g)** 56 Is.S.C. 30 (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

1.1.4.3 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Executive bodies.

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.

1.3.5.14 **Constitutional Justice** – Jurisdiction – The subject of review – Government acts.

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

2.1.1.4.1 **Sources of Constitutional Law** – Categories – Written rules – International instruments – United Nations Charter of 1945.

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

3.3 **General Principles** – Democracy.

3.7 **General Principles** – Relations between the State and bodies of a religious or ideological nature.

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

3.16 **General Principles** – Proportionality.

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

5.1.4 **Fundamental Rights** – General questions – Emergency situations.

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

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

Keywords of the alphabetical index:

Terrorism / Self-defence / Military, intervention / Hostage / Civilian, differentiation from combatants / Holy place, protection / Church, protection / Value, Jewish / International humanitarian law / Geneva Convention, relative to the Protection of Civilian Persons in Time of War / Victim, International Armed Conflicts, protection / Victim, Non-International Armed Conflicts, protection / Red Cross, access / Drug / Medical treatment / Negotiation, under way / Burial, decent, right / War, occupation.

Headnotes:

Combat activities do not take place in a normative void. International law applying to combat activity must be upheld during such activity.

The upholding of international law during combat activities expresses the difference between a democracy fighting for its life, and the fighting of terrorists rising up against it. The State fights in the name of the law, while upholding it; the terrorists fight against the law, while breaking it.

The upholding of international law during combat activities also expresses Israel's values as a Jewish and democratic state.

Summary:

The Israeli Cabinet decided to carry out a military operation against the Palestinian terror infrastructure, to prevent recurrence of terrorist attacks which plagued Israel. As the Israel Defence Forces (I.D.F.) entered Bethlehem, Palestinians on Israel's "most wanted" terrorist list overtook the Church of the Nativity, while shooting, and were joined by unarmed civilians. The I.D.F. surrounded the church compound, and called to those inside, informing them that those not "wanted" were free to leave unharmed, and

that those “wanted” could choose either to be tried in Israel or to quit Palestinian Authority controlled areas.

By the time of the hearing, many in the compound had left. Negotiations for a solution were already being held between the Palestinian side and Israel, and a previous petition regarding the events in the compound had been rejected for that reason.

In the present petition, filed by the Governor of Bethlehem, who was present inside the compound, and two Israeli members of Knesset (parliament), against the Israeli Minister of Defence and the Chief of the General Staff and the Commander of the Central Command of the I.D.F., the Petitioners requested that the Red Cross be allowed to enter the compound, transfer food and medicine, collect bodies, and provide medical care. Of these issues, agreement had already been reached, by the time of the hearing, on all issues except water and food.

Respondents’ counsel relayed to the Court that there was a well in the compound; Palestinians who left the compound had relayed that there were bags of rice and vegetables inside; but it was clear that there was a shortage of food.

The Petitioners argued that depriving the Palestinians in the compound of food is a severe breach of international law; the Respondents claimed that the subject of the petition is not institutionally justiciable, that there is no basis for judicial intervention while negotiations are taking place, and, on the main issue, that they are upholding the rules of international law.

Regarding the civilians: the Respondents had been informing them that they may leave the compound unharmed, but the Petitioners claimed that the armed Palestinians were preventing them from doing so, and thus, the only way to ensure the rights of those civilians was to bring in enough food for all present in the compound. The State replied that there was already enough basic food in the compound for all present, and that it was not possible to bring in extra food and ensure that it not be eaten by the armed Palestinians.

The Court ruled:

1. Israel is acting according to its right of self-defence (Article 51 of the United Nations Charter), in response to a raging wave of terrorism. However, the combat activity is not taking place in a normative void, rather according to international law, which provides rules for combat activity. The maxim “when the cannons roar, the muses are silent” is not correct; the strength of society to withstand its enemies is based on its recognition

that it is fighting for values worthy of defence, and the rule of law is one of those values.

2. That approach expresses the difference between a democratic state fighting for its life, and the fighting of terrorists rising up against it. The State fights in the name of the law, upholding the law. The terrorists fight against the law, breaking the law. In addition, Israel is a Jewish and democratic state, and national goals and human rights are harmonious, not conflicting.
3. Regarding the armed Palestinians, the Respondents are acting in accordance with international law, and proportionally, not entering the compound, allowing those who leave without their weapons to do so without being hurt, only arrested (Articles 17 and 23 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949).
4. Regarding the civilians: Respondents agreed, during the hearing, that the civilians were free to leave the compound, receive extra food, and return to the compound. Considering the presence of water and basic food inside the compound, this fulfils international law.
5. It is difficult to describe the gravity of the overtaking of a holy place by armed Palestinians, defiling its sanctity and holding civilians hostage (Geneva Protocol I, Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977; Geneva Protocol II, Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts).
6. The solution to the situation in the compound must be found through negotiations. The responsibility for this rests with the executive branch. The Court will take no stand regarding the way the combat activity is being conducted.

Cross-references:

- H.C. 3436/02 *La Custodia Internazionale di Terra Santa v. Government of Israel* (unpublished);
- H.C. 168/91 *Marcus v. The Minister of Defense* 45 P.D. (1) 467, 470-471;
- H.C. 3114/02 *Barakeh, M.K. v. The Minister of Defense* (not yet published);
- H.C. 320/80 *Kawasma v. The Minister of Defense* 35 P.D. (3) 113, 132.

Languages:

Hebrew, English (translation by the Court).



Japan Supreme Court

There was no relevant constitutional case-law during the reference period 1 January 2002 – 30 April 2002.



Kazakhstan

Constitutional Council

On the results of the work of the Constitutional Council, Republic of Kazakhstan, in 2001

In 2001 the Constitutional Council examined 19 applications: two concerned the constitutionality of laws adopted by Parliament, ten related to the official interpretation of constitutional norms, and seven were based on referrals from the courts.

Two laws that had been adopted by the Republic's Parliament were examined for compatibility with the Constitution. In particular, the section of the Law "On introducing amendments and additions to certain legislative acts of the Republic of Kazakhstan" that refers to the legal regime for private ownership of land was examined. The Law was found to be compatible with the Constitution.

The Law "On introducing amendments and additions to the Law 'On the Parliament of the Republic of Kazakhstan and the status of its deputies'" was also examined. Having examined the submission, the Council held that several points in the Law were incompatible with the Republic's Constitution. Thus, there was a violation of the provision in Article 61.6 of the Constitution, which states that draft laws envisaging a reduction in state revenues or an increase in state expenditure may be submitted only where there has been a positive opinion from the Government. However, the Government had indicated no such opinion. In addition, the contested Law proposed certain extensions of Parliament's powers, something that is possible only via amendments and additions to the Constitution.

The Constitutional Council ruled on the official interpretation of separate provisions in the Constitution, regulating the powers of various branches of state power in the Republic, the basis for discontinuing the powers of members of parliament, the execution and ratification of international treaties, and other questions.

Members of Parliament lodged an application with the Council regarding the official interpretation of the constitutional provisions on the basis for suspending and terminating the powers of a member of the Republic's Parliament. The Council adopted a ruling to the effect that the grounds for discontinuing a member of Parliament's powers could include other circumstances over and above those expressly set

out in the Constitution. These circumstances are derived from the constitutional provisions: the death of a member of parliament, the loss of Kazakh citizenship by a member of Parliament, the entry into legal force of a court decision recognising that a person who is a member of parliament has disappeared without trace, liquidation of a political party or discontinuation of membership of the party on whose list the member of parliament was elected. On the basis of this Council ruling, a member of the lower house of parliament who had entered parliament on a party list and subsequently left the party on his own volition was obliged to renounce his powers as member of parliament.

In addition, following an application lodged by a group of members of the Republic's parliament, the Council gave an interpretation of the Constitutional provisions governing the question of granting chambers of commerce and industry the right to certify official documents stating the origin of goods.

The Council ruled on the official interpretation of constitutional provisions regarding the ratification of international treaties. The Council held that the list of international treaties subject to ratification, and the ratification procedure, is established by the legislation of the Republic of Kazakhstan. The Parliament of the Republic of Kazakhstan decides autonomously on ratification and denunciation of international treaties by the Republic of Kazakhstan.

The Council also ruled on the official interpretation regarding the constitutional provisions stating that the Republic of Kazakhstan proclaims itself a social state, the highest values of which are the individual, his/her life, rights and freedoms, and regarding the procedure for introducing amendments and additions to draft laws that have been submitted.

In applications lodged by the Republic's courts in accordance with Article 78 of the Constitution, questions were raised regarding the unconstitutionality of several standard-setting texts and international agreements. The Constitutional Court held, in particular, that separate provisions in two international treaties on the "Baykonur" complex, concluded between Kazakhstan and Russia, were contradictory to the Constitution and violated the rights of citizens of Kazakhstan.



Latvia

Constitutional Court

Statistical data:

1 January 2002 – 30 April 2002

Number of judgments: 6

Number of selected cases: 4

Important decisions

Identification: LAT-2002-1-001

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 17.01.2002 / **e)** 2001-08-01 / **f)** On Conformity of Article 348 (the seventh part) of the Civil Proceedings Law with Article 92 of the Republic of Latvia *Satversme* (Constitution) / **g)** *Latvijas Vestnesis* (Official Gazette), 18.01.2002 / **h)** CODICES (Latvian, 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.

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

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

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

Keywords of the alphabetical index:

Bankruptcy, court decision, right to appeal / Debtor, insolvent, right of appeal.

Headnotes:

The constitutional guarantee to a fair trial must be interpreted in the context of Article 6 ECHR and its jurisprudence as a human right with regard to criminal charges, which cannot be extended to civil proceedings involving legal persons.

In this sense, Article 348 of the Law on Civil Proceedings, which provides that in cases of insolvency and bankruptcy a court decision in the first instance stating that the declaration of the insolvent debtor is final, with no further appeal procedure, is consistent with the right to a fair trial guaranteed by Article 92 of the Constitution.

Summary:

An applicant, the owner of an insolvent farm, challenged the conformity of Article 348 of the Law on Civil Proceedings with Article 92 of the Constitution. The applicant considered that her human right to protect her rights in a fair trial, as established by the Constitution, had been violated by Article 348 providing that a court decision in the first instance is final and allowing no appeal against it.

In order to evaluate the conformity of the challenged norm with the Constitution, the Court deemed it necessary to establish whether the notion of “fair trial” was intended to include the right of appeal against the court decision in a civil case.

When interpreting Article 92 of the Constitution in the context of binding international laws, agreements and practices, the Court established that Article 6 ECHR and ensuing judgments of the European Court of Human Rights do not extend the right to a fair trial to the right of appeal against court decisions. The right of appeal is established in Article 2 Protocol 7 ECHR with regard to criminal charges, and that only applies to physical persons. The European Court of Human Rights has also stated that Article 6 ECHR does not imply the institution of appeal courts; the states are free to decide on the institution of an appeal jurisdiction, and on determination of categories of cases to which such right of appeal will be extended.

In the present case, the Court held that in the procedure of insolvency, which by its nature is a civil procedure, the applicant participated in the capacity of a representative (owner) of the legal person (the farm). Therefore, no fundamental rights of the physical person could have been violated.

It was also established that existing procedural norms provide sufficient guarantees to verify the legality and validity of court decisions even without employing the appeal procedure.

Furthermore, in the particular category of cases involving insolvency and bankruptcy, the principle of immediate protection of the interests of creditors, debtors and third parties have been applied.

Based on the above, the Court declared the challenged legal norm to be in conformity with Article 92 of the Constitution.

Languages:

Latvian, English (translation by the Court).



Identification: LAT-2002-1-002

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 22.02.2002 / **e)** 2001-06-03 / **f)** On Compliance of Items 4, 5, 6, 7, 8 and 9 and the First Sentence of Item 9 of the *Saeima* Presidium 28 February 2000 Regulations "On Procedure of Compensating Expenses Occurred to the Deputies while Exercising their Authority" with Article 91 of the Republic of Latvia *Satversme* / **g)** *Latvijas Vestnesis* (Official Gazette), 26.02.2002 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

1.3.5.9 **Constitutional Justice** – Jurisdiction – The subject of review – Parliamentary rules.

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

3.13 **General Principles** – Legality.

4.5.4.1 **Institutions** – Legislative bodies – Organisation – Rules of procedure.

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

4.10.7.1 **Institutions** – Public finances – Taxation – Principles.

5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.

Keywords of the alphabetical index:

Parliament, member, salary, tax exemption / Parliament, member, allowance, types of costs and procedure / Tax, exemption.

Headnotes:

The internal executive norms of Parliament may be subject to constitutional review.

The remuneration of the members of parliament is to be instituted by law, thus ensuring a guarantee of

independence and transparency. The expenses incurred while acting in the capacity of the elected office may be compensated in accordance with the procedure for claiming compensation, established by a proper legal act, when supported by duly documented receipts. Such compensation may, when appropriate, be subjected to the appropriate taxation.

The internal regulations governing type, amount and procedure of benefits and compensations to the members of parliament, issued by the presidium are therefore unconstitutional as the presidium as the executive body of the parliament does not have the authority for issuing a normative act with generally binding character. They also violate Articles 1 and 91 of the Constitution insofar as they permit the benefits and allowances to be in part exempt from general taxation rules thus contradicting declared remuneration principles for members of parliament.

Summary:

The executive body of the parliament – the presidium – passed internal regulations governing the type, amount and procedure of benefits and compensations to the members of parliament. These regulations permitted the benefits and allowances of the members of the parliament to be in part exempt from general taxation rules.

Prior to deciding on the merits of the case, the Court had to establish its jurisdiction, and the validity of the grounds to submit the claim.

Regarding its jurisdiction, the Court overruled an objection that internal executive norms are not subject for constitutional review, referring to a previous case where the principle of separation of powers was clearly established. Moreover, it considered that by passing the regulations, the presidium had exceeded its authority and issued a normative act with a generally binding character. A generally binding character of the regulations was proved by their subject: an abstract range of persons, and by their scope of application: regulations of legal liabilities between public subjects and other natural and/or legal persons.

As to the validity of the claim, under Article 19 of the Constitution, any person considering that his or her rights have been violated may submit a constitutional claim. Therefore, the Court is not obliged to ascertain the fact or degree of a violation of rights prior to considering the case.

In the present case, the Court supported the opinion of the applicant that as a former MP and the person entitled to be re-elected to parliament, he was subject

to the challenged normative act, as was any other person entitled to stand for election to parliament.

Reviewing the merits of the normative provisions in question, the Court established that in a democratic state the remuneration of members of parliament shall be instituted by law, thus ensuring the guarantee of independence and transparency.

Furthermore, the Court was of the opinion that for the stated purposes, the expenses incurred while acting in the capacity of an elected office should be compensated. However, types of costs and procedures for claiming compensation are first to be established by a proper legal act; second, they are to be supported by duly documented receipts; and third, when appropriate, they are to be subjected to the appropriate taxation. A sufficient control mechanism is also to be instituted.

The Court emphasized that lack of transparency and financial control in the mechanism of remuneration and benefits for members of parliament leads to breaches of the rule of law and weakens general trust in parliament as the highest legislative power, thus undermining the very foundation of the democratic state.

The challenged act was found to not to conform, on grounds of legislative authority, with Article 14 of the Rules of Procedure of Parliament and with Article 91 of Constitution, and on grounds of scope of application, with Article 9.16 of the Law on the Resident Income Tax as well as with Articles 1 and 91 of the Constitution.

Cross-references:

- Cf. On Conformity of the State Stock Company - the Real Estate Agency Regulations "On the Rental Procedure for Free Apartments in Dwelling Houses under the Management of Estate Agencies" with Articles 2, 10 and 11 of the Law "On Housing Support Granted by the State and Local Government", Article 40 of the Law "On the Rent of Dwelling Space" and Item 4 of the Transitional Provisions of the Law "On the Privatisation of State and Local Government Apartments", Decision of 09.07.1999 (04-03/99), *Bulletin* 1999/2 [LAT-1999-2-003];
- Cf. On Conformity of Items 1 and 4 of the *Saeima* 29 April 1999 Resolution on Telecommunications Tariff Council with Articles 1 and 57 of the Constitution and Other Laws, Decision of 01.10.1999 (03-05/99), *Bulletin* 1999/3 [LAT-1999-3-004];

- Cf. On Compliance of Item 1 of the Transitional Provisions of the Law "On Social Insurance" with Articles 1 and 109 of the Constitution and Articles 9 and 11 (the first Part) of the 16 December 1966 International Pact on Economic, Social and Cultural Rights, Decision of 13.03.2001 (2000-08-0109), *Bulletin* 2001/1 [LAT-2001-1-001].

Languages:

Latvian, English (translation by the Court).



Identification: LAT-2002-1-003

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 25.02.2002 / **e)** 2001-11-0106 / **f)** On Compliance of requirements Incorporated into the First Part of Article 6 of the Law "On Employment" on the necessity of Having the permanent residence permit to Obtain the Status of the Unemployed with Article 91 and 109 of the Republic of Latvia *Satversme* (Constitution) / **g)** *Latvijas Vestnesis* (Official Gazette), 32, 27.02.2002 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

- 5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
- 5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.
- 5.4.13 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.
- 5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to unemployment benefits.

Keywords of the alphabetical index:

Spouse, foreigner, stateless person / Residence, permit, temporary / Residence, permit, welfare benefit.

Headnotes:

A requirement for foreign citizens or stateless persons to be holders of a permanent residence permit in order to apply for social security benefits in case of unemployment as established by the Law on Employment, is contrary to Articles 91 and 109 of the Constitution insofar as it makes no distinction

between different categories of persons holding temporary residence permits.

A spouse of a permanent resident of Latvia, who is entitled to request a residence permit and unconditional working permit for the same period, enters the labour market on general conditions, including full participation in the obligatory state social insurance scheme, and shall therefore enjoy the right to apply for social security in case of unemployment.

Summary:

The applicant introduced the constitutional claim challenging the requirement to hold a permanent residence permit in order to be registered as an unemployed person, and receive social security benefits established by Article 6 of the Law on Employment. The applicant claimed that Article 6 is contrary to Articles 91 and 109 of the Constitution as all foreigners or stateless persons, having legal residence and working permits in Latvia, and having been employed, are subjected to taxation and social insurance contributions and should therefore have the right to enjoy social security benefits in case of unemployment, without further discrimination as to the type of residence permit.

In accordance with the law, a foreign citizen or a stateless person, who is married to a Latvian citizen, to a stateless person or to a foreigner holding a permanent residence permit in Latvia and effectively residing in Latvia, is granted a temporary residence permit for the first five years of residence. The status of spouse also guarantees immediate and unconditional entitlement to the working permit for the same period. However, in case of unemployment such persons are not entitled to a right to apply for social security benefits on the grounds of not having a permanent residence permit.

Article 109 of the Constitution guarantees the right to social security in case of unemployment to everyone. Upon careful consideration of this article, the Court established that the scope of application of the article is limited to employees, having permanent residence in Latvia and having been subjects of the obligatory social insurance scheme.

Reviewing the compliance of the challenged norm in respect of non-citizens with Article 109 of the Constitution, it was established that not only is the Law on Employment is relevant, but also other legal acts regulating entry and employment conditions for foreign and stateless persons must be considered.

Applicable immigration, general employment and social insurance legislation makes a clear distinction

between different types of employees without permanent residence status in Latvia. Persons arriving in Latvia for the purpose of employment or studies are granted conditional work and residence permits for the period of their employment or studies. During the period of their employment such persons do not become participants in the obligatory social insurance scheme in full, only in the part covering illness and temporary disability benefits. It is clearly stated that no entitlement to social benefits in case of unemployment is created.

However, any person upon becoming a spouse of a permanent resident of Latvia, is then able to request a residence permit and unconditional work permit for the same period and enters the labour market on general conditions, including full participation in the obligatory state social insurance scheme.

The Court held that the legislation regulating social benefits must distinguish between various categories of holders of limited period residence permits, depending on the purpose of their residence in Latvia. Spouses of permanent residents of Latvia shall enjoy the same rights to social benefits in case of unemployment as permanent residents, without further discrimination on the basis of the type of residence permit.

Cross-references:

- Cf. Decision of 13.03.2001 (2000-08-0109) On Compliance of Item 1 of the Transitional Provisions of the Law "On Social Insurance" with Articles 1 and 109 of the Constitution and Articles 9 and 11 (the first Part) of the International Pact on Economic, Social and Cultural Rights, *Bulletin* 2001/1 [LAT-2001-1-001];
- Cf. Decision of 26.06.2001 (2001-02-016) "On Compliance of Transitional Provisions (Paragraph 1 on length of insurance of foreign citizens and stateless persons whose permanent place of residence until 1 January 1991 has been the Republic of Latvia) of the Law "On State Pensions" with Articles 89, 91 and 109 of the Constitution as well as with Article 14 of the 4 November 1950 Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of the First Protocol of the Convention, *Bulletin* 2001/2 [LAT-2001-2-003].

Languages:

Latvian, English (translation by the Court).



Identification: LAT-2002-1-004

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 19.03.2002 / **e)** 2001-12-01 / **f)** On Compliance of Paragraph 26 of the State Pension Law Transitional Provisions with Articles 91 and 109 of the Republic of Latvia *Satversme* (Constitution) / **g)** *Latvijas Vestnesis* (Official Gazette), 20.03.2002 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.
 5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.
 5.4.15 **Fundamental Rights** – Economic, social and cultural rights – Right to a pension.

Keywords of the alphabetical index:

Economy, transition period / Pension, reduction / Pension, system, reform.

Headnotes:

The consequences of the economic transition extend to the reform of the pension system; the state pension payments depend on the economic feasibility and availability of funds to be distributed for this purpose.

However, a provision to reduce the amount of an individual's pension depending solely on his employment status, introduced as a measure aiming to stabilise the pension system and to reduce the budget deficit, directly violated the right to an old age pension as guaranteed by the Constitution, and was not justified.

Summary:

The applicants challenged the compliance of Article 26 of Transitional Provisions of the Pension Law with Articles 91 and 109 of the Constitution. They claimed that the amount of an individual's pension is derived from his social insurance contributions, and thus is part of the property of the insured person, as opposed to a state social benefit. Furthermore, the

applicants sustained that the challenged legislation discriminates against working pensioners compared to non-working pensioners with regard to the amount of the pension.

The Court observed that the Pension Law lays down three requirements to be entitled to the state old age pension. None of these refers to the current employment status of the person.

An analysis of principles of calculating the size of pensions revealed that only in part is it derived from individual social insurance contributions. The other part of the pension is calculated for the employment period prior to the 1996 Pension Reform Act, and is based on the solidarity principle. Thus, the argument on private funds as the sole source of the pension was overruled.

After evaluating international practice on state social security benefits, it was established that the usual practice is to suspend the state social pensions and benefits for the part which exceeds the established limit for combined income, which however was not the case in Latvia.

It was also established that the challenged norm does not provide for any criteria for suspension of pension other than formal employment. In certain cases, such a situation has led to a situation where employed pensioners have refused remuneration for the work but the suspension has nevertheless been applied. In other cases, the suspended amount has been considerably higher than the remuneration earned by employment.

Following changes in economic feasibility and availability of funds for pension payments, a number of amendments to the Pension Law were introduced, including the challenged provision. The main body of the law remained unchanged whereas Transitional Provisions introduced partial suspension of pension payments for pensioners simultaneously registered as obligatory socially insured persons, i.e. employed people. Such measures were introduced with the aim of stabilising the pension system and to reduce the budget deficit.

The Court emphasised that once the right to social guarantees is incorporated into the Constitution it becomes the right of every individual and shall be protected by the State.

The Court considered that insufficient evidence was provided to establish that in the present case, the introduced measures were adequate and that no other alternatives were available to ensure the better protection of individual rights to social security.

Carefully evaluating economic aspects of the transition period, international practice and impacts on individuals, the Court decided that the measures introduced by the challenged norm were not justified, and that they violated the principle of fairness and trust guaranteed by Article 1 of the Constitution. Therefore, the challenged norm was declared null and void, although the argumentation supplied by the applicants was held insufficient and inapplicable to the case.

Cross-references:

- Cf. Decision of 11.03.1998 (04-05(97)) On Conformity of the Joint Interpretation by the Ministry of Finance (no.047/475 Certified on 30 April 1993) and by the Ministry of Economic Reforms (no. 34-1.1.-187, Certified on 4 May 1993) On Revaluation of Fixed Assets by Enterprise and Entrepreneur Company Accountancy and Interpretation by the Ministry of Economy no. 3-31.1-231 of 28 December 1993 On the Procedure of Application of the Joint Interpretation by the Ministry of Finance and the Ministry of Economic Reforms On Revaluation of Fixed Assets by Enterprise and Entrepreneur Company Accountancy with the law On the Procedure of Privatisation of Objects (Enterprises) of the State and Municipal Property as well as other laws, *Bulletin* 1998/1 [LAT-1998-1-002];
- Cf. Decision of 10.06.1998 (04-03(98)) On Conformity of the Cabinet of Ministers 23 April 1996 Resolution no. 148 On the Procedure by which the Property is Restituted or its Value is Compensated to Persons, whose Administrative Deportation from the Territory of the Latvian SSR or from the Part of the Territory of the Latvian SSR that Has Been Incorporated into the RSFSR is Recognised Unfounded and the Cabinet of Ministers 4 November 1997 Resolution no. 367 Amendments to Regulations no. 148 of 23 April 1996 The Procedure by which the Property or its Value is Compensated to Persons, whose Administrative Deportation from the Latvian SSR is Recognised Unfounded" with the Law On the Determination of the Status of Politically Repressed Persons who Suffered during the Communist and Nazi Regimes, *Bulletin* 1998/2 [LAT-1998-2-004];
- Cf. Decision of 01.10.1999 (04-07(99)) On Conformity of Item 1 of the Cabinet of Ministers 30 November 1999 Resolution (Protocol 67, Paragraph 38) On Protection of Foreign Investments Earmarked for Entrepreneurial Activity of the Limited Liability Association "WINDAU" at the Bauska Co-generation Station with the Constitution, Chapter 3 of the Law On the Structure of the Cabinet of Ministers, the First Part of Article 1 of the Law On Foreign Investment in the Republic of Latvia, Article 41 of the Power Industry Law, the First and the Fourth Parts of Article 8 of the Law On Privatisation of the State and Municipal Property and Article 49 of the Law On Joint Stock Companies, *Bulletin* 1999/3 [LAT-1999-3-004];
- Cf. Decision of 13.03.2001 (2000-08-0109) On Compliance of Item 1 of the Transitional Provisions of the Law On Social Insurance with Articles 1 and 109 of the Constitution and Articles 9 and 11 (the first Part) of the 16 December 1966 International Pact on Economic, Social and Cultural Rights, *Bulletin* 2001/1 [LAT-2001-1-001];
- Cf. Decision of 26.06.2001 (2001-02-0106) On Compliance of Transitional Provisions (Paragraph 1 on the length of insurance of foreign citizens and stateless persons whose permanent place of residence till 1 January 1991 has been the Republic of Latvia) of the Law On State Pensions with Articles 89, 91 and 109 of the Constitution as well as with Article 14 of the 4 November 1950 Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of the First Protocol of the Convention, *Bulletin* 2001/2 [LAT-2001-2-003].

Languages:

Latvian, English (translation by the Court).



Liechtenstein

State Council

Important decisions

Identification: LIE-2002-1-001

a) Liechtenstein / **b)** State Council / **c)** / **d)** 18.02.2002 / **e)** StGH 2001/61 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

5.3.13.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to a hearing.

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

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

Keywords of the alphabetical index:

Asylum, medical opinion / Medical opinion, asylum / Asylum, grounds, economic conditions / Expert, opinion, necessity / Refugee / Expulsion.

Headnotes:

There is violation of the right to a hearing when the decision is taken to forego an expert medical opinion that has been requested and is absolutely necessary for the proper appreciation of decisive elements of the material evidence as to the existence or otherwise of medical grounds making it impossible to execute an expulsion order in cases concerning the right to asylum.

Summary:

After their application for asylum was rejected and an expulsion order was issued against them, a family from eastern Bosnia with an asthmatic child filed a constitutional appeal with the State Court of Justice (*Staatsgerichtshof*) alleging, *inter alia*, violation of the right to a hearing following the rejection of a request for an expert medical opinion.

According to the State Court, the precarious economic conditions that were to be expected were not in

themselves a serious enough threat to make a repatriation or expulsion measure appear unacceptable. However, because of the psychosomatic component of asthma, it did consider it possible that the material problems in the event of repatriation and the related psychosocial stress could significantly aggravate the asthma.

The State Court accordingly found it most appropriate that a special examination of the psychosomatic component of the asthma in the event of repatriation also be expressly carried out. In the opinion of the State Court an explanation by a specialised doctor is indispensable, as a person's health is at stake.

Accordingly, the constitutional appeal was admitted on the grounds of violation of the right to a hearing, and the impugned decision was set aside with a view to reviewing the proceedings and the decision.

Languages:

German.



Lithuania

Constitutional Court

Statistical data

1 January 2002 – 30 April 2002

Number of decisions: 7

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

The main content of the cases was the following:

- State budget: 1
- Autonomy of universities: 1
- Management of the Klaipeda Seaport: application of laws: 1
- Right to succession: the right to property: 1
- the law on Pharmaceutical Activities: 1
- On the introduction and use of cash registers: 1
- State pensions of officials and soldiers of the systems of interior affairs, state security, defence and prosecutor's office: 1

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

Changes in the composition of the Constitutional Court:

Since 21 of March 2002 three judges retired from their duties (after 9 years' service):

1. Vladas Pavilionis (former chairman)
2. Zigmantas Levickis and
3. Teodora Staugaitiene

Since that date, three judges took up their duties for a term of 9 years:

1. Armanas Abramavicius
2. Kestutis Lapinskas and
3. Zenonas Namavicius

The new composition of the Constitutional Court for the next three years is:

1. Egidijus Kuris (chairman)
2. Armanas Abramavicius
3. Egidijus Jarasiunas
4. Kestutis Lapinskas

5. Zenonas Namavicius
6. Augustinas Normantas
7. Jonas Prapiestis
8. Vytautas Sinkevicius
9. Stasys Staciokas

Important decisions

Identification: LTU-2002-1-001

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 14.01.2002 / **e)** 25/01 / **f)** On the State budget / **g)** *Valstybes žinios* (Official Gazette), 5-186, 18.01.2002 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 3.4 **General Principles** – Separation of powers.
 4.6.8.1 **Institutions** – Executive bodies – Sectoral decentralisation – Universities.
 4.8.7.2 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects – Arrangements for distributing the financial resources of the State.
 4.8.7.3 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects – Budget.
 4.10.2 **Institutions** – Public finances – Budget.
 5.4.2 **Fundamental Rights** – Economic, social and cultural rights – Right to education.

Keywords of the alphabetical index:

Education, higher, access / Education, public, free of charge / Education, higher, access, requirement / University, autonomy.

Headnotes:

The drafting of the state budget and its submission to the Parliament (*Seimas*) belong to the sphere of the government's decision-making in regard to state administration as prescribed by the Constitution.

The government not only exercises a constitutional right, but also has a constitutional duty to provide for specific revenue sources in the draft state budget, indicate their amounts as well as specific amounts intended for financing the needs of the state and society.

Only the Parliament has the prerogative to consider the draft state budget submitted by the government and approve it by law. According to the Constitution,

the adoption of the law on the state budget constitutes a final step in the formation of the budget.

The laws specified in Article 131.2 of the Constitution providing for certain expenditures are not laws that would substitute or change the law on the state budget. As such, these laws may not provide for funds necessary for the execution of routine functions of the state, or for funds necessary to finance everyday needs of the society.

The need of the society and the State to have graduate specialists in various areas and the possibility to finance only a certain number of specialists cannot be an obstacle for a person to seek higher education according to his abilities even when this exceeds the needs and possibilities of the society and the State as long as this is not at the expense of the state.

In accordance with Article 41.3 of the Constitution, those who seek higher education cannot be subjected to requirements that are based on criteria other than their abilities.

The independence of activities of local government within the limits of the competence established by the Constitution and laws and the support of the State for local governments, as well as coordination of the interests of local governments and those of the state, which are entrenched in the Constitution, imply that funds (local government revenues and their sources) must be provided for in the state budget, necessary for ensuring the self-sufficient functioning of local government and for the implementation of functions of local authorities.

Summary:

The case was initiated by a group of members of the Parliament (*Seimas*). The group requested the investigation of the Republic of Lithuania Law on Approving the Financial Indicators of the 2001 State Budget and Budgets of Local Governments (wording of 19 December 2000), the Republic of Lithuania Law on the Approval of Indicators Determining the Amount and Levelling of Revenues of Local Governments Budgets for 2001, 2002 and 2003 to see if their enactment procedure were in compliance with Article 69.1 of the Constitution, while in terms of their content, with Articles 41.3, 69.1, 120.2, 121.1, 127.1 and 131.2 of the Constitution. The petitioner raised doubts concerning whether the above-mentioned legal acts were in compliance with the Constitution.

The Constitutional Court recalled that under the Constitution, only the government has the right and duty to draft the state budget. Once approved by the

Parliament, the state budget becomes law. Pursuant to Article 94.4 of the Constitution, the government shall execute the state budget meaning that it has a duty to ensure that the budget receives the specified revenues and that these funds are transferred to the entities specified in the law on the state budget.

Article 41.3 of the Constitution provides: "Everyone shall have an equal opportunity to attain higher education according to their individual abilities. Citizens who demonstrate suitable academic progress shall be guaranteed education at establishments of state higher education free of charge".

The constitutional provision that higher education is available to everyone according to his abilities means that both state and non-state higher education institutions established according to the procedure prescribed by law – the entire system of higher education establishments – have to be accessible to every person.

Article 41.3 of the Constitution also establishes the right of every citizen with a good academic progress in a state higher school to free higher education. This right presumes that funds must be provided out of the state budget to guarantee higher education free of charge to citizens who demonstrate good academic progress in state higher schools.

Therefore, the Constitutional Court noted that higher education tuition of citizens who are students at state higher education colleges and demonstrate good academic results cannot be imposed on these persons themselves in whatever form. The higher education of citizens who are students at state higher education colleges and demonstrate good academic results is financed by the state.

The laws specified in Article 131.2 of the Constitution that provide for certain expenditure are laws ensuring the succession of the relations of the state budget in each financial year as well as the financial continuity when the persistent pursuit of certain public objectives (special, long-term and strategic) requires more funds than it is possible to allot in one budget year. As such, these laws are an exception rather than the rule.

According to the Constitution, the State has a duty to provide for the principles and procedure of allocation of state funds necessary to finance tuition of citizens who are students at state higher education colleges and demonstrate good academic results, and also to establish control of their legal utilisation.

The Constitutional Court recalled that according to Article 120.2 of the Constitution, "Local governments

shall act freely and independently within the limits of their competence which shall be established by the Constitution and laws". Article 121.1 of the Constitution provides that "Local governments shall draft and approve their own budget". In accordance with Article 127.1 of the Constitution, "The budgetary system of the Republic of Lithuania shall consist of the independent state budget of the Republic of Lithuania and independent local governments budgets".

The Constitutional Court concluded that the independence of local governments within the limits of their competence established by the Constitution and laws entrenched in the Constitution implies that if local governments are transferred state functions by laws, or if they are given duties by laws or other legal acts, funds must be provided for the implementation of these functions (duties).

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2002-1-002

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 05.02.2002 / **e)** 18/2000 / **f)** On the Law on Higher Education / **g)** *Valstybes žinios* (Official Gazette), 14-518, 08.02.2002 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.

3.21 **General Principles** – Equality.

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

5.4.20 **Fundamental Rights** – Economic, social and cultural rights – Scientific freedom.

Keywords of the alphabetical index:

Education, higher / Education, institution, autonomy, differences in scope / University, autonomy.

Headnotes:

Institutions of higher education have to react to changes in social needs and coordinate their activities with the interests of society. Therefore, the principle of

autonomy of institutions of higher education must be coordinated with the principle of responsibility and accountability before society, with other constitutional values, with the duty of institutions of higher education to observe the Constitution and laws, and with the interaction and coordination of interests of institutions of higher education and society.

Article 40.3 of the Constitution specifies that institutions of higher learning are granted autonomy. The diversity of goals of higher education determines the fact that there may be a variety of types of schools of higher learning. So laws may provide for autonomy of different scope for various types of schools of higher learning (depending on whether they are universities or colleges, whether they were founded by the State or other entities, and on other conditions); laws may also regulate the administration and self-government of schools of higher learning in a different manner.

In themselves, different forms of establishment by law of the administrative forms of schools of higher learning of various types and also of the schools of higher learning founded by various founders (the state and the private sector), as well as institutions which differ in their administration, the procedure of their formation and their functions and powers, do not deny the constitutional principle of autonomy of institutions of higher learning.

Summary:

The case was initiated by a group of members of the Parliament (*Seimas*). It requested an investigation into whether Article 8.5, the first and second sentences of Article 9.3, Articles 22.5.10, 22.5.11, 22.5.12, 24.1.1, 24.1.2, 24.1.5, 24.2, 24.7 and the second sentence of Article 42.4 of the Law on Higher Education were in compliance with Article 40 of the Constitution, if the second sentence of Article 22.3, Articles 60.2, 61.1, 62.1, 65.1 and 65.2 of the same law were in compliance with Article 29 of the Constitution, and if Article 60 of the same law was in compliance with Article 41 of the Constitution.

In the opinion of the petitioner, the functions of the university senate as established in Article 22.5.10, 22.5.11 and 22.5.12 of the Law, as well as the functions of the state university council and the state college council as established in Article 24.1.1, 24.1.2 and 24.1.5 of the Law, restrained the rights of self-government of schools of higher learning in the areas of scientific and educational activities. They also restricted the autonomy guarantees set out in Article 40 of the Constitution. The petitioner was of the opinion that the autonomy of institutions of higher education in their educational and scientific activities

provided for in Article 40.3 of the Constitution must be of the same level for all institutions of higher education irrespective of their types (universities or colleges, public or private etc). The petitioner doubted if the provision of Article 22.3 of the Law that the rector and the chairman of the senate must not be the same person was in conformity with Article 40.3 of the Constitution.

The petitioner also doubted if Articles 60.2, 61.1, 62.1, 65.1 and 65.2 of the Law were in compliance with Article 29.1 of the Constitution, and if Article 60 of the Law was in compliance with Article 41 of the Constitution.

Under Article 69.4 of the Law on the Constitutional Court, the case was dismissed as to the request of the petitioner to determine whether Articles 60.2, 61.1, 62.1, 65.1 and 65.2 of the Law were in compliance with Article 29.1 of the Constitution, and whether Article 60 of the Law was in compliance with Article 41.3 of the Constitution.

The Constitutional Court recalled that the system of higher education ensures the development of science and culture, the social sphere and the economy. The purpose of higher education is to create, accumulate and disseminate knowledge of science and cultural values, to educate society and to enhance personal development. Therefore society is concerned with creating sufficient conditions for institutions of higher education in order to ensure broad-based personal development, freedom of teaching, scientific research and creative activities.

It also ascertained that Article 40.3 of the Constitution specifies that institutions of higher learning are granted autonomy. However, this provision must not be construed as prohibiting the establishment by laws of different limits of autonomy of schools of higher learning.

The Constitutional Court therefore ruled that all the disputed provisions of the Law, which have been investigated, were in conformity with the Constitution.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2002-1-003

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 19.02.2002 / **e)** 26/2000 / **f)** On the Management of Klaipeda Seaport / **g)** *Valstybes žinios* (Official Gazette), 18-738, 22.02.2002 / **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.
4.6.2 **Institutions** – Executive bodies – Powers.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.

Keywords of the alphabetical index:

Government, exceeding of powers / Lease, seaport / Lease, amount, determination.

Headnotes:

The law is a legal act of supreme legal power. The Government resolution is a sub-statutory legal act, and therefore it may not be in conflict with the law, nor may it contain any provisions conflicting with those of the law.

Summary:

The petitioner – the Higher Administrative Court – applied to the Constitutional Court requesting the determination of whether Item 4.2 of Resolution no. 608 of the Government “On the Management of Klaipeda Seaport” of 6 August 1993 was in conformity with Article 11.1 of Law on the Leasing of Land (wording of 23 December 1993) and Article 8.2 thereof (wording of 24 March 1998).

The petitioner asserted that the government was not given the right to delegate the establishment of the amount of rent to another institution by norms of the Law on the Leasing of Land. In adopting the said resolution, the government exceeded its powers.

The Constitutional Court investigated only the compliance of Item 4.2 of the resolution with Article 11.1 of the law (wording of 23 December 1993) to the extent that the provision of Item 4.2 of the resolution, after it had commissioned the Ministry of Transport to prepare and approve the rules for the lease of Klaipeda State Seaport, created legal pre-conditions for establishing the norms in the said rules

regulating the establishment of the amount of payment for the lease of the Seaport.

The Court noted that under Article 11.1 of the law (wording of 23 December 1993), the payment of rent for the Seaport was established according to the procedure prescribed by the laws and the government. Therefore, after the law had been adopted, the disputed provision of Item 4.2 of the resolution – whereby the Ministry of Transport was commissioned to prepare and approve, along with the other rules, those for the lease of the Seaport – should have been harmonised with Article 11.1 of the law (wording of 23 December 1993). However, Item 4.2 of the resolution was not amended and harmonised with Article 11.1 of the law (wording of 23 December 1993).

The Constitutional Court ruled that the disputed norm of the resolution contradicted Article 11.1 of the Law on the Leasing of Land (wording of 23 December 1993).

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2002-1-004

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 04.03.2002 / **e)** 17/2000 / **f)** On the right to succession / **g)** *Valstybes žinios* (Official Gazette), 24-889, 06.03.2002 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.5 **General Principles** – Social State.

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

5.1.1.4.2 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Incapacitated.

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

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:

Succession, right / Disabled person, dependant, succession / Deceased, will, intestacy / Succession, rules.

Headnotes:

In accordance with Article 23 of the Constitution establishing the inviolability of property and protection of the rights of ownership, the owner has the right to state in his will to whom his property will be left after his death, while in cases of intestacy, after his death his property will be inherited by the heirs established by law.

The legislature, while regulating the relations of succession, must ensure a balance between the right of an individual to leave his property to other persons on the one part, and the other values protected by the Constitution on the other part.

Summary:

The petitioner – the Panevežys City District Court – applied to the Constitutional Court requesting the determination of whether Article 573 of the Civil Code of the Republic of Lithuania (wording of 17 May 1994) was in compliance with Articles 23, 29 and 59 of the Constitution.

The petitioner indicated that Article 573 of the Civil Code (wording of 17 May 1994) provides for unequal succession rights for incapacitated or disabled dependants who had been supported by the deceased for not less than one year prior to his/her death. In case of the absence of a will of the deceased, the said persons were deprived of an opportunity to be successors together with the heirs of the first line of succession.

The Constitutional Court noted that the Constitution guarantees the right to succession. Article 23 of the Constitution establishes the right of the owner to leave his property as inheritance. In the course of the systematic construction of the provisions of Article 23 of the Constitution, one must conclude that the institution of succession stems from the Constitution and especially of the constitutional provisions establishing that the family is the basis of society and the State and providing for a duty of the State to take care of the family, as well as the right and duty of parents to support their children until they come of age, and the duty of children to respect their parents, to care for them in old age, and to preserve their heritage (Article 38.1, 38.2, 38.6 and 38.7 of the Constitution), a duty of the State to protect children

who are under age by law (Article 39.3 of the Constitution), also the provisions establishing the constitutional rights of individuals (Article 18 of the Constitution) etc.

The relations of succession must be regulated by law only. The legislature, while regulating these relations, must observe the principles and norms of the Constitution. This means *inter alia* that there may not be any established legal regulation which, on the one hand, might deny the will of a testator to leave his property as inheritance to other persons, and, which, on the other hand, in the absence of a will, would give priority to other persons but not those related to the deceased, which priority is established in the Constitution.

The provisions of Article 573.1 of the Civil Code (wording of 17 May 1994), which were cited by the petitioner, mean that in case of intestacy, invalid dependants who were not related to the deceased, have no priority over the children, adopted children, spouse, parents and foster-parents of the deceased.

The Constitutional Court ruled that Article 573 of the Civil Code (wording of 17 May 1994) was in compliance with the Constitution to the extent that it did not provide that the invalid individuals who had been supported by the deceased for not less than one year prior to his/her death were entitled to legal succession together with the heirs of the first order of succession.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2002-1-005

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 14.03.2002 / **e)** 23/2000 / **f)** On the law on Pharmaceutical Activities / **g)** *Valstybes žinios* (Official Gazette), 28-1003, 16.03.2002 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.

3.25 **General Principles** – Market economy.

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.

5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.

5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Pharmacy, property, condition / Education, higher, requirement for property / Pharmacist, requirements.

Headnotes:

The freedom of individual economic activity creates opportunities to realise various individual aspirations. Under the Constitution, the national economy is to be based on the freedom of individual economic activity and initiative. Therefore one may not establish legal regulations creating inappropriate conditions for the implementation of the freedom of economic activity. Under Article 46.2 of the Constitution, the State shall support economic efforts and initiatives which are useful to the community. The freedom of economic activity and initiative is based on the inherent right of an individual to personal freedom, as well as on the inherent right to ownership.

The right to freely choose to carry out business is one of necessary conditions in order to satisfy the vital needs of an individual and to occupy a proper place in the society. Conditioning the right to acquire a pharmacy upon the higher pharmaceutical education is unconstitutional inasmuch it restricts the right of people without higher pharmaceutical education and that of groups of people to own pharmacies.

Summary:

The petitioner – the Higher Administrative Court – applied to the Constitutional Court requesting a determination whether Article 11.2 of the Law on Pharmaceutical Activities was in compliance with Articles 46.1 and 48.1 of the Constitution.

The petitioner raised such arguments: Article 11.2 of the law provides that pharmacies may belong by right of ownership only to those persons who have had higher pharmaceutical education or to groups of natural persons in which more than half of the authorised capital of the pharmacy belongs to persons who have had higher or specialised secondary pharmaceutical education. Thus, Article 11.2 of the law establishes a restriction on the acquisition of

property on the grounds of the education of the individual. Although a pharmacy belongs to the owner, his right of ownership is implemented by the head of the business in respect of whom qualification requirements ought to be established.

The constitutional right of ownership is an essential condition for the implementation of the freedom of individual economic activity. When the right of ownership is restricted, the freedom of individual economic activity is restricted as well.

Under the Constitution, it is permitted to restrict the rights and freedoms of individuals if the following conditions are observed: that it is done by law; that such restrictions are necessary in a democratic society in order to protect the rights and freedoms of others as well as the values enshrined in the Constitution together with constitutionally important objectives; that the restrictions do not deny the nature and essence of the rights and freedoms; and that the constitutional principle of proportionality is followed.

The Constitutional Court noted that under the Constitution, it is prohibited to restrict the right of ownership of a person on the basis of the person's education. The requirements for pharmaceutical education and necessary qualification must be imposed on the persons conducting pharmaceutical activities in pharmacies. It is not permitted to impose requirements for education on the persons who own pharmacies.

The provision of Article 48.1 of the Constitution that every person may freely choose to carry out business means that every individual has a constitutional right to decide by himself which business to choose.

The Court ruled that Article 11.2 of the Law on Pharmaceutical Activities conflicted with Articles 23.1, 23.2, 46.1 and 48.1 of the Constitution to the extent that it restricts the right of ownership of people and of groups of people without higher pharmaceutical education to possess pharmacies.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2002-1-006

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 09.04.2002 / **e)** 24/2000 / **f)** On the introduction and use of cash registers / **g)** *Valstybes žinios* (Official Gazette), 39-1441, 12.04.2002 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
 3.25 **General Principles** – Market economy.
 4.10.7 **Institutions** – Public finances – Taxation.
 5.2 **Fundamental Rights** – Equality.
 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.
 5.4.16 **Fundamental Rights** – Economic, social and cultural rights – Right to just and decent working conditions.

Keywords of the alphabetical index:

Accounting, method / Competition, fair / Tax, inspectorate / Transport, passengers, public / Transport, passengers, private / Employment, working conditions.

Headnotes:

While construing the provisions of Article 46.1, 46.3 and 46.4 of the Constitution in a systematic manner, one has to note that the State, while regulating economic activity, must ensure the interests of both the private individual and society. Economic activity is inseparable from the duty to pay taxes and other obligatory payments, and from the duty to observe the established financial procedure. The legislature, which has a constitutional duty to regulate economic activity so that it serves the general welfare of the people, regulates the financial activity of economic entities as well and establishes ways of conducting accounting. In the course of conducting bookkeeping, various ways and means of accountancy are used. One of the ways of organising and conducting accountancy is the introduction and use of cash registers. Such legal regulation does not deny the freedom of fair competition. Production and the market are not monopolised, nor does this violate the rights of private ownership, economic freedom and initiative.

Article 48.1 of the Constitution enshrines the right to adequate, safe and healthy working conditions which means *inter alia* that every employee has the right to such working conditions which would not exert negative influence on his life and health, and which would be in line with the requirements of security and hygiene. The working environment, the nature of

work, the time of work and rest, and the means of work are to be considered as working conditions.

Summary:

The case was initiated by a group of members of the Parliament (*Seimas*). It requested an investigation into whether Item 3.4.4 of Resolution of the Government no. 664 "On the Introduction and Use of Cash Registers" of 4 June 1998 (wording of 28 December 1999) was in compliance with Articles 46.1, 46.3, 46.4 and 48.1 of the Constitution as well as Article 1.1 of the Law on Competition, and if Item 3.7.15 of the same resolution was in compliance with Article 46.1, 46.3 and 46.4 of the Constitution, as well as Articles 2.1, 3.11, 9.1 and 9.2 of the Law on Competition.

The request was based on the following arguments: the above-mentioned resolution established that cash registers must be installed in passenger transport vehicles in which tickets, which are registered with the territorial state tax inspectorates, are sold and that cash registers are not necessary in town passenger transport vehicles in which one pays the fare by punching single use tickets if not less than half such tickets sold by the carrier are sold permanently at news stalls, in shops or other trading places. Therefore advantageous conditions are created for local government passenger transport carriers to operate in the market, the freedom of fair competition is violated, and the market is being monopolised. In the opinion of the petitioner, after cash registers are installed in private passenger transport, the psychological stress of the drivers increases and there appear dangers for other road-users and passengers, and inadequate, insecure and unhealthy working conditions are created for the drivers.

Article 46.3 of the Constitution provides that the State shall regulate economic activity so that it serves the general welfare of the people. While construing the content of Article 46.3 of the Constitution, one must pay attention to the fact that the freedom of individual economic activity is not absolute. The State regulates economic activity, while coordinating the interests of individuals and of society. While regulating economic activity, the State may not violate fair competition, the equality of economic entities, and other principles enshrined in the Constitution.

Article 46.3 of the Constitution is related to Paragraph 2 of the same article in which it is established that the State shall support economic efforts and initiatives which are useful to the community. While regulating economic activity, the State may not establish any such legal regulation which might create unfavourable and unequal conditions for the economic activity of economic entities, which might

limit initiative, and which would not create opportunities for the initiative to show its worth.

The provision of Article 46.4 of the Constitution that the law shall protect freedom of fair competition means, *inter alia*, that the legislature is obliged to establish such legal regulation by law so that production and the market would not become monopolised, that the freedom of fair competition would be ensured and the means and ways for its protection would be provided for. Besides, this provision means that the legal acts issued by other state and local government institutions may not violate the said constitutional principles.

The Constitutional Court ascertained that a duty to install cash registers in all passenger transport vehicles, belonging both to private enterprises and municipal passenger transport enterprises if they do not sell tickets in the above way, is established in the above-mentioned resolution. The Constitutional Court noted that the disputed provisions of the resolution regulate the conducting of accountancy. Such legal regulation does not deny the freedom of fair competition, and production and the market are not monopolised, nor does it violate the rights of private ownership, economic freedom and initiative.

After the resolution had established that cash registers must be installed in passenger transport vehicles in which tickets, which are registered with the territorial state tax inspectorates, are sold, the right to adequate, safe and healthy working conditions was not violated.

The Constitutional ruled that disputed provisions of the resolution were in compliance with the Constitution and certain norms of the Law on Competition.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2002-1-007

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 23.04.2002 / **e)** 27/2000 / **f)** On the state pensions / **g)** *Valstybes žinios* (Official Gazette), 43-1636, 26.04.2002 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

3.5 **General Principles** – Social State.

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

3.13 **General Principles** – Legality.

4.14 **Institutions** – Activities and duties assigned to the State by the Constitution.

5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.

Keywords of the alphabetical index:

Pension, amount / Pension, determination / Regulation, implementing statute, illegal.

Headnotes:

The formula “the State shall guarantee” as employed in Article 52 of the Constitution means *inter alia* that pensions and various types of social assistance are guaranteed for the persons on the basis and by the amounts that are established in laws.

Amendments to the established legal regulation on pension rights are possible only when there appears a special situation in the State and only when it is necessary to protect other constitutional values. This can be done by law only, without violating the Constitution.

After the types of pensions, the persons entitled to the pension, the basis of granting and payment of pensions, their amounts, and the conditions of payment, have all been established by laws, a duty arises for the State to follow the constitutional principles of the protection of legitimate expectations and legal certainty in the area of pension rights.

The Government may only establish such legal regulations which one in conformity with the laws. The procedure established by the Government may not contain any legal norms establishing a different legal regulation than provided for in the law and conflicting with laws.

Summary:

The petitioner – the Higher Administrative Court – appealed to the Constitutional Court requesting a determination as to whether Articles 7.1, 7.2, 16.6 and 16.9.2 of the Law on the State Pensions of Officials and Soldiers of the Interior, the Special Investigation Service, State Security, Defence and of the Prosecutor's Office (wording of 2 May 2000) (hereinafter “the

law”) were in compliance with Article 29.1 of the Constitution, and whether Item 31.3 of the Regulations of Granting and Payment of State Pensions to Officials and Soldiers of the Systems of Internal Affairs, State Security, Defence and Prosecutor's Office (hereinafter “the regulations”) approved by the Government of the Republic of Lithuania Resolution no. 83 of 20 January 1995 was in compliance with Article 7.1 of the above-mentioned law.

The petitioner maintained that, under Articles 7.1, 7.2, 16.6 and 9.2 of the law, the amount of the state pension of officials and soldiers depends on the time of the retirement of the person, i.e. prior to or after the law coming into force. The petitioner doubted whether the fact that the amount of the state pension of officials and soldiers depends on the time of the retirement of the person did not violate the constitutional principle of equality of persons before the law.

In the opinion of the petitioner, Item 31.3 of the regulations provided for a different procedure of recalculation of state pensions of the officials and soldiers granted prior to the law coming into force from that provided for in the law. The petitioner requested the determination of whether Item 31.3 of the regulations was in compliance with Article 7.1 of the law.

The Constitutional Court recalled that the constitutional principle of equality of persons can be defined as an inherent human right to be treated equally with the others. Article 29.1 of the Constitution establishes a formal equality of all persons, while in Paragraph 2 thereof the principle of non-discrimination of and not granting privileges to persons is consolidated.

The basis of maintenance of pension rights and social assistance are enshrined in Article 52 of the Constitution, wherein it is established that the State shall guarantee the right of citizens to an old age and disability pension, as well as to social assistance in the event of unemployment, sickness, widowhood, loss of breadwinner's income, and other cases provided by law. Under this article of the Constitution, not only the pensions and social assistance pointed out in the said article but also other pensions and different social benefits, including the state pension of members of the armed forces, may be provided for. Under Article 52 of the Constitution, the relations of maintenance of pension rights and social assistance are regulated by laws only.

The Constitutional Court also emphasised that under the law, the state pension of officials and soldiers is granted to all persons listed in Article 1 of the law on the same basis, under the same conditions and the same procedure. The principles and procedure of

calculation of the amount of the state pension of officials and soldiers as established in the law are the same for all persons who are entitled to this pension. The norms of the law which establish the procedure of calculation and recalculation of state pensions of officials and soldiers do not contain any provisions consolidating the inequality of the persons entitled to the said pensions. The Constitutional Court ruled that the disputed norms of the law were in compliance with the Constitution.

Article 5.1 and 5.2 of the Constitution provide that "In Lithuania, the powers of the State shall be exercised by the Parliament, the President of the Republic and the Government, and the Judiciary. The scope of powers shall be defined by the Constitution".

These provisions of the Constitution express the principle of the separation of powers. The Constitutional Court has noted for a long time that the constitutional principle of separation of powers means that the legislative, executive and judicial powers must be separated so that they are sufficiently independent but also balanced; that every institution of authority is assigned with the competence which corresponds to its purpose; that the content of the competence of the institution depends on the place of the corresponding power in the system of powers, on its relation with the other powers, on the place of the institution among the other institutions of authority and on the relation of the powers of the said institution with the powers of other institutions; that after the Constitution had directly established the powers of a particular state authority, no state institution may take over such powers from another institution or transfer or waive them, and that such powers may not be amended or restricted by a law.

Under Article 94.2 of the Constitution, the Government shall implement laws and resolutions of the Parliament (*Seimas*) concerning the implementation of laws, as well as the decrees of the President of the Republic.

A legal act adopted by the Government is a sub-statutory legal act: it may not conflict with a law, change the content of the norms of the law, nor may it contain any legal norms which would conflict with those of the law.

The Constitutional Court noted that under Article 7.1 of the law, the amount of the state pension of officials and soldiers is determined by the fact that the said amount is calculated and paid on the basis of the remuneration for work valid in the month of the payment of the pension for the post held by the official or soldier at the time of his retirement.

Item 31.3 of the regulations established the amount of the state pension of the officials and soldiers granted before the law went into effect and the procedure of recalculation of this amount.

Therefore the Court ruled that Item 31.3 of the regulations conflicted with Article 7.1 of the law. Besides, the Court ruled that the above-mentioned item conflicted with Articles 7.2.6, 9.2, and 16 of the Law, as well as Articles 52, 94.2, 5.1 and 5.2 of the Constitution.

Languages:

Lithuanian, English (translation by the Court).



Moldova

Constitutional Court

Important decisions

Identification: MDA-2002-1-001

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 19.02.2002 / **e)** 10 / **f)** Constitutionality review of the Parliament Decision no. 807-XV on the settlement of the date for general local elections of 5 February 2002 / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

3.3.1 **General Principles** – Democracy – Representative democracy.

3.13 **General Principles** – Legality.

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

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

4.9 **Institutions** – Elections and instruments of direct democracy.

Keywords of the alphabetical index:

Election, local / Election, date, parliamentary decision / Local council, members, mandate / Mandate, termination.

Headnotes:

The Constitution states that public authorities, by which local autonomy is exercised in villages and towns, are represented by the elected local councils and mayors. The manner of electing the local councils and mayors, as well as their competencies, are established under the law (Article 112 of the Constitution).

Adopting the parliamentary decision providing for the determination of the date for general local elections on 7 April 2002, the Parliament has *de iure* and *de facto* terminated the mandate of local councillors elected for a 4-year term of office. Such decision is unconstitutional insofar as the Parliament is not endowed with the right to cease the mandate of local councillors.

Summary:

The ground for consideration of this case was the petition lodged with the Constitutional Court for the constitutional review of the Parliament Decision no. 807-XV on the settlement of the date for local elections of 5 February 2002.

The petitioners claimed that the Parliament, having established by Decision no. 807-XV the local elections on 7 April 2002, had unduly terminated the mandate of the local authorities, as in pursuance to Article 119.1 of the Electoral Code, the local authorities had been elected for a 4-year term, which expires on 23 May 2003.

Thus, by enforcing the Parliament Decision no. 807-XV, some provisions of Article 112 of the Constitution on the powers of local authorities, and the provisions of Article 38 of the Constitution, pursuant to which free elections are held periodically by an universal, equal, direct, secret and freely expressed suffrage, were infringed upon.

By not observing the Electoral Code on passing this Decision, the Parliament clearly disregarded Article 74 of the Constitution on the passing of laws and decisions by the Parliament, as the Constitution institutes differences in the adoption of organic laws and decisions of the Parliament.

According to the Constitution, one of the main powers of Parliament is to pass laws, decisions and motions (Article 66.a). As a legal ground for adopting the Parliament Decision no. 807-XV was Article 122.1 under the Electoral Code, by virtue of which Parliament fixes the date for general or anticipated local elections by a parliamentary decision.

Article 38 of the Constitution foresees also the manner of electing these authorities “through free elections, held periodically and based on universal, equal, direct, secret and freely expressed suffrage”.

The manner of organisation and conduct of elections is provided for by the Electoral Code – the organic law no. 1381-XIII, passed on 21 November 1997 with the subsequent amendments and modifications (*Monitorul Oficial*, 1997, no. 81, Article 667).

On the basis of the above-mentioned provisions, under the Constitution and the Electoral Code it is clear that the Parliament's right to pass a decision within the scope foreseen by the Constitution does not foresee the adoption of a law. Simultaneously, the provisions of the act in question, both partly and

generally, must effectively correspond to the Supreme Law.

The term “periodically”, enshrined in Article 38 of the Constitution, within the framework of legal issues subject to the review of constitutionality, is laid down in the Electoral Code and in the legislation on local public administration and expresses the period of time, determined by the electoral law, for which local public bodies are elected. Under the Electoral Code, the local public authorities are elected for a 4-year term, beginning on the day of the local elections. Under the conditions in which the exercise of certain rights and liberties is not constrained (Article 54 of the Constitution), this term has a periodic nature, namely, only at its expiration the general local elections are organised and held, observing the fundamental right of the people to freely express their will.

The local council, pursuant to the Law no. 186-XIV on local public administration (*Monitorul Oficial*, no. 14-15, Article 60) – with subsequent amendments and modifications – of 6 November 1998, carries out its term of office beginning with the date of acknowledging itself as legally constituted until the date of the legal establishment of a newly elected council. The council's mandate can be prolonged, through the organic law, in the case of emergency or war (Article 19).

Simultaneously, having expressly determined the term of office of the local council, the legislation foresees the cases under which the mandate of the local council may be revoked, suspended and, as a follow-up, terminated. The local council is considered legally dissolved in cases laid down in an express way by Article 21.3 under the Law on local public administration.

A local council's activities may be suspended under the Law on Local Public Administration (Article 30.1), if the council had recurrently handed down decisions, which were irrevocably annulled by the court of law. The termination of a local council's activities is enforced by the Parliament, following a well-grounded proposal brought forward by the mayor, the chairman of the executive committee of the district council or the Government. The date for conducting the new elections to the local council is settled by the Central Electoral Commission (Article 30.2 and 30.3).

In pursuance to the Law on the status of the local commissioner, its term of office lasts as a rule until the expiration of the respective council or mayor mandate. The mandate of the local commissioner may cease before the fixed date, if certain legal conditions appear for this (Article 5.1).

Taking into account the aforesaid reasons, the Constitutional Court ascertained that the Parliament Decision no. 807-XV on the settlement of the date for general local elections produces juridical effects which bring about constraints to the constitutional system. The Constitution and the valid legal framework do not endow the Parliament with the right to cease the mandate of local commissioners. Being empowered by the electoral law to pass decisions on the settlement of the date for general or anticipated local elections, the Parliament in compliance with Article 54.1 of the Constitution, has no right to restrict or diminish fundamental human rights and liberties.

Following the invoked constitutional provisions and the legal framework on the national electoral system and the local public administration, the Constitutional Court handed down the Parliament Decision no. 807-XV as being in contradiction to Articles 2.1, 38, 54, 72.3.a, 109, 112 and 120 of the Constitution and, therefore, it ruled on its unconstitutionality.

Languages:

Romanian.



Identification: MDA-2002-1-002

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 05.03.2002 / **e)** 4a / **f)** Constitutionality review of the Law no. 764-XV on the territorial administrative organisation of the Republic of Moldova of 27 December 2001 / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian).

Keywords of the systematic thesaurus:

2.1.1.4.11 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Charter of Local Self-Government of 1985.

3.3.2 **General Principles** – Democracy – Direct democracy.

3.18 **General Principles** – General interest.

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

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

4.8.4 **Institutions** – Federalism, regionalism and local self-government – Basic principles.

4.8.5 **Institutions** – Federalism, regionalism and local self-government – Definition of geographical boundaries.

4.9.2 **Institutions** – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy.

Keywords of the alphabetical index:

Citizen, management of public affairs, direct participation / Local self-government, statute, amendments / Referendum, local / Referendum, consultative, organisation, conditions.

Headnotes:

In order to consult the citizens following the constitutional and legal provisions, different means can be identified and utilised, especially those which are traditional and specific to the republic, such as opinion polls, open sessions of the councils, the addressing of local communities on concrete issues acknowledged through the signatures of the territorial units' inhabitants etc.

Having instituted the temporal restriction, in which the initiation of the procedure for the establishment, cancellation and modification of the status of territorial units only once in every four years at least six months before the parliamentary elections is allowed, the Parliament has restrained the powers of local communities in the exercise of local self-government. It also restricted the citizens' right to express their opinion during consultations, including by means of local referendum, on any issue of particular interest.

Summary:

The ground for case consideration were the complaints lodged with the Court by a group of Members of Parliament and an ombudsman challenging the constitutionality of the Law no. 764-XV of 27 December 2001 on the territorial-administrative organisation of the Republic of Moldova. The applicants allege that the law at issue goes contrary to the provisions of the Constitution and the European Charter of Local Self-Government, because it infringes the citizen's right to a referendum without any temporary limitation, with the aim of consulting the citizens on local problems of special interest. The ombudsman argued that the modifications of the territorial-administrative units cannot be exercised without the consultation of local public authorities and the Government, as well as the population by conducting the local referendum.

The Law on the territorial-administrative organisation regulates the legal framework of the territorial-administrative organisation and lays down the territorial organisation into two levels. The villages (communes) and cities (municipalities) are ascribed to the first level, and the districts to the second level.

Pursuant to the Constitution, Parliament endorses the main trends for external and internal policies of the state; it is the supreme representative body of the people and the sole legislative authority of the state; it regulates by organic law the organisation of local administration, territory, as well as the general regime on local self-government.

The Constitution expressly provides that the territory of the republic is organised, from the administrative point of view, into districts, cities and villages. Certain cities can be declared as municipalities under the law (Article 110 of the Constitution).

The Constitution pursues the aim of safeguarding the observance of citizens' rights and freedoms, particularly the principle of local self-government (Article 109 of the Constitution).

The European Charter of Local Self-Government provides that the principle of local self-government has to be sanctioned by the Constitution or by domestic legislation, which determines the form of state government, thus safeguarding its stability.

Article 1 of Law no. 764-XV foresees that the territorial-administrative organisation of the republic and the ascertaining of the legal framework for villages (communes), cities (municipalities) and other territorial-administrative units has been carried on in pursuance to Articles 110 and 111 of the Constitution and is enforced in compliance with economic, social and cultural needs, with the respect for historical traditions and with the aim of safeguarding an appropriate development level for all rural and urban places. Article 2 of the same law sets forth that the act of dividing the state territory into territorial-administrative units is aimed at securing the enforcement of local self-government principles, the decentralisation of public services, the eligibility of local public administration authorities, the safeguarding of citizens' access to public bodies and their consultation on local problems of particular interest.

The Court underlined that by the Law no. 764-XV the concept of districts had been restored in substitution for counties, and, thus, the number of 2,500 inhabitants previously needed up an autonomous territorial-administrative unit had decreased to 1,500 inhabitants (Article 17.2, the fact which implicitly brought about the

modifications in the number of territorial-administrative units).

In Article 17.1 under the Law no. 764-XV the legislature established that the setting up, cancellation and modification of the status of the territorial-administrative unit are carried out by Parliament, following the consultation of citizens, once every four years, at least six months before the parliamentary elections.

The concept of local self-government, defined in Article 3 of the European Charter of Local Self-Government, provides for the right and effective ability of local communities to settle and manage a great deal of public affairs in favour of the local population.

The European Charter of Local Self-Government ascertained that "the principle of local self-government has to be sanctioned by the Constitution or by domestic legislation", which determines the form of state government, thus ensuring its stability.

The Court points out that the local self-government has to be framed within the limits ascertained by the law, thus, excluding the possibility of derogation from the legal provisions and erroneous interpretation of the prerogatives of territorial-administrative units.

The consultation of citizens is provided for by Article 17.1 and 18 under the Law no. 764-XV in cases when the Parliament is entitled to solve issues on the setting up, cancellation, and modification of the status and alteration of the boundaries of territorial-administrative units, or concerning the transfer of the administrative centre.

The term "consultation of citizens" enshrined in the constitutional provisions and legal provisions quoted above, has a different judicial force, but neither the Constitution, nor the law at issue impose the mandatory conduct of the referendum.

Under the Law no. 741-XIII of 20 February 1996 the legislator approved the regulations on the manner of solving the issues on territorial-administrative organisation of the republic, pursuant to which the setting up and cancellation of the territorial-administrative units, according to which the establishment and alteration of boundaries and other issues are within the competence of Parliament and in all cases the legislature solicited the legally sanctioned documents including the decisions passed by the general assembly of the inhabitants or the assembly of their representatives.

The status of the village (commune) and the city (municipality) endorsed through the Law no. 432-XIII of 19 April 1995, which constitutes the legal basis for establishing the status of the territorial-administrative unit, allows for local referenda, as well as the assembly of citizens, as a means of consulting the inhabitants of communes and municipalities on problems of particular interest.

The aforesaid legal regulations are fully in compliance with the provisions under the European Charter of Local Self-Government, which in Article 5 lay down that for any alteration of boundaries of local territories, the respective local communities have to be consulted first, possibly by means of a referendum, if the law provides for it.

To this end, taking into account the aforementioned provisions of the European Charter, one can draw the conclusion that if the legal norms do not provide for a mandatory referendum, there can be organised other forms of consulting the citizens.

The Court ascertained that the Law on the territorial-administrative organisation of the republic does not infringe upon the constitutional provisions invoked by the applicants, excepting the findings listed below. Parliament, being the supreme representative body of the people, through the exclusive competence assigned to it by the Constitution, regulates by an organic law the organisation of local administration, the territory and the general regime on local self-government.

Simultaneously, the Court appraises as being justified the arguments invoked in both complaints, by which are called in question the provisions of Article 17.1 under the Law no. 764-XV, pursuant to which the setting up, cancellation and modification of the status of territorial-administrative units can take place only once in four years, with at least six months before the parliamentary elections.

It is important to mention that the operation of amendments in the status of a territorial-administrative unit is also determined by the conditions listed of Articles 17.2, 17.3 and 18 of the contested law.

The Court states that in cases when the minimum number of the inhabitants in the territorial-administrative units, the economic development level or the geographic position (due to natural calamities) have been changed or the boundaries of these territorial units have been altered, the local communities and the Parliament cannot be limited in time for initiating the settlement of these issues which cannot be postponed and on which the autonomous

existence of the respective territorial-administrative units depends.

In this context, the Constitution does not prevent the Parliament from adopting, amending or abrogating the organic laws within six months before the expiration of its mandate or at the established term, before the parliamentary elections.

In the same framework, the Court asserts that the limitation in time of the right assigned to the Parliament for performing the appropriate modifications in the Law on the territorial-administrative organisation of the republic also does not comply with Article 74.3 of the Constitution, which lays down that the draft laws submitted by the Government, as well as the legislative proposals expressed by members of Parliament and being accepted by the Government, are taken into consideration by the Parliament according to the manner and priorities established by the Government, including emergency proceedings.

Exercising its power of constitutional jurisdiction enforcement, the Court ruled as constitutional the Law no.764-XV on the territorial-administrative organisation of the Republic of Moldova of 27 December 2001, excepting the phrase "... once in four years, with at least six months before the parliamentary elections" under Article 17.1.

Languages:

Romanian.



Norway Supreme Court

There was no relevant constitutional case-law during the reference period 1 January 2002 – 30 April 2002.



Poland

Constitutional Tribunal

Statistical data

1 January 2002 – 30 April 2002

I. Constitutional review

Decisions:

- Cases decided on their merits: 13
- Cases discontinued: 1

Types of review:

- *Ex post facto* review: 12
- Preliminary review: 2
- Abstract reviews (Article 22 of the Constitutional Tribunal Act): 12
- Courts referrals (points of law), Article 25 of the Constitutional Tribunal Act: 2

Challenged normative acts:

- Cases concerning the constitutionality of statutes: 13
- Cases on the legality of other normative acts under the Constitution and statutes: 1

Decisions:

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

Precedent decisions: 1

II. Universally binding interpretation of laws

- Resolutions issued under Article 13 of the Constitutional Tribunal Act: 14
- Motions requesting such interpretation rejected: 0

Important decisions

Identification: POL-2002-1-001

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 07.05.2001 / **e)** K 19/2000 / **f)** / **g)** *Dziennik Ustaw*

Rzeczpospolitej Polskiej (Official Gazette), 2001, no. 43, item 489; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 4, item 82 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

4.10.8 **Institutions** – Public finances – State assets.
5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Public institution, economic activity, constitutional regime.

Headnotes:

The provisions of the Remuneration Act, which apply to persons employed in certain government or self-government units having a legal personality and carrying out economic activity, are concordant with the principles of economic freedom, protection of property, and equality.

Summary:

The case was examined by the Tribunal as a result of a motion filed by the Committee of Polish Employers, which claimed that the provisions in question, in particular, breached the principle of economic freedom laid down in the Constitution.

In the Tribunal's opinion, the principle of economic freedom does not apply to the same extent to all subjects which perform an economic activity. It results from the Constitution, that the rule relates to the activity of natural persons and private entities, which have a right to decide independently on their participation in "economic life", including the scope and forms of this participation.

This rule of freedom cannot be applied in relation to the government and other public institutions, whose direct participation or indirect influence on the economy cannot be excluded but whose activity should be governed by different constitutional regime from that applying to the activity of private entities. The status of so-called "public economic subjects" is different, by its nature, from that of private subjects. The constitutional principle of freedom of economic activities does not, in general, apply to the activities of the government itself. It affects such activities, however, by prohibiting the development of the public sector over constitutionally justified needs and

obliging the public sector to obey the rules of free competition in the economy and not to breach the rights of private economic entities.

Since public authorities or persons representing the State Treasury do not act in their own name but in the name of the State Treasury, Parliament could impose on them an obligation to enforce certain provisions. Such persons and authorities manage public assets and have only as much freedom as the provisions of the relevant Acts together with relevant regulations and guidelines provide for.

In the Tribunal's opinion, the provisions of the Constitution give explicit grounds for different treatment by Parliament of economic activities not carried out using private property. They give grounds for a certain differentiation by an Act, according to whether the subject belongs to the public or private sector. The Tribunal emphasised that the public sector cannot be privileged in comparison with private subjects. However, taking into account its other functions, certain limitations and restrictions, which from a point of view of competitiveness could be seen as extra burdens, can be introduced.

Cross-references:

- Decision of 04.04.1995 (K 10/94).

Languages:

Polish.



Identification: POL-2002-1-002

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 29.05.2001 / **e)** K. 5/2001 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2001, no. 57, item 601; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 4, item 87 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

2.3.6 **Sources of Constitutional Law** – Techniques of review – Historical interpretation.

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

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

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

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

Keywords of the alphabetical index:

Housing, co-operative / Property, acquisition, condition / Occupancy, right / Property, collective.

Headnotes:

It is an unlawful limitation of the constitutionally guaranteed right to property to impose an obligation on a housing co-operative to transfer, upon a request of a member of the co-operative, and on preferential conditions, the ownership of a property to that member if, at the date of coming into force of the relevant act, he or she was entitled to a co-operative occupancy right to such premises.

The right of the individual to step out of a social organisation, and the freedom to create a new association, prevail over the interests of the organisation itself. In this sense, the right of the members of a housing co-operative to create a new co-operative constitutes a direct implementation of the freedom of association guaranteed by the Constitution.

Summary:

The Constitutional Tribunal was seized on the constitutionality of a) the provisions of the Act on Housing Co-operatives ("the Act") relating to the conditions of the purchase of property by a person entitled to a co-operative occupancy right to such property, and b) the provisions of the Act relating to a division of an existing co-operative by creating a new co-operative by some of its members.

The Constitutional Tribunal noted that the purpose of housing co-operatives is to satisfy the housing needs of their members and their families. Their role is to realise the Government's tasks of implementing a policy of satisfying the housing needs of citizens, and supporting their efforts to acquire their own premises. Protection of the co-operative's property as collective property is justified only if it serves to protect the rights to which members of the co-operative are entitled.

As regards the provisions imposing on a housing co-operative – upon a request by one of its members – an obligation to dispose of a part of its property by

transfer, on preferential conditions, of ownership of property to that member if, at the date of coming into force of the Act, he or she was entitled to a co-operative occupancy right to such premises, the Constitutional Tribunal considered that it constitutes an interference in the ownership right of the housing co-operative. Such limitation of the right of ownership does not have a sufficient constitutional justification and does not meet conditions of the acceptable restrictions of human rights and freedoms provided for by the Constitution. The Tribunal emphasised the differences between ownership and occupancy rights. The creation of an ownership right to premises was closely connected with the terms and conditions of the social and economic system in force in Poland between 1944 and 1989. This was the so-called "handicapped", or "incomplete" ownership right which had some features in common with full ownership rights but which could be subject to severe limitations.

However, this kind of justification could not be used in relation to co-operative occupancy rights to premises. It was underlined that in no circumstances is this right similar to full ownership rights; it refers in some of its features, however, to other legal titles to premises, and in particular to a type of leasehold relationship. An assumption that a member of a co-operative entitled to the co-operative occupancy right to premises can acquire a proprietary right to the premises, even though the amount paid by him to the co-operatives does not reflect the costs of construction and the market value of the premises, signifies not only that the co-operative has been formally deprived of some of its property, but results in a decrease of the economic value of the assets of the co-operative belonging to all its members. A preferential acquisition of ownership over the assets of the housing co-operative, constituting private property in a sense defined by the Constitution, in no way can go further than the one relating to assets of public subjects.

As concerned the provisions on division of the housing co-operatives by the creation of a new co-operative by some of its members, the Tribunal considered that rights and freedoms guaranteed by the Constitution to an individual should prevail over rights and freedoms of a group, which exist due to the membership of citizens and other persons under a regime of proportional representation. It was also acknowledged that even though none of the provisions of the Constitution refer directly to the co-operatives, their creation and activities are covered by the constitutionally guaranteed freedom of association.

The Tribunal was of the opinion that while analysing the provisions concerning the division of housing co-operatives, the historical aspects (namely the realities

of the functioning of co-operatives before 1990) should also be taken into account. Before the 1990's, the rule of voluntary accession to a particular housing co-operative was factually and legally restricted, and creation of a new co-operative was dependent on political factors. These historical issues are important also from a constitutional point of view. The legislator has the right to take measures susceptible to reverse the effects of infringements of human rights and freedoms that took place in the past.

In the light of the above-mentioned considerations, the Constitutional Tribunal decided that the provisions of the Act relating to the conditions of purchase of the ownership to premises, by a person entitled to a co-operative occupant right to such premises are discordant with the protection of the constitutional right to property and with the protection of other proprietary rights.

On the other hand, the provisions of the Act relating to division of an existing co-operative by creating a new co-operative by some of its members, are entirely consonant with the constitutionally guaranteed freedom of association.

Cross-references:

- Decision of 12.01.1999 (P 2/98), *Bulletin* 1999/1 [POL-1999-1-002];
- Decision of 25.02.1999 (K 23/98), *Bulletin* 1999/1 [POL-1999-1-005].

Languages:

Polish.



Identification: POL-2002-1-003

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 07.06.2001 / **e)** K 20/2000 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2001, no. 64, item 658; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 5, item 119 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.5 **General Principles** – Social State.

4.8.2 **Institutions** – Federalism, regionalism and local self-government – Regions and provinces.

4.8.7.2 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects – Arrangements for distributing the financial resources of the State.

4.8.7.3 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects – Budget.

Keywords of the alphabetical index:

Fund, municipal / Fund, environmental protection / District, income, disposal, right.

Headnotes:

It is not unconstitutional to limit the right of a self-governing environmental protection fund to dispose its surplus income. This applies only under certain conditions and provided that the main income of the fund makes the effective performance of public tasks related to environmental protection possible.

Summary:

The Constitutional Tribunal examined the case following a joint petition introduced by a number of committees in certain municipalities. The case claimed the unconstitutionality of the obligation of municipalities and districts (*poviats*), having environmental protection funds whose income was about 15 times bigger than the average national income *per capita* (calculated for municipalities and *poviats* accordingly) in the preceding calendar year, to transfer their surplus income to a relevant regional (*viowodship*) fund, established by the Environmental Protection Act.

The Tribunal noted that the relevant provisions of the Environmental Protection Act do not make the performance of municipalities' tasks in respect of environmental protection impossible. Furthermore, it considered that it had not been proved, in the present case, that the procedures limiting the extent of measures of the environmental protection funds in municipalities and *poviats* infringes the rules of division of public measures provided for by the Constitution.

While analysing a charge that these provisions breached social justice rules, the Tribunal ascertained that these rules do not exclude the possibility of prescribing a certain level of municipalities' income and to oblige municipal and *poviat* funds to transfer any surplus exceeding a fixed level. On the contrary, it was considered that these rules constitute an

important factor, which has to be taken into account while appraising the constitutionality of legal provisions providing for a differentiation of self-government units in the area of public finances.

Therefore, the Tribunal concluded that the obligation which compelled municipalities and *poviats* with environmental protection funds whose income was 15 times bigger than an average national income *per capita* in a preceding calendar year, to transfer surplus income to a relevant *viowodship* fund, was concordant with the rules of social justices and the rule of financial independence of local government and the rule of public authorities acting on the grounds and within limits of law stated in the Constitution.

Cross-references:

- Decision of 04.10.1995(K 8/95);
- Decision of 24.03.1998 (K 40/97), *Bulletin* 1998/1 [POL-1998-1-006];
- Decision of 16.03.1999 (K 35/98), *Bulletin* 1999/1 [POL-1999-1-006].

Languages:

Polish.



Identification: POL-2002-1-004

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 06.09.2001 / **e)** P 3/2001 / **f)** / **g)** Conclusion of a judgment: *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2001, no.101, item 1113; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzędowy* (Official Digest), no. 6, item 163 / **h)** CODICES (Polish).

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:

Proceedings, costs, reimbursement / Proceedings, discontinuation.

Headnotes:

It is contrary to the principle of equality, guaranteed by the Constitution, not to provide for the possibility for reimbursement of the costs of the proceedings of the compliant in case of discontinuation of the proceedings following the acceptance of the claim by the administrative authority that has issued a disputed decision.

Summary:

The Tribunal examined the case following a legal question introduced by the Highest Administrative Court.

According to the provisions of the Act on the Highest Administrative Court (the Act), a judgment or a decision of the Court should contain a decision on the costs of the proceedings. In the absence of such a decision, the compliant has the right to apply for supplementing the judgment or the decision in this sense. On the other hand, the Act does not provide for an adjudication on the costs of the proceedings of an authority being the other party to the proceedings.

Indeed, in accordance with the Act, the costs of the proceedings may only be reimbursed to the compliant, and that only if the Court decided on the merits of the case. Such possibility does not exist in case of a discontinuation of the proceedings.

The Constitutional Tribunal considered that the rules on calculation of the costs of the proceedings should be analysed with reference to the procedure before the Court. After receiving a claim, the Court sends it to the authority which issued a decision that is the subject of the claim, with a request to react within 30 days from the delivery of a copy of the claim. After receiving the response of the concerned authority, the Court will continue with the proceedings and decide to accept or to dismiss the complaint.

It is also possible for the Court to take a decision on discontinuance of the proceedings as a result of admitting the charges of the complaint by the authority, which has issued the contested decision.

The Tribunal noticed that the questioned provision providing that a complaining party has only right to reimbursement of the costs of the proceedings if the Highest Administrative Court issued a substantial

decision in a case, is regularly applied by the Supreme Court and the Highest Administrative Court.

It considered that the principle of equality means, amongst others, that every person has an equal right of access to courts, and to honest consideration of his/her case. According to the current wording of the challenged provision and the court's practice, in a situation where – as a result of administrative authority's decision – was necessary for a person to file an appeal to the Highest Administrative Court and when the said authority acknowledged the claim, the person who beared the costs of the proceedings cannot be reimbursed these costs even though the decision was defected.

In the Tribunal's opinion, differentiation of persons appealing to the Highest Administrative Court upon the fact whether it was the Court or the administrative authority that has acknowledged their case is unacceptable. It is practice of the Tribunal, that in relation to every examined provision, determines which criteria constitute grounds for the differentiation, in order to decide whether the differentiation is justifiable.

There are no doubts, that it has no difference for the claimants whether the claim is acknowledged by the Highest Administrative Court or by the administrative authority whose actions or refraining from actions have been subject of an appeal. In such a case, a different treatment of persons, to which the examined provisions relate to should be acknowledged as discordant with the principle of equality guaranteed by the Constitution.

Cross-references:

- Decision of 09.02.1999 (U 4/98).

Languages:

Polish.

*Identification:* POL-2002-1-005

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 03.10.2001 / **e)** K 27/2001 / **f)** / **g)** *Monitor Polski* (Official Gazette), 2001, no. 45, item 739; *Orzecznic-*

two Trybunalu Konstytucyjnego Zbiór Urzędowy (Official Digest), 2001, no. 7, item 209 / **h**) CODICES (Polish).

Keywords of the systematic thesaurus:

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

3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.

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

Keywords of the alphabetical index:

Criminal law / *Vacatio legis*.

Headnotes:

The current criminal law doctrine unanimously accepts the approach according to which “in criminal law the rule *lex retro non agit* has the nature of a constitutional rule resulting from the principle of democracy”. In addition to this rule, the Constitution also provides for a rule *nullum crimen* and *nulla poena sine lege*.

Determining an anterior calendar date as the date of the coming into force of an act breaches the rule of citizens' trust in the government's actions, and the rule of the non-retrospective effect of laws.

Summary:

The Constitutional Tribunal examined the case as a result of a motion filed by the President of the Republic of Poland, who claimed that a legal act which was passed on 6 July 2001 and was supposed to be binding from 1 July 2001 violated the rule of the non-retrospective effect of law.

The Tribunal was of the opinion that if the legislator decides to determine a calendar date for the entry into force of an act, it should also predict a time required not only for further steps of the process of the legislation, including the publication of the act, but also for ensuring a sufficiently long *vacatio legis*.

In its earlier decisions, the Tribunal adopted a uniform understanding of the prohibition of retroactive force of legal norms. It is understood as “... one of the most important elements of the principle of democracy”. “... The rule of citizens' trust in the government's actions requires that no legal norms which would relate to actions which took place before the coming into force of a new norm and with which the law did

not associate any legal consequences introduced by the new norms, should be adopted ...”.

The prohibition of retrospective effect in criminal law expresses a principle that an action can only be treated as a crime if such action was prohibited by an act in force at the time of its commission. Therefore, in order to constitute grounds for criminal liability for an action, an act must come into force before the action has been committed.

The Constitutional Tribunal therefore concluded that provisions of the Act on Detective Services, providing for the retroactive effect of the Act, were discordant with the rule of constitutional democracy and the rule of non-retrospective effect of law.

Cross-references:

- Decision of 28.05.1986 (U 1/86);
- Decision of 22.08.1990 (K 7/90);
- Decision of 30.11.1998 (K 1/88);
- Decision of 21.11.1999 (K 22/99).

Languages:

Polish.



Identification: POL-2002-1-006

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 15.10.2001 / **e)** K 12/2001 / **f)** / **g)** Conclusion of a judgment: *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2001, no. 122, item 1349; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 7, item 213 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.5 **General Principles** – Social State.

3.16 **General Principles** – Proportionality.

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

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

Keywords of the alphabetical index:

Income, criteria for determining / Welfare benefit, discrimination, based on the source of the income.

Headnotes:

Certain provisions of the Social Welfare Act are in breach of the principles of equality and social justice insofar as they make it impossible for certain persons performing economic activity and persons assisting them to qualify for social welfare benefits, whereas other persons, not carrying an economic activity would be entitled to such benefits.

Summary:

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

The Social Welfare Act grants persons and families whose income per person in a family does not exceed the limits provided for in the Act a right to financial benefits from welfare funds. The relevant income is defined as the sum of monthly incomes of the persons in the family from the month preceding the month in which the application was made, from which a monthly instalment for income tax and the social security benefits are deducted. This definition of the relevant income does not apply, however, to persons carrying out economic activity. In relation to those persons, the amount mentioned in a statement (never less than 60% of the average monthly remuneration in the preceding quarter) is deemed to be their relevant income. As a result, there is a smaller category of subjects within a group of subjects entitled to social welfare benefits. In the case of those subjects, the granting of benefits depends not on the actual amount of the income but on the source of the income i.e. carrying out an economic activity.

The Tribunal decided that there is no justification for the reference, in the provisions examined, to the method of determining income in relation to persons performing economic activity used in the Social Security Act. The nature and functions of social welfare benefits and family allowances do not correspond to the functions and nature of the social security system.

In the Tribunal's opinion, a deviation from the rule of equal treatment of persons used in Social Security and Family Allowances Act, and which deviation is caused by the automatic transfer of legal provisions used in the social security system, into provisions providing for the granting of this kind of social welfare benefit is not of a relevant nature. It does not have a

direct connection with a purpose and general content of the provisions of the Social Security Act and the Family Allowances Act and also does not implement these Acts. The provisions examined result in a situation in which some persons, who would be granted support if they were not performing economic activity, may be left aside the social security and family allowances systems. The method of determining income introduced in relation to persons performing economic activity also does not have a proportional nature.

The Tribunal mentioned that the differentiation in the legal situation of similar entities introduced in the challenged provisions is also not in any way connected with other constitutional rules or norms that could justify the different treatment of the above-mentioned subjects.

Cross-references:

- Decision of 18.01.2000 (K 17/99);
- Decision of 12.05.1998 (U 17/97).

Languages:

Polish.

*Identification: POL-2002-1-007*

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 30.10.2001 / **e)** K 33/2000 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2001, no. 129, item 1448; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 7, item 217 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

- 3.5 **General Principles** – Social State.
- 3.10 **General Principles** – Certainty of the law.
- 3.12 **General Principles** – Clarity and precision of legal provisions.
- 3.16 **General Principles** – Proportionality.
- 3.18 **General Principles** – General interest.
- 5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Premise, institutional / Property, transfer / Right, essence, breach.

Headnotes:

The Act on the Change of Laws on Transfer of Institutional Premises by Governmental Enterprises establishes an obligation on the owner of institutional premises, acquired before the Act entered into force, to transfer the ownership of the premises to a person authorised to live in, and actually living in, the premises on the day of its acquisition, upon his request and the price – as paid at the acquisition must be increased by the value of any improvements which have been carried out.

Such a limitation of the right to property represents an excessive interference in the right, leads to a breach of its nature, and cannot be considered necessary for enforcement of its constitutional aims.

Summary:

The case was examined by the Tribunal as a result of joint motions of the Ombudsman and the committee of one of the Polish cities claiming the unconstitutionality of the obligation for the owner of institutional premises, which he acquired before the entering into force of the act, upon a motion of a person authorised to live and living in the premises on the day of its acquisition, to transfer the ownership of the premises to this tenant for a price. This price was the price paid at the acquisition, increased by a value of improvements carried out.

The Constitutional Tribunal considered that the disputed provisions were defective, incomplete, largely undetermined and unclear, and did not allow for a precise determination of the regulation at issue. This constituted a breach of the legislation. Furthermore, the provisions were considered at odds with the rules of social justice and the rule of the protection of property.

Cross-references:

- Decision of 06.05.1998 (K 37/97), *Bulletin* 1998/2 [POL-1998-2-009];
- Decision of 24.10.2001 (SK 22/01).

Languages:

Polish.

*Identification:* POL-2002-1-008

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 08.11.2001 / **e)** P 6/2001 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2001, no. 131, item 1478; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 8, item 248 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

5.1.1.4.2 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Incapacitated.

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

5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right to participate in the administration of justice.

Keywords of the alphabetical index:

Alcoholism, treatment / Institution, treatment, discontinuation / Decision, right.

Headnotes:

It is a violation of the constitutionally guaranteed right of access to a tribunal, to exclude the right of a person under a rehabilitation order to seize a court and claim for a change of the decision describing the type of rehabilitation treatment institution which he has been forced to attend.

Summary:

The case was examined by the Tribunal as a result of a legal question made by the Provincial Court's Family and Minors Department, regarding the constitutionality of some provisions of the Act on Counteracting Alcoholism.

The Tribunal noted that the right to a court comprises the following:

1. the right of admission to a court, i.e. the right to commence proceedings before the court;
2. the right to shape the proceedings in accordance with the requirement of justice and openness and

3. the right to a court judgment, i.e. the right to obtain a binding court decision in the relevant case.

Taking into account its previous decisions, the Tribunal considered that there was no doubt that to deprive somebody under a rehabilitation order of his right to file a motion with a court for a change of the decision describing the type of rehabilitation institution, represents a violation of his right to a court in one of its crucial elements – the right of admission to the court.

Cross-references:

- Decision of 09.06.1998 (K 28/97), *Bulletin* 1998/2 [POL-1998-2-013];
- Decision of 16.03.1999 (SK 19/99), *Bulletin* 1999/1 [POL-1999-1-007].

Languages:

Polish.



Identification: POL-2002-1-009

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 12.11.2001 / **e)** P 2/2001 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2001, no. 133, item 1507; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 8, item 249 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.

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

Keywords of the alphabetical index:

Fund, social security / Claim, filing, right, preservation / Pension, disability, right.

Headnotes:

In conformity with the principle of equality, all addressees of a legal norm having the same “relevant

feature”, must be treated according to the same rules, and without any discrimination or favouritism.

Summary:

The Tribunal examined the case as a result of a legal question made by the District Court’s Labour and Social Security Department. The question concerned the norm introducing a one-year term for vindication of claims by members of a family of a deceased person, who had filed a motion for granting social security benefits; after a lapse of this term these claims expire. The applicant sustained that these provisions violate the equality principle and the constitutional right of protection of family life.

The Tribunal recalled that the equality rule has often been the subject of its decisions. It noted that the principle of equality means that in order to appraise a specific regulation in the light of the equality rule, it is necessary to ascertain whether the subjects are similar or whether they differ from each other, as well as how similar they are, and whether the situation of the subjects differentiated in a groundless way.

The Tribunal decided that there was no breach of the equality rule since an individual and an authority (public body) do not have a common “relevant feature” which make the differentiation of their situation admissible and justified. The Tribunal also observed that the applicant did not prove the existence of a link between the constitutional rights – a guarantee of protection of family life, private life, honour, and good name, and the disputed provision concerning the expiry of the relevant claims.

It was therefore decided that provisions of the Act on Pensions and Disability Payments from the Social Security Fund introducing a twelve month period for vindication of unaccomplished claims, and providing that after a lapse of this period the claims will expire, conform to the constitutional equality rule as well as to the constitutional right of protection of family life.

Cross-references:

- Decision of 09.03.1988 (U 7/87).

Languages:

Polish.



Identification: POL-2002-1-010

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 28.11.2001 / **e)** K 36/2001 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2001, no. 138, item 1567; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 8, item 255 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Parliament, member, activity / Immunity, scope / Parliament, member, immunity / Proceedings, criminal.

Headnotes:

Parliamentary immunity grants to Members of Parliament certain privileges over other individuals. However, this immunity is not to be considered as an exemption from the rule that every person committing a crime is subject to a criminal liability, whose enforcement is to be made by prosecutors and, finally, by the independent courts.

The legal provisions relating to immunity must be interpreted according to the rules of interpretation of exemptions that, amongst others, exclude the possibility of using the so-called “expanding interpretation”.

Summary:

The Tribunal examined the case as a result of motion filed by the Ombudsman claiming that the provisions of the Act on Performance of the Deputies’ and Senators’ Duties requiring the consent of one of the chambers of Parliament for the continuation of criminal proceedings initiated against the person before he was elected a deputy or senator, result in an inadmissible and unconstitutional extension of the scope of parliamentary immunity.

The Constitutional Tribunal noted that the nature and the need of the immunity go as far as it is necessary for the sufficient activities of Parliament as a body and a proper performance of the deputy’s or senator’s mandate as a member of this body. There are, however, no constitutional grounds to consider parliamentary immunity as a measure granting

exemption from punishment to Members of Parliament who breach the law.

It was decided that the disputed provisions comprise norms different to the constitutional norms describing the scope of the formal immunity. This difference goes so far that there is no possibility for the simultaneous use of both provisions because they are mutually exclusive. The differences of the compared regulations go so far that they contradict each other and this contradiction cannot be removed by interpretation.

The Tribunal therefore concluded that they are discordant with the scope of the formal immunity of deputies and senators provided for in the Constitution, and contrary to the constitutional rule of justice.

Cross-references:

- Decision of 28.01.1991 (K 13/90);
- Decision of 08.12.1999 (SK 19/99), *Bulletin* 1999/3 [POL-1999-3-030].

Languages:

Polish.



Portugal

Constitutional Court

Statistical data

1 January 2002 – 30 April 2002

Total: 194 judgments, of which:

- Preventive review: 3 judgments
- Abstract *ex post facto* review: 10 judgments
- Appeals: 109 judgments
- Complaints: 37 judgments
- Electoral disputes: 30 judgments
- Political parties and coalitions: 3 judgments
- Property and income declarations: 1 judgment
- Political parties' accounts: 1 judgment

Important decisions

Identification: POR-2002-1-001

a) Portugal / b) Constitutional Court / c) Plenary / d) 31.01.2002 / e) 36/02 / f) / g) *Diário da República* (Official Gazette), 45 (Serie I-A), 22.02.2002, 1458-1466 / h) CODICES (Portuguese).

Keywords of the systematic thesaurus:

- 1.3.2.1 **Constitutional Justice** – Jurisdiction – Type of review – Preliminary review.
- 1.3.5.6 **Constitutional Justice** – Jurisdiction – The subject of review – Presidential decrees.
- 3.3 **General Principles** – Democracy.
- 3.10 **General Principles** – Certainty of the law.
- 4.4.1 **Institutions** – Head of State – Powers.
- 4.4.1.2 **Institutions** – Head of State – Powers – Relations with the executive powers.
- 4.5.6.1 **Institutions** – Legislative bodies – Law-making procedure – Right to initiate legislation.
- 4.6.4.3 **Institutions** – Executive bodies – Composition – End of office of members.

Keywords of the alphabetical index:

President, decree, legal effects / President, decree, publication, Official Gazette / Government, resignation, request, effects / Draft legislation, lapse / Institutional solidarity, principle.

Headnotes:

According to legal theory, in order to have legal effects on third parties, all decisions by the President of the Republic must take the form of a “Presidential Decree” issued as a document in its own right.

According to the Constitutional Court, the decree is also the natural and constitutionally appropriate form for a measure by which the President of the Republic “officialises” the resignation of the Government as accepted by him when tendered by the Prime Minister.

The date on which the government's resignation (at least in relations between the organs of sovereignty) takes legal effect is the date when the causes occur.

In accepting the resignation tendered by the Government, the President of the Republic takes an option regarding the country's political future, thereby accepting, at least implicitly, that current political circumstances (which in the case in point arose as a result of the local elections of 16 December 2001 which principally prompted the government to tender its resignation) require a change of government and the “withdrawal of legitimacy” from the government which is no longer able fully to carry out its programme (the government then being restricted under the terms of Article 186.5 of the Constitution to a caretaker role).

Recognition of this fact occurs at the precise moment when the President of the Republic pronounces the decision to accept the resignation tendered by the Government. This same decision must be formally established by signature of the decree on the same date. The date of signature, as the date of acceptance of the resignation (which need not necessarily be the same as the date when the resignation was tendered), accordingly constitutes a choice and a sign. It is understood that the government's resignation takes effect (primarily for the Government itself) as from that date.

Reasons of legal certainty, which afford protection for third parties by requiring those who have to observe rules of conduct to enable knowledge to be had of the law, and in which the publication of measures is of very special importance, cannot be relied upon in this context. The certainty that needs to be defended here is that the organs of sovereignty exercise their powers as long as they enjoy democratic legitimacy.

Institutional solidarity and co-operation, political fair play between the organs of sovereignty (which are indispensable conditions for the proper functioning of democratic institutions) necessarily presuppose types

of political relations between those organs which do not require prior knowledge of measures through circulation of the Official Gazette (*Diário da República*) in which they are published – at least as regards measures whose legal and political effects are constitutionally important for the exercise of their powers (the fundamental issue here being the exercise of power which is constitutionally proper only if it emanates from organs that retain their democratic legitimacy). Institutional co-operation and solidarity would be jeopardised by concealing relationships in an area which is necessarily public in a democratic state ruled by law.

Lastly, the Court held that the Government's resignation must take effect, in relation to the government or the Assembly of the Republic, as from the date when the decision accepting the resignation tendered by the Government (17 December 2001) was pronounced.

Summary:

The President of the Republic requested prior appraisal of the constitutionality of the provision of a single article of Decree no. 185/VIII of the Assembly of the Republic, which changed the system of special aid for the repayment of public debt of the Autonomous Regions of the Azores and Madeira. This decree was passed to the President's office on 11 January 2002 for promulgation in the form of an organic law. This legislative modification was part of the parliamentary legislative procedure initiated by a proposal tabled by the government and adopted during the parliamentary sitting on 20 December 2001.

However, the government was no longer in office, the President of the Republic having accepted the resignation tendered by the Prime Minister. It is true that Presidential Decree no. 60-A/2001 accepting the resignation, although dated 17 December and inserted in the Official Gazette of the same day, was not circulated until 26 December 2001. However, the fact that the President had accepted the Government's resignation was public knowledge, having been publicly announced to the mass media by the President's office.

The question to be answered was: from what point in time is the government to be regarded as no longer in office?

Under Article 119.2 of the Constitution, the measures which it lists, including presidential decrees, are without legal effect unless published in the Official Gazette. This would at first sight seem to imply that the presidential decree in question could not take effect until after its publication in the Official Gazette.

It is also understood that "publication" means actual publication in the form of circulation of the Official Gazette. There is, moreover, undisputed case-law according to which measures subject to publication cannot take effect until the Official Gazette, in which they are published, is actually circulated (made available to the public). However, all relevant argument has focussed mainly on the publication of legislative measures (laws and measures with generic content), the main concern being to preserve legal certainty.

Article 195.1 of the Constitution, as amended in 1982, specifies the circumstances that "entail the government's resignation". Unlike the provisions of Article 195.2 (which specifically provides that the President of the Republic may not dismiss the government unless it is absolutely necessary for the proper functioning of the democratic institutions and after consulting the State Council), in none of the situations provided for in Article 195.1 is resignation initiated by the President of the Republic. By the use of the term "entail", Article 195.1 makes it clear that the government's resignation is determined "*opus legis*" by one of the circumstances it enumerates.

It may accordingly be argued that the legally important date is that on which the President effects the political measure of accepting the resignation tendered by the Prime Minister, thereby, according to the terms of Article 195.1 of the Constitution, making the Government's resignation effective. In this case, the Government would have ceased to be in office on 17 December, which in this instance was also the date of signature of the decree and of the Official Gazette in which it was published. But it may also be argued that the government does not cease to be in office until circulation of the Official Gazette which publishes the presidential decree certifying the President's acceptance of the resignation tendered by the Prime Minister. In that case, the Government would not have ceased to be in office until 26 December.

These two hypotheses are crucial to the constitutionality of the measure under examination. If the legally important date is taken to be that of actual acceptance of the resignation tendered, viz 17 December, then according to Article 167.6 of the Constitution, the Bills tabled by the government in parliament lapse as from that date.

Accordingly, the question raised by the President was, firstly, at what point in time must the government be deemed no longer in office? However, this question is connected to the subject of the request for examination of constitutionality, viz a measure tabled by the government and adopted by the parliament on

20 December 2001, from which it follows that the answer required is: when does the government's resignation take effect in relation to the legislative process initiated by the proposal in question, having regard to the provisions of Article 167.6 of the Constitution (whereby bills lapse upon the government's resignation). In its judgment, the Court held that the government's resignation (at least as regards relations between organs of sovereignty) must take effect as from the date when the causes provided for in Article 195.1 of the Constitution occur.

The time of the government's resignation, and hence also that of the lapse of the bills tabled in parliament, having thus been determined, it remained to be decided whether their lapse legally and constitutionally affected the measure in question. The Constitutional Court held that when the bill was passed in the parliament sitting of 20 December 2001, it had already lapsed (on 17 December 2001) by reason of the government's resignation. In conclusion, the Court decided that parliamentary Decree no. 185/VIII is unconstitutional because it is in contradiction with Article 167.6 of the Constitution.

Languages:

Portuguese.



Identification: POR-2002-1-002

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 08.02.2002 / **e)** 65/02 / **f)** / **g)** *Diário da República* (Official Gazette), 51 (Serie II), 01.03.2002, 3997-4004 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.

1.3.2.1 **Constitutional Justice** – Jurisdiction – Type of review – Preliminary review.

1.3.4.2 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between State authorities.

1.3.5.10 **Constitutional Justice** – Jurisdiction – The subject of review – Rules issued by the executive.

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

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

3.18 **General Principles** – General interest.

4.4.1.1 **Institutions** – Head of State – Powers – Relations with legislative bodies.

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

Keywords of the alphabetical index:

Necessity, strict, measure / Public affairs, management / Government, resignation, powers / Government, legislative measure, strict necessity.

Headnotes:

Measures taken by the Government after its resignation are naturally subject to scrutiny by the competent authorities. One of the steps in such scrutiny will be to verify whether the constitutional criterion of strict necessity is satisfied, whether it be political scrutiny effected by the President of the Republic, who may use his veto, or legal scrutiny involving the Constitutional Court.

The government must show the strict necessity of the legislative measures it approves, failing which it cannot demonstrate compliance with the condition for exercising the corresponding power. Both the explanatory memorandum and subsequent scrutiny must deal with two aspects: firstly, the objective claimed by the government, in relation to which the question of urgency will be of considerable importance; secondly, the actual measure approved for the purpose of achieving that objective. In this context, the explanatory memorandum and scrutiny thereof must concentrate on the question of appropriateness (which is now the material reference).

Since the scrutiny exercised by the Constitutional Court – in this instance preventive scrutiny of provisions approved by the government – is of a legal nature, it is necessary to specify what it consists of. In other words, it must be determined, in relation to the very vague concept of strict necessity, where the Constitutional Court's jurisdiction lies. The diminishment of the government's legislative powers does not entail transfer of the Constitutional Court's powers to the sphere of political options.

This observation applies to scrutiny both of the objective and of the choice of measure for achieving it.

Where scrutiny of the objective is concerned, the Constitutional Court must confine itself to ascertaining any incongruity or clear lack of foundation in the reasons given for the urgency of the measure – considering them from an objective point of view, and not simply that of the policies and programme defined

by the government which is no longer in office. In relation to that objective, it must consider whether there is any manifest discrepancy between the aim pursued and the measure proposed. It cannot, for example, save in the event of an obvious error, reject the legislator's judgment as to the probability of attaining the objective, particularly when that judgment involves mainly technical assessments. Otherwise, the Constitutional Court would be encroaching on the legislator's (in this case, the government's) preserve by venturing into the sphere of criticism of political options.

Lastly, in cases where there is a legal connection between an objective and a means, the reasons put forward by the government can be scrutinised by the Court as subjects falling within its jurisdiction.

Summary:

The President of the Republic asked the Constitutional Court for a preliminary examination of the constitutionality of the provisions of various articles of a government decree which were possibly contrary to the Constitution with regard to the government's departure from office, as laid down in Article 186.5 of the Constitution ("... after its resignation, the government shall confine itself to measures strictly necessary for the management of public affairs"). This decree was passed to the President's office on 16 January 2002 for promulgation in the form of a legislative decree.

The President of the Republic wished to know whether the adoption of changes, whatever their merit, which the government considers important, concerning "the manner of appointment of technical management boards of hospitals and health establishments", "the membership of hospitals' technical boards" and the rules governing "hospitals' acquisition of goods and services" falls within the constitutionally recognised powers of a government after its resignation. He also affirms that it is not a question of appraising the "weighty political reasons" adduced by the government in support of the measure, but only of determining whether it must be regarded as a "measure strictly necessary for the management of public affairs".

The Prime Minister contended that none of the government proposals exceeded the powers of a government no longer in office. Firstly, because they do not constitute fundamental innovations, including only measures "to streamline hospital management (...) utilising rules already tested in the past or in current experiments". Secondly, because they "did not restrict the policy-making powers of the incoming government". Thirdly, they should be regarded as "strictly necessary for the management of public affairs" (...) because without them, in the health field the government cannot complete either the State

budget, or that of the Stability and Growth Pact for 2002-2005 (...) submitted to the European Union in December 2001". Also, to explain the strict necessity of the changes, the government refers to the importance of hospital funding in the national health service and the length of time likely to elapse before the incoming government takes office.

The question of unconstitutionality arises from the "government's resignation in consequence of the acceptance of the resignation tendered by the Prime Minister" by virtue of the presidential decree of 17 December 2001. It is naturally related to the question of the constitutional definition of the powers of a government after its resignation.

The Constitutional Court had frequently pronounced on the constitutional definition of a government's powers after its resignation, holding that that definition entailed no restriction as to the nature of the measures, but that the decisive criterion was the strict necessity of carrying them out. There is no doubt that the issue is one of the form and substance of a legislative measure. The measure in question makes a considerable change in the legal rules currently applicable to the management of hospitals and health establishments. It is accordingly necessary to determine whether the legislative measures introducing important changes in the Portuguese legal system fall within the powers of governments which have ceased to be in office.

The nature of the measure is not important for circumscribing the powers of a government after its resignation; the decisive criterion that has to be analysed is that of strict necessity. For the Constitutional Court, this concept corresponds basically to that of urgency or the impossibility of deferment. The Constitutional Court has previously stated in its case-law that the concept of strict necessity includes a margin of relative uncertainty. It follows that its definition may be inferred from two indicators: firstly, the great importance of the interests at stake, such that failure to take the measure could seriously impair the management of public affairs; secondly, the impossibility of deferment, i.e. the impossibility, without causing grave damage, of leaving it to the incoming government to resolve the problem, or of resolving it after appraisal of the same government's programme.

In conclusion, the Court decided that the provisions in question are not unconstitutional because they are not contrary to the constitutional condition whereby they must be strictly necessary in accordance with Article 186.5 of the Constitution.

The Constitutional Court held that regarding the objective which the government sought to achieve by

means of the decree – the reduction of expenditure by hospitals and health establishments, having regard to their importance in public expenditure as a whole – the constitutional requirement of strict necessity was satisfied. Similarly, it held that the urgency or impossibility of deferring the measure were also demonstrated.

Lastly, it had to be determined whether the strict necessity revealed by the measure's objective, considered in the abstract, could also be used to justify adoption of the provisions contained in the decree. In other words, it had to be determined whether the provisions were appropriate to the achievement of the stated objectives. Within the limits of the Constitutional Court's powers of appraisal in scrutinising the reasons for governments' acts after their resignation, it may be reliably concluded that the explanation provided by the government is neither incongruous nor obscure, and does not justify a finding that the measures adopted were manifestly inappropriate to the objective pursued. The Court must verify only whether they comply with the minimum parameters imposed by a general requirement of appropriateness and proportionality; no grounds were found for doubting that the measures in question complied with those parameters.

Supplementary information:

The Constitutional Court has frequently given rulings on the restriction of governments' powers after their resignation, in respect of various measures adopted in identical circumstances. The sphere of competence of an outgoing government is not defined in the original text of the Constitution, but it is dealt with in Article 186.5 of the Constitution of the 1982 revised version, which stipulates that "(...) the government shall confine itself to measures strictly necessary for the management of public affairs".

Judgment 56/84 concludes that it "was clear that the government, after its resignation, is not restricted as to the nature, form or substance of measures (it may, in the political, legislative and administrative fields, take any measures except those which are in essence incompatible with the institutionally irregular situation)". The line followed in Judgments nos. 142/85, 427/87, 2/88 and 111/88 is the same.

Languages:

Portuguese.



Romania

Constitutional Court

Important decisions

Identification: ROM-2002-1-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 20.11.2001 / **e)** 322/2001 / **f)** Decision on objections challenging the constitutionality of the provisions of Section 17.11 of Judicature Act no. 92/1992 revised, with subsequent amendments / **g)** *Monitorul Oficial al României* (Official Gazette), 66/30.01.2002 / **h)** CODICES (Romanian, French).

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.
 4.7.1.1 **Institutions** – Judicial bodies – Jurisdiction – Exclusive jurisdiction.
 4.7.4.1.1 **Institutions** – Judicial bodies – Organisation – Members – Qualifications.
 4.7.4.1.2 **Institutions** – Judicial bodies – Organisation – Members – Appointment.
 4.7.4.1.5.1 **Institutions** – Judicial bodies – Organisation – Members – Status – Incompatibilities.
 4.7.4.1.5.3 **Institutions** – Judicial bodies – Organisation – Members – Status – Irremovability.
 4.7.4.2 **Institutions** – Judicial bodies – Organisation – Officers of the court.
 4.7.5 **Institutions** – Judicial bodies – Supreme Judicial Council or equivalent body.

Keywords of the alphabetical index:

Judge, aptitude / Judge, authority / Judge, impartiality / Assistant magistrate, definition, duties / Labour dispute / Panel, composition.

Headnotes:

Justice is a state function performed by the Supreme Court of Justice and the other judicial authorities established by law, in the name of the law, and solely by judges. It is therefore not possible to assign the

power of trial or the function of determining cases to anyone but judges.

Assistant magistrates, appointed by the Minister of Justice, have the status of public servants and thus can only perform a supporting function when cases relating to labour disputes and litigation are determined by a judge. In fact they are only entitled to a consultative vote in the reaching of decisions and are not entitled to engage in any activity connected with delivery of judgment, which is set aside by the Constitution for judges alone.

Participation by assistant magistrates in the trying of certain cases, with a deliberative vote and the ability to outvote the judge, owing to the composition of the Court, is contrary to the principle of impartial justice in that these officials do not serve the law or have the guarantees of independence laid down by the Constitution (in the case of judges, immunity from dismissal and disqualification from other public office or private employment and from political party membership).

Summary:

The Constitutional Court had before it an objection on grounds of unconstitutionality to provisions of Section 17.11-13 of the Judicature Act no. 92/1992 revised, with subsequent amendments.

The submissions in support of the objections alleged that the impugned provisions instituting the office of assistant magistrates competent to try in the first instance cases relating to labour disputes and litigation in conjunction with a judge were contrary to the provisions of Articles 1.3, 51, 123, 124 and 125 of the Constitution. According to these provisions, the judge has sole competence to make rulings and have them enforced. The appointment of assistant magistrates as members of the Court with a deliberative vote is thus contrary to the principle of independence of judges, since these officials, representing the trade unions and employers' associations, are neither independent nor impartial.

Section 17.11 of the Judicature Act no. 92/1992 provides as follows:

“Cases relating to labour disputes and labour litigation shall be expeditiously tried at first instance by a court consisting of a judge and two assistant magistrates of whom one represents the employers' associations and the other the trade unions. Rulings in these cases shall be made by majority vote of the members of the Court”.

In considering the allegations of unconstitutionality, the Court made the observation that according to Article 1.3 of the Constitution Romania is a law-based state, implying *inter alia* that the state's judicial function is exercised through the agency of impartial and independent judges deferring only to the law.

As the Court further pointed out, these principles are also enshrined in Article 10 of the Universal Declaration of Human Rights and Article 6.1 ECHR.

Thus, in full consonance with the aforementioned instruments, the Constitution lays down these three principles: in Romania, justice is administered by the Supreme Court of Justice and the other judicial authorities established by law; the independence of justice above all presupposes the complete independence of judges, to secure which the judges appointed by the President of Romania are irremovable, in accordance with the law, as well as the incompatibility of judicial office with any other public or private appointment except teaching functions in higher education, and exclusion from the activity of political parties.

One component of judicial authority is the Judicial Service Commission wholly consisting of magistrates elected by parliament whose characteristic function is to secure the irremovability, independence and impartiality of the judges whose appointment is proposed by the President of Romania.

The Court accordingly held that justice was purely a state function performed by the Supreme Court of Justice and the other judicial authorities established according to law, so as to exclude the discharge of judicial activity by other official bodies or by other private individuals or institutions. The Court also held that the activity of hearing and determining cases was performed in the name of the law solely by the members of these authorities, i.e. by independent judges deferring solely to the law.

The Court found that Section 17.11 of Act no. 92/1992 revised, with the subsequent amendments, requiring decisions in cases relating to labour disputes and labour litigation to be reached by majority vote of the members of the Court consisting of a judge and two assistant magistrates was contrary to Articles 1.3, 51, 123, 124 and 125 of the Constitution.

According to the terms of the impugned statute, one of the two assistant magistrates appointed by the Minister of Justice at the proposal of the Economic and Social Council represents the employers' associations, and the other the trade unions. In the Court's finding, their participation in the trying of cases with a deliberative vote and the ability to

outvote the judge, owing to the composition of the Court, is contrary to the principle of impartiality of justice because they do not serve the law and lack the guarantees of independence laid down by the Constitution, these guarantees being, for judges, irremovability and disqualification from public or private appointments or political party membership. In other words, assistant magistrates are not independent and their lack of independence affects the very independence of justice.

Therefore they cannot perform any activity in connection with hearing and determining cases, which is set aside by the Constitution for judges alone. Consequently, the Court declared unconstitutional Section 17.11 of the Judicature Act no. 92/1992 revised, stipulating that "rulings in cases relating to labour disputes and litigation which are tried at first instance shall be taken by the majority vote of the trial court".

Supplementary information:

Subsequently, Section 171-3 of the Judicature Act no. 92/1992 revised, with subsequent amendments, was amended and supplemented by Government Emergency Order no. 20 of 20 February 2002 published in the *Monitorul Oficial al României*, Part I, no. 151 of 28 February 2002.

Languages:

Romanian, French (translation by the Court).



Identification: ROM-2002-1-002

a) Romania / **b)** Constitutional Court / **c)** / **d)** 19.12.2001 / **e)** 349/2001 / **f)** Decision concerning the objection to the provisions of Articles 53 and 54.2 of the Family Code on grounds of unconstitutionality / **g)** *Monitorul Oficial al României* (Official Gazette), 240/10.04.2002 / **h)** CODICES (Romanian, 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.

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

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

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

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

Keywords of the alphabetical index:

Child, protection and assistance / Paternity, contestation.

Headnotes:

The stipulation in Article 54.2 of the Family Code of the presumptive father's sole right to bring an action contesting presumed paternity is unconstitutional in that it ignores the legitimate interest in so doing which the mother and a child born in wedlock may have.

Summary:

By a preliminary request of 28 March 2001, the Court of first instance at Alba Iulia referred to the Constitutional Court an objection challenging the constitutionality of Articles 53 and 54 of the Family Code.

In the statement of grounds of unconstitutionality, the impugned statutory provisions were alleged not to comply with Articles 16.1.2, 26.2, 44.1 and 45.1 of the Constitution.

According to Article 53 of the Family Code, "the father of a child born in wedlock is the mother's husband. The father of a child born after the dissolution, invalidation or annulment of a marriage is the mother's ex-husband, if the child was conceived while they were married and was born before the mother contracted another marriage".

On examining the plea of unconstitutionality with regard to Article 53 of the Family Code, the Court found that it was not contrary to Articles 16.1.2, 26.2, 44.1 and 45.1 of the Constitution.

Article 54.2 of the Family Code, though, provides that an action contesting paternity can be instituted only by the husband, whose heirs may continue the action instituted by him.

The Court held that the complaint of unconstitutionality bore on the right to family and private life, also secured by Article 8 ECHR.

In its Judgment of 27 October 1994 in the case of *Kroon and others v. the Netherlands* (*Bulletin* 1994/3 [ECH-1994-3-016]), the European Court of Human Rights decided that it was contrary to Article 8 ECHR for a national law to prevent a married woman from denying her husband's presumed paternity in respect of a child conceived during their marriage.

The Court therefore considered it necessary to review its case-law regarding the unconstitutionality of Article 54.2 of the Family Code, as it found the text contrary to the provisions of Articles 16.1, 26, 44.1 and 45.1 of the Constitution.

Accordingly, it was noted that the stipulation in Article 54.2 of the Family Code of the presumptive father's right to institute an action challenging his paternity, to the exclusion of the mother and a child born in wedlock, infringes the principle of equal rights set out in Article 16.1 of the Constitution.

The fact that the presumptive father and the mother of the child each have a personal and separate motive for overturning the presumption of paternity does not warrant the discriminatory arrangements made by the impugned text. The specific motives may be different, but the common logic consists in ensuring that truth prevails over falsehood and, the reason being the same, the solutions must also be identical.

The Court also noted that Article 54.2 of the Family Code infringed Article 44.1 of the Constitution establishing equality between spouses, in denying mothers the right also to bring an action challenging presumptive paternity.

Regarding Article 26.1 of the Constitution on personal, family and private life, the Court held that the stipulation of the presumptive father's sole right to bring the action contesting the presumed paternity failed to reflect the requirements of paragraph 1 of the constitutional provision.

It further observed that the text at issue also infringed Article 26.2 of the Constitution in that it did not acknowledge the right of the child to bring an action contesting the presumed paternity.

It was accordingly noted that the conferment of this right on the child, being an expression of every persons' constitutional right to self-determination, would not go against the rights and freedoms of other people or offend public policy or morality.

Lastly, the Court found that Article 54.2 of the Family Code also infringed Article 45.1 of the Constitution securing to children and young people a special

system of protection and assistance in the exercise of their rights.

Cross-references:

- *Kroon and others v. the Netherlands*, 27.10.1994, Vol. 297-C, Series A of the Publications of the Court; *Bulletin* 1994/3 [ECH-1994-3-016].

Languages:

Romanian, French (translation by the Court).



Identification: ROM-2002-1-003

a) Romania / **b)** Constitutional Court / **c)** / **d)** 21.02.2002 / **e)** 57/2002 / **f)** Decision on the objection challenging the constitutionality of the provisions of Article 915.2 of the Code of Criminal of Criminal Procedure / **g)** *Monitorul Oficial al României* (Official Gazette), 182/18.03.2002 / **h)** CODICES (Romanian, French).

Keywords of the systematic thesaurus:

- 2.1.1.4.2 **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.
- 2.1.3.1 **Sources of Constitutional Law** – Categories – Case-law – Domestic case-law.
- 2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.13.16 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Rules of evidence.
- 5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.
- 5.3.34 **Fundamental Rights** – Civil and political rights – Inviolability of communications.

Keywords of the alphabetical index:

Recording, audio, video / Criminal procedure, principles / Evidence, assessment.

Headnotes:

Articles 911-915 of the Code of Criminal Procedure concerning the use of audio and video recordings as evidence in criminal proceedings not only fulfil the need to make available to criminal courts new and effective means of proof recognised by systems of modern law, but also complies with the principle of safeguarding fundamental rights and freedoms.

In fact the provisions of the Universal Declaration of Human Rights and the European Convention on Human Rights acknowledge the legitimacy of restrictions to the exercise of certain rights and freedoms on condition that they are prescribed by law in order to protect important social values such as the conduct of the criminal investigation or the prevention of criminal acts.

Summary:

By preliminary request dated 27 September 2001, Criminal Division I of the Bucharest Court referred to the Constitutional Court an objection challenging the constitutionality of the provisions of Article 915.2 of the Code of Criminal Procedure stipulating that “the audio and video recordings referred to in this section [Section V (Articles 911-915) – Audio and video recordings] which are submitted by the parties may serve as evidence insofar as they are not prohibited by law”.

It was alleged in the statement of grounds for the objection that the impugned statutory provisions did not comply with:

1. the principle of inviolability of personal, family and private life laid down in Article 26 of the Constitution, in that the provisions enabled the public authorities to interfere in the individual’s personal life under other conditions than those governed by law in accordance with the Constitution;
2. the secrecy of correspondence provided for in Article 28 of the Constitution, in that the challenged provisions made it possible for any person, even a party to criminal proceedings, to record telephone or other conversations which could subsequently be used as evidence, and
3. Articles 6 and 8 ECHR.

On examining the objection, the Constitutional Court found the impugned provisions consistent with the principles of the law of criminal procedure, particularly disclosing the truth (Article 3 of the Code of Criminal Procedure), weighing evidence, and assuming that the value of evidence is not established in advance (Article 63.2 of the Code of Criminal Procedure). Thus, the impugned provisions are held to limit and determine the use of audio and video recordings as evidence that there are certain facts or tangible clues as to the planning and perpetration of an offence. They regulate the possibility of the audio and video recordings being subjected to technical appraisals at the request of the prosecutor, the parties or the Court of its own motion. The assessment of each piece of evidence is made by the judge following an attentive analysis of all evidence adduced. The trial court is thus required to verify whether it was legal and justifiable to make recordings whenever it is presented with evidence in the form of recordings of conversations or of scenes which parties to the proceedings have made.

The Court also considered the challenged provisions to be in accordance with the international principles invoked by the originator of the objection. In this connection reference was made to the judgment delivered by the European Court of Human Rights in the case of *Klass and others v. Germany* of 1978 (*Special Bulletin ECHR* [ECH-1978-S-004]).

Lastly, the Court recalled that it had already ruled on the constitutionality of the provisions of Articles 911-915 of the Code of Criminal Procedure in its Decision no. 21/2000. In that decision, it held that the interception and recording of conversations or the recording of certain scenes without the consent of the person concerned constituted a restriction on the exercise of the right to respect for personal, family and private life and to its protection by the public authorities, as well as restricting the exercise of the right to inviolability of the secrecy of conversations and other legal means of communication, rights secured by Articles 26.1 and 28 of the Constitution.

The Constitution itself, in Article 49, allows the exercise of certain rights and certain fundamental freedoms to be restricted in cases and under conditions which are exhaustively and precisely defined. In its earlier analysis of the formulation of the impugned statutory provisions, the Court had found that the conditions laid down by the Constitution for restricting the exercise of the rights secured by Articles 26.1 and 28 were complied with.

In the present case, the Court confirmed the terms of its previous decision.

Cross-references:

- Constitutional Court Decision no. 21 of 03.02.2000, published in *Monitorul Oficial al României*, Part I, no. 159 of 17.04.2000;
- *Klass and others v. Germany*, 06.09.1978, Vol. 28, Series A of the Publications of the Court; *Special Bulletin ECHR* [ECH-1978-S-004].

Languages:

Romanian, French (translation by the Court).



Slovakia

Constitutional Court

Statistical data

1 January 2002 – 30 April 2002

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 5
- Decisions on the merits by the panels of the Court: 10
- Number of other decisions by the plenum: 8
- Number of other decisions by the panels: 136

Important decisions

Identification: SVK-2002-1-001

a) Slovakia / **b)** Constitutional Court / **c)** Plenary / **d)** 07.03.2002 / **e)** Pl. US 14/01 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 5.1.4 **Fundamental Rights** – General questions – Emergency situations.
- 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.

Keywords of the alphabetical index:

Administrative decision, judicial review / Appeal, effect / Building, plan, inspection procedure / *Locus standi*, building, inspection procedure, owner.

Headnotes:

The public interest must not trump the right to be a party to proceedings in the course of which one's rights and interests may be determined, except for extreme situations, when one's participation in the

proceedings would weigh against their legitimate purpose.

The nature of legal remedies available against a decision of a public authority must be adequate in relation to the intensity and the manner in which such a decision may affect one's rights and lawful interests.

Summary:

The petitioner, a number of parliamentarians, contested a provision of the Building Code pursuant to which the owner of a lot on which a building was built did not have standing in a building inspection procedure. According to the petitioner, such an owner therefore could not raise in a relevant way any objections she might have against the final permit issued in a building inspection procedure and granting the builder the right to use and occupy the building. This was claimed to violate the right of access to court, and the right to appeal an administrative decision to a court.

The Constitutional Court agreed with the petitioner and held the contested provision incompatible with the relevant components of the right to court. According to the decision, the right to court includes the right to be a party to any proceedings in which one's rights or duties could be determined. On one hand, there is relevant public interest in the efficiency of building inspection procedures. On the other hand, this interest is not as strong as to deprive the affected lot owner of her standing in a procedure in which the respective public authority can also adjudicate on her rights and interests. The only instance in which a person could be deprived of her standing in a procedure in which her rights and interests may be affected – and thus of her right to access to court – concerns extreme situations such as a natural disaster, war and other circumstances in which performing a “normal” procedure would go against the legitimate purpose of such procedure.

The Constitutional Court came to the conclusion that rights and interests of a lot owner could be affected in the course of the building inspection procedure. The protection of these rights is a duty of the respective public authority (the building office) but the possibility of pursuing their protection should also be granted to the affected lot owner. As for access to judicial review of building inspections decisions, the Constitutional Court concluded that the affected owner could apply for the protection of her rights in a civil procedure. Nonetheless, the nature and the effect of available remedy venues must in principle reflect the intensity and the manner in which the party's rights may be affected. The judicial review procedure is in this case a more efficient, more rapid and less expensive way

of vindicating one's rights. To deprive the affected owner of this venue therefore amounts to a violation of the right to have an administrative decision examined by a court.

Languages:

Slovak.



Identification: SVK-2002-1-002

a) Slovakia / **b)** Constitutional Court / **c)** Plenary / **d)** 04.04.2002 / **e)** Pl. US 26/00 / **f)** / **g)** *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

3.5 **General Principles** – Social State.
 3.16 **General Principles** – Proportionality.
 3.17 **General Principles** – Weighing of interests.
 3.25 **General Principles** – Market economy.
 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:

Housing, access / Housing, price, regulated / Market, equality, value / Housing, obligation to sell.

Headnotes:

The need to protect tenants in privatised residential premises legitimises a regulation, which subjects the owners of these premises to a duty to transfer them for a regulated price to their current tenants. Having somewhere to live is a fundamental need of extraordinary value. Since solving the housing situation is not only in the private but also in public interest, even more so in a situation of an on-going economic transformation, an unrestrained operation of the market would create risks of adverse social consequences.

The principle of proportionate and just balance requires that the destruction of private property during the former regime, especially as regards the owners

of rental apartments as opposed to owners of family houses, be taken into account. The government's approach to the rental market undergoing a thorough transformation is based on a set of regulations, including a statutory determination of the maximum purchase price. Government interventions in the realm of housing are, after all, not alien to the European practice of social policy.

Summary:

The Attorney General contested several provisions of the Act on Ownership of Residential Premises according to which owners of certain types of residences were obliged to transfer them to their current tenants, and for a price not exceeding the amount as specified by the given Act. According to the Attorney General, the contested provisions violated property rights of the affected owners by subjecting them to a duty to transfer their real estate property for a statutorily determined price, which did not reflect their actual market value.

The Constitutional Court found no violation of the respective constitutional provisions, i.e. Article 20 of the Constitution guaranteeing the right to property. According to the Constitutional Court, the given Act is only a part of the entire statutory scheme of residential ownership transfers and reflects the fact that the local regime of residential ownership was not a product of typical market functions but came about as a result of active governmental interventions. In other words, most residential premises were built on the basis of government funds and, by extension, of taxpayers' contributions. The current owners of the types of residences subject to so-called regulated prices were also participants in the government subsidies system. Further, the Constitutional Court stated, having somewhere to live is a need of such fundamental value and solutions to this need are in the public interest. It is especially with regard to the special need for protecting the affected tenants and for preventing severe adverse social consequences, and even more so in a situation of an on-going economic transformation, that the unrestrained functioning of the market must be supplemented by some government regulation.

The Constitutional Court found both the contractual duty and the maximum-price stipulation to be two aspects of a single restriction, i.e. one aimed at restricting the statutory content of the respective property rights, and thus not amounting to expropriation. Three justices, however, filed concurring opinions in which they agreed with the verdict but suggested that the contested provisions indeed did amount to expropriation. Nonetheless, the concurring justices came to a conclusion that the expropriation

took place for public interest and that the statutory reparation was not disproportionate.

Languages:

Slovak.



Slovenia

Constitutional Court

Statistical data

1 September 2001 – 31 December 2001

The Constitutional Court held 27 sessions (14 plenary and 13 in chambers) during this period. There were 420 unresolved cases in the field of the protection of constitutionality and legality (denoted by the prefix "U" in the Constitutional Court Register) and 604 unresolved cases in the field of human rights protection (denoted by the prefix "Up" in the Constitutional Court Register) from the previous year at the start of the period (1 September 2001). The Constitutional Court accepted 92 new U and 185 Up new cases in the period covered by this report.

In the same period, the Constitutional Court decided:

- 71 U cases in the field of the protection of constitutionality and legality, in which the Plenary Court made:
 - 22 decisions and
 - 49 rulings;
- 5 U cases joined to the above-mentioned cases for common treatment and adjudication.

Accordingly the total number of U cases resolved was 76.

In the same period, the Constitutional Court resolved 151 Up cases in the field of the protection of human rights and fundamental freedoms (9 decisions issued by the Plenary Court, 142 decisions issued by a Chamber of three judges).

Statistical data

1 January 2002 – 30 April 2002

The Constitutional Court held 16 sessions (10 plenary and 6 in chambers) during this period. There were 415 unresolved cases in the field of the protection of constitutionality and legality (denoted by the prefix "U" in the Constitutional Court Register) and 628 unresolved cases in the field of human rights protection (denoted by the prefix "Up" in the

Constitutional Court Register) from the previous year at the start of the period (1 January 2002). The Constitutional Court accepted 173 new U and 165 Up new cases in the period covered by this report.

In the same period, the Constitutional Court decided:

- 50 U cases in the field of the protection of constitutionality and legality, in which the Plenary Court made:
 - 18 decisions and
 - 32 rulings;
- 54 U cases joined to the above-mentioned cases for common treatment and adjudication.

Accordingly the total number of U- cases resolved was 104.

In the same period, the Constitutional Court resolved 115 Up cases in the field of the protection of human rights and fundamental freedoms (11 decisions issued by the Plenary Court, 104 decisions issued by a Chamber of three judges).

Decisions are published in the Official Gazette of the Republic of Slovenia, whereas the rulings of the Constitutional Court are not generally published in an official bulletin, but are handed over to the participants in the proceedings.

However, decisions and rulings are published and submitted to users:

- in an official annual collection (Slovenian full-text versions, including dissenting/ concurring opinions, and English abstracts);
- in the *Pravna Praksa* (Legal Practice Journal) (Slovenian abstracts, with the full-text version of the dissenting/concurring opinions);
- since 1 January 1987 via the on-line STAIRS database (Slovenian and English full-text versions);
- since June 1999 on CD-ROM (complete Slovenian full text versions from 1990 onwards, combined with appropriate links to the text of the Slovenian Constitution, Slovenian Constitutional Court Act, Rules of Procedure of the Constitutional Court and the European Convention for the Protection of Human Rights and Fundamental Freedoms translated into Slovenian);

- since September 1998 in the database and/or Bulletin of the Association of Constitutional Courts using the French language (A.C.C.P.U.F.);
- since August 1995 on the Internet (full text in Slovenian as well as in English at <http://www.us-rs.si>);
- since 2000 in the JUS-INFO legal information system on the Internet (full text in Slovenian, available at <http://www.us-rs.si>);
- in the CODICES database of the Venice Commission.

Important decisions

Identification: SLO-2002-1-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 10.05.2001 / **e)** Up-232/2000 / **f)** / **g)** *Uradni list RS* (Official Gazette), 15/01 / **h)** *Pravna praksa* (abstract).

Keywords of the systematic thesaurus:

- 1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.
- 1.3.5.12 **Constitutional Justice** – Jurisdiction – The subject of review – Court decisions.
- 2.1.1.4.12 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Convention on the Rights of the Child of 1989.
- 3.22 **General Principles** – Prohibition of arbitrariness.
- 4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
- 5.2 **Fundamental Rights** – Equality.
- 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.
- 5.3.42 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Inheritance / Parent, right / Parent, duty / Legal remedy, revision, situation, factual.

Headnotes:

In the framework of revision proceedings, the Supreme Court may only evaluate substantive and

procedural legal issues, and may not make an assessment of the facts. By interfering with the factual situation as ascertained by the courts of first and second instances, the Supreme Court exceeded its authority pursuant to the relevant provisions of the Civil Procedure Act. It thus violated the complainants' right to the equal protection of rights determined in Article 22 of the Constitution.

Summary:

In this case, the Constitutional Court set aside the judgment and order of the Supreme Court and returned the case to the Supreme Court for new adjudication.

The case concerned a claim for the rescission of an agreement on the dissolution of joint property, made by the plaintiff and her ex-husband (who died during the proceedings and was subsequently substituted by the complainants). Dismissing the claim, the Court of first instance held that:

1. the case did not concern a fixed contract that could be rescinded without giving an additional time-limit for performance; and
2. the matter did not involve a situation in which the debtor's activity implied that he would not perform the agreement within the additional time limit.

The appellate court dismissed the plaintiff's appeal. The Supreme Court, in deciding on the request for revision filed by the plaintiff, changed the first and second instance judgments and rescinded the agreement on the dissolution of joint property. It held that, from the very beginning, the debtor had not intended to perform the agreement since he had offered the plaintiff only co-owned property, which was not sufficient to fulfil his contractual obligations. In order to do that, he would have needed to offer her full ownership of the property. It was not enough that she just took the keys of the property, which, according to the Supreme Court, only meant that she expected the negotiations to continue. Thus, given the intended non-performance by the defendant, the plaintiff did not need to give the defendant an additional time-limit for performance.

In their constitutional complaint, the complainants asserted that the Supreme Court had violated their right to the equal protection of rights determined in Article 22 of the Constitution. By establishing a violation of substantive law, it in fact changed the facts of the case, which the Supreme Court cannot do according to revision proceedings set out in the Civil Procedure Act.

The Constitutional Court granted the petition and set aside the challenged judgment.

Supplementary information:

Legal norms referred to:

- Articles 22, 23, 33, 53.3, 56.1 and 157 of the Constitution;
- Articles 358 and 370 of the Civil Procedure Act (ZPP);
- Articles 10, 99, 127 and 308 of the Code of Obligations Act (ZOR);
- Article 12 of the Convention on the Rights of the Child;
- Article 59.1 of the Constitutional Court Act (ZUstS).

Cross-references:

In the reasoning of its decision, the Constitutional Court referred to its cases nos. Up-369 of 21.01.1998 (OdiUS VII, 116) and Up-73/97 of 07.12.2000.

Languages:

Slovenian.



Identification: SLO-2002-1-002

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 22.11.2001 / **e)** U-I-68/98 / **f)** / **g)** *Uradni list RS* (Official Gazette), 101/01 / **h)** *Pravna praksa* (abstract); CODICES (Slovenian, 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.
- 3.3 **General Principles** – Democracy.
- 3.7 **General Principles** – Relations between the State and bodies of a religious or ideological nature.
- 3.9 **General Principles** – Rule of law.
- 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.

5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of worship.

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

Keywords of the alphabetical index:

Education, kindergarten, primary / Education, religion / Education, religious, participation of children of other denomination / State, statutory measures, milder measure.

Headnotes:

According to Article 41.2 of the Constitution, citizens have the right not to make any declarations concerning their religious beliefs and the right to expect the State to prevent their forcible confrontation with any kind of religious belief. The democratic State (Article 1 of the Constitution) is, on the basis of the separation of Church and State (Article 7 of the Constitution), obliged – in performing public services and in all public institutions – to ensure neutrality and to prevent one religion or philosophical belief prevailing over another, since no one has the right to State support for the promotion of his religion. To reach this goal, it is constitutionally admissible that the State should take such statutory measures as are necessary to protect the negative aspect of freedom of religion (namely, the freedom from religion) and thereby to realise the obligation of neutrality.

However, in imposing such measures, the State has also to ensure the proportionality between the protection of the negative aspect of the freedom of religion (or freedom of conscience) of non-believers or the followers of other religions on the one hand, and the weight of the consequences resulting from an interference with the positive aspect of freedom of religion and the rights of parents guaranteed by the Constitution.

The general prohibition of any denominational activity in a licensed kindergarten and school, as provided for by Article 72.3 of the Organisation and Financing of Upbringing and Education Act (ZOFVI), is not proportionate to the necessity of ensuring the negative aspect of freedom of religion of others, as this can be successfully protected by a milder measure.

Summary:

The petitioners challenged Articles 72.3 and 72.4 of the Organisation and Financing of Upbringing and

Education Act, according to which denominational activities are not permitted in licensed or public kindergartens and schools. As these provisions limited the carrying out of denominational activities only to the private sphere of life and, in particular, prohibited denominational activities also in licensed private schools, outside the training considered as a confirmed public program, they were allegedly inconsistent with Article 41 of the Constitution and Article 2 Protocol 1 ECHR.

The challenged paragraphs 3 and 4 read as follows:

- “3. The carrying out of a denominational activity is not permitted in public kindergartens and schools or in licensed kindergartens and schools.
4. The denominational activity determined in the previous paragraph of this article encompasses:
- religious training or denominational training in religion aimed at educating students in that religion,
 - training in which a religious community decides on the contents, textbooks, teachers' education and the suitability of teachers for teaching,
 - organised religious rites.”

The Constitutional Court held that Article 72.4 of ZOFVI is not inconsistent with the Constitution and European Convention on Human Rights; and that Article 72.3 of ZOFVI is inconsistent with the Constitution in so far as it relates to the denominational activities in licensed kindergartens and schools, and to the extent following from the reasoning of this decision.

The Constitutional Court stated that it was reviewing the question of whether the exclusion of denominational activities from the premises of public and licensed kindergartens and schools, outside the extent of carrying out a public service, admissibly interfered with the positive aspect of the freedom of conscience of an individual (determined in Article 41.1 of the Constitution), the right of parents determined in Article 41.3 of the Constitution and the right of parents determined in Article 2 Protocol 1 ECHR, on the basis of the so-called strict test of proportionality derived from Article 15.3 of the Constitution.

The Constitutional Court held that in accordance with this provision, human rights and fundamental freedoms are limited only by the rights of others and in such cases as provided by the Constitution. Since the Constitution does not provide such limitations as

included in the challenged statutory regulation, it was necessary to review whether interference with the positive aspect of the rights and freedoms guaranteed by Articles 41.1 and 41.3 of the Constitution, and the right determined in Article 2 Protocol 1 ECHR, was admissible to ensure the protection of the constitutional rights of others.

According to the Constitutional Court, in the present case, the legislature interfered with the positive aspect of freedom of religion (Article 41.1 of the Constitution) and the right of parents determined in Article 41.3 of the Constitution, in order to protect the negative aspect of the freedom of religion of other children and their parents (Article 41.2 of the Constitution). To achieve this goal, the interference with the right determined in Article 41.1 of the Constitution was necessary.

As regards the challenged para. 3, the Constitutional Court reasoned that the interference with the positive freedom of religion and the rights of parents determined in Article 41.3 of the Constitution was not proportionate in the narrow sense of the word, in the part relating to licensed kindergartens and schools outside the area of their public service. Here the adjective “public” does not refer to an institution as certain premises, nor does it refer to the entire activity, but only to that part of the activity the State finances as the carrying out of delimited public programmes. The principle of democracy (Article 1 of the Constitution), freedom of the activities of religious communities (Article 7.2 of the Constitution), the positive aspect of freedom of religion (Article 41.1 of the Constitution), and the rights of parents to bring up their children in accordance with their personal religious beliefs (Article 41.3 of the Constitution), impose on the State the obligation to permit (not to force, foster, support or even prescribe as mandatory) denominational activities in licensed kindergartens and schools outside public programmes financed from State funds. Moreover, this should be so since there are milder measures to protect the negative aspect of freedom of religion. In reviewing the proportionality in the narrow sense one must weigh, in a concrete case, the protection of the negative aspect of the freedom of religion (or freedom of conscience) of non-believers or the followers of other religions on the one hand, and the weight of the consequences ensuing from an interference with the positive aspect of freedom of religion, with the rights of parents determined in Article 41.3 of the Constitution. There will be no such proportionality if one generally prohibits any denominational activity in a licensed kindergarten and school. By such prohibition the legislature respected only the negative freedom of religion, although its protection, despite the establishment of certain positive religious freedom, could

be achieved just as well by less severe means. Comparative legal theory, the legislation and case law are such milder measures to protect the negative aspect of freedom of religion, e.g. prohibition of mandatory attendance at religious education classes; religious training being organised prior to the beginning or after the classes so that students who do not want to take part in such training may avoid these classes without interrupting them. Foreign legal theorists also emphasise that from the view of the individual's negative freedom of religion it is constitutionally more admissible that the students register for religious training than to avoid studying such courses. In the concrete case, this means that the weight of the consequences affecting the positive aspect of freedom of religion and the rights of parents determined in Article 41.3 of the Constitution is not proportionate to the necessity of ensuring the negative aspect of freedom of religion of others, since this can be successfully protected by a milder measure from the one included in the statutory regulation. Therefore, the challenged provision is inconsistent with Article 41 of the Constitution in the part relating to licensed kindergartens and schools outside the carrying out of their public service.

As to the challenged para. 4, the Constitutional Court held that Article 72.4 of ZOFVI is not, from the aspect of the positive freedom of religion (Article 41.1 of the Constitution) and the aspect of the rights of parents determined in Article 41.3 of the Constitution, inconsistent with the Constitution, since it gives only an objective definition of a denominational activity for which the Constitutional Court did not establish that it nevertheless inadmissibly narrowed the freedom of conscience of the individual or somewhat differently interfered with the fundamental rights and freedoms of the individual. In fact the petitioners did not assert this, since their petition was filed against the prohibition against denominational activities in public kindergartens and schools and licensed kindergartens and schools.

Supplementary information:

Legal norms referred to:

- Articles 1, 2, 7, 14, 22, 41.1, 41.2, 41.3 and 57 of the Constitution;
- Articles 9 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms;
- 2nd sentence of Article 1 Protocol 1 ECHR;
- Article 48 of the Constitutional Court Act (ZUstS).

Concurring opinion of a Constitutional Court judge.

Cross-references:

In the reasoning of its decision the Constitutional Court referred to its cases:

- no. U-I-137/93 of 02.06.1994, Official Gazette RS, no. 42/94 - DecCC III, 62;
- no. U-I-299/96 of 12.12.1996, Official Gazette RS, no. 5/97 - DecCC V, 177;
- no. U-I-290/96 of 11.06.1998, Official Gazette RS, no. 49/98 - DecCC VII, 124.

Cases:

- no. U-I-92/98 of 12-13.03.1998;
- nos. U-I-98/98, U-I-102/98, U-I-106/98, U-I-111/98, U-I-121/98 of 02.04.1998;
- no. U-I-187/98 of 07.05.1998

were joined with the considered case by a Constitutional Court ruling due to joint consideration and decision-making.

Languages:

Slovenian, English (translation by the Court).



Identification: SLO-2002-1-003

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 14.03.2002 / **e)** Up-134/97 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 32/02 / **h)** *Pravna praksa* (abstract); CODICES (Slovenian, 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.

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

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

2.3.9 **Sources of Constitutional Law** – Techniques of review – Teleological interpretation.

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

5.3.13.22 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Presumption of innocence.

5.3.13.23 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right not to incriminate oneself.

Keywords of the alphabetical index:

Criminal procedure, guarantees / Defendant, right to silence / Criminal procedure, legal caution.

Headnotes:

The right to silence (Article 29.4 of the Constitution) is one of the fundamental constitutional procedural rights of the defendant. It does not only mean the prohibition against the use of coercion or deception, but also the prevention of self-incrimination, as the defendant is possibly not aware (for lack of legal knowledge) that he or she is not obliged to incriminate him or herself.

The essence of the right against self-incrimination in conjunction with the prohibition against extorting testimonies is that the prosecuting authorities in the broadest sense must allow the defendant to be completely passive, or to decide – wilfully, rationally and above all voluntarily – whether to co-operate with them or not.

As a body which has to judge impartially, a court must not try to persuade the defendant to confess to the commission of a criminal offence by promising a reward, such as a lower sentence. The court has to establish a substantive truth. However, the truth is not necessarily what the state prosecutor asserts. Persuading a defendant to confess to a crime forces the defendant to act against himself even if he did not commit a criminal offence, or did not commit it in a manner as asserted by the state prosecutor in the indictment. Such a legal caution not only forces the defendant to cooperate with the prosecution, but also forces him to act against his own interests and to confess to the allegations in the indictment. As such, it violates the defendant's right to silence and is also inconsistent with the presumption of innocence (guaranteed by Article 27 of the Constitution), since it derives just from the opposite presumption – the presumption of guilt.

Summary:

Article 29 of the Constitution provides legal guarantees in criminal proceedings. In accordance with Subparagraph 4, a person charged with a criminal offence must, in addition to absolute equality, be guaranteed the right not to incriminate himself, his relatives or those close to him, or to admit guilt.

Thereby, the Constitution provides the right against self-incrimination.

The International Covenant on Civil and Political Rights embraces a similar provision. Article 14.3.g1 ICCPR provides that, in determination of any criminal charge against a person, everyone shall be entitled in full equality not to be compelled to testify against himself or to confess guilt. The Convention for the Protection of Human Rights and Fundamental Freedoms does not explicitly regulate such a right. However, according to the case-law of the European Court of Human Rights, the right against self-incrimination is recognised as one of the general guarantees of a fair trial determined in accordance of Article 6 ECHR.

By virtue of the linguistic and teleological interpretation of the provision of Article 29.4 of the Constitution, the Constitutional Court considered that the right against self-incrimination implies the constitutional right to silence. A legal caution, in which the defendant must to be instructed in this right, must be such that a decision whether to exercise the right to silence entirely depends on his free will.

The right to silence has an extraordinarily important consequence as regards evidentiary procedure. The state prosecutor must prove all the elements of the indictment and the defendant is not obliged to do anything in its own defence. In this aspect the right to silence is the element of the constitutional right determined in Article 27 of the Constitution (the presumption of innocence). Therefore, the prosecutor must prove all the elements of a criminal offence in order to convince the court, even if the defendant remains completely passive. The Constitutional Court in Decision no. U-I-18/93, dated 11 April 1996 (Official Gazette RS, no. 25/96 and DecCC V, 40), emphasised that the presumption of innocence means that the burden of proof (*onus probandi*) is on the plaintiff (the State) and not on the defendant, and that the State as the plaintiff bears the burden of persuasion: "*Actore non probante reus absolvitur!*" The right to silence is the stronghold which prevents the burden of proof falling on the defendant. The right to silence secures the defendant the possibility of not saying anything about the charges against him. Therefore it is particularly important that the defendant is aware that he has the right to silence without any consequences that the exercising of this right in itself would have for him.

The declaration that a confession is a mitigating circumstance, which may be considered in sentencing, affected the complainant's decision whether to say anything and what to say. With such a legal caution the complainant was led into temptation – she had to decide an additional issue – whether to co-operate with the court or not. The promised "reward" (a lower

sentence which the complainant had expected to be suspended) undoubtedly increased the possibility of a decision to confess (notwithstanding the fact whether the complainant was, in fact, guilty of the alleged criminal offence). Simultaneously with the offered "reward" the probability of an autonomous and independent decision decreased, and the probability of a decision for the offered "reward" (a lower sanction) increased. Therefore, the subjective circumstances of the complainant have to be considered as well: during the court proceedings she was 18 years old and she had already tried to commit suicide. Moreover, the circumstances of the part played by the court had to be considered as well: such a legal caution was repeated to the complainant four times. The complainant's confession was thus not obtained respecting her will to freely and independently decide her interest on the basis of a legal caution on her rights.

A court as an independent and impartial body has the task of deciding on charges brought against the defendant (Article 23.1 of the Constitution). The task of the court is to establish the truth and hear both sides, as well as to decide the dispute. Its task is not to try to persuade one of the parties to consent to the assertions of the other side, particularly in criminal proceedings where there exists a duty of a state prosecutor to prove with certainty that the defendant is guilty, even if the defendant remains completely passive. Precisely the fact that the court does not cooperate with the state prosecutor but remains impartial is one of the functions of the right against self-incrimination, as well.

With the given legal caution the court persuaded the complainant to confess and thereby testify against herself. Persuasion by the court, whose role is to be an independent and impartial body, can no longer be seen as enabling a person to freely decide whether to testify against him or herself or not. It derives from the defendant's personal right not to testify, that such a decision may not be bound by any conditions or pressures. When an individual has the right to silence, every – even the smallest – pressure may cause a violation of human rights. The defendant is in a weak position because he is at a police station or before a judge. This fact alone can influence his decision. For this particular vulnerability a threshold for the review of the right against self-incrimination must be set with special care and rigor. This means that even the most subtle example of influencing or conditioning must be interpreted as a pressure or an influence on a free decision.

Consequently, the Constitutional Court was of the opinion that the legal caution given by the court meant influencing the will of the complainant to decide whether to exercise the right to silence.

Therefore, her decision could not have been made freely. Accordingly, the proceedings before the lower court had violated the guarantees provided in Articles 29.4 and 27 of the Constitution. The violations were not remedied in the appellate proceedings, as they were not remedied in deciding on the request for the protection of legality.

Furthermore, the Constitutional Court considered that the standpoint of the Supreme Court was inconsistent with the provision of Article 29.4 of the Constitution. The Supreme Court had said that the lower court could base its judgment on the complainant's testimony due to the fact that coercion, threat or other similar means that would force her to confess were not used. This is based merely on a restrictive linguistic interpretation. The Supreme Court overlooked the teleological interpretation of the right against self-incrimination, embraced in the provision of Article 29.4 of the Constitution, as one of the fundamental, generally recognised procedural guarantees of the defendant. It is not enough that only the prohibition of use of coercion, threat or deception exists; this prohibition must be defined as an active procedural right of the defendant, and must allow the defendant to remain silent.

With the legal caution, with which the court persuaded the complainant to confess and thereby incriminate herself, the right to silence and the presumption of innocence were violated. Thus, the Constitutional Court overturned the challenged judgments.

Supplementary information:

Legal norms referred to:

- Articles 23, 27, 29.3 and 29.4 of the Constitution;
- Article 14.3 ICCPR;
- Article 59.1 of the Constitutional Court Act (ZUstS).

Concurring opinion of a Constitutional Court judge.

Cross-references:

- Decision of 11.04.1996 (no. U-I-18/93), Official Gazette RS, no. 25/96 and DecCC V, 40.

Languages:

Slovenian, English (translation by the Court).



South Africa

Constitutional Court

Supreme Court of Appeal

Important decisions

Identification: RSA-2002-1-001

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 25.01.2002 / **e)** CCT 36/2000 / **f)** Prince v. The President of the Law Society of the Cape of Good Hope and Others / **g)** 2002 (2) *South African Law Reports* (Official Gazette) 794 (CC) / **h)** 2002 (3) *Butterworths Constitutional Law Reports* 231 (CC); CODICES (English).

Keywords of the systematic thesaurus:

- 2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
- 3.16 **General Principles** – Proportionality.
- 3.18 **General Principles** – General interest.
- 3.19 **General Principles** – Margin of appreciation.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
- 5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of worship.

Keywords of the alphabetical index:

Cannabis, possession, use / Cannabis, use, for religious purposes / Court, duty to enforce the laws / Drug, harmful, use, exception.

Headnotes:

In a democratic society, the legislature has the power and, where appropriate, the duty to enact legislation prohibiting conduct considered by it to be anti-social and to enforce that prohibition by means of criminal sanction. Where it acts consistently with the Constitution, courts have to enforce the laws whether they agree with them or not.

Legislation prohibiting the possession and use of cannabis limits the individual and collective religious rights of Rastafarians. Such a limitation is, however, justifiable under Section 36 of the Constitution in particular, considering that South Africa is one of the major sources from which the world trade in cannabis

was supplied and has an international obligation to curtail that trade. If a religious exemption for the possession and use of harmful drugs were to be permitted, the State's ability to enforce its drug legislation would be substantially impaired.

Summary:

In 1997, the Cape Law Society refused to register Gareth Anver Prince's contract of community service which he was required to perform to qualify for admission as an attorney. He was refused registration on the grounds of two convictions for possession of cannabis in contravention of Section 4.b of the Drugs and Drug Trafficking Act no. 140 of 1992. Prince stated that he would continue to use cannabis because the use of cannabis was an integral part of his religion, Rastafarianism.

The Court of first instance, the Cape High Court, refused to set aside the Law Society's decision. On appeal, the Supreme Court of Appeal dismissed Prince's challenge to the constitutionality of the prohibition on cannabis. Prince then appealed to the Constitutional Court – the highest court on constitutional matters. The only issue was the constitutional validity of the prohibition on the use or possession of cannabis for religious purposes. The appeal was opposed by the Attorney-General and the Minister of Health, with the Law Society and the Minister of Justice abiding the decision of the Supreme Court of Appeal.

Prince did not dispute that the prohibition served a legitimate government interest and the Court was therefore not required to decide whether cannabis should be legalised. Instead, the constitutional complaint was that the prohibition went too far in that it included the possession or use of cannabis required by the Rastafarian religion.

In a joint judgment on behalf of the majority of the Court, Chief Justice Chaskalson and Justices Ackermann and Kriegler dismissed the appeal. They held that the prohibition against the possession and use of cannabis was part of a worldwide attempt to curb its distribution and was fully supported by the government. Whether decriminalisation of the possession and use of small quantities of cannabis was a more appropriate response to the problem than criminalisation, was not suggested and was not an issue in the appeal. In a democratic society the legislature has the power and, where appropriate, the duty to enact legislation prohibiting conduct considered by it to be anti-social and, where necessary, to enforce that prohibition by means of criminal sanction. Where it acted consistently with the Constitution, courts had to enforce the laws whether they agreed with them or not.

The majority held that the only question was whether the law was inconsistent with the Constitution because it interfered with Prince's right to freedom of religion and his right to practise his religion. The Court held that Rastafarianism was indeed a religion and that the legislation therefore impacted on the Rastafarians' individual rights (Section 15 of the Constitution) and collective rights (Section 31 of the Constitution) to practise their religion. What had to be decided was whether the limitation was justifiable under Section 36 of the Constitution.

There was no objective way in which law enforcement officials could distinguish between the religious and recreational possession or use of cannabis. South Africa was one of the major sources from which the world trade in cannabis was supplied and had an international obligation to curtail that trade. If a religious exemption for the possession and use of harmful drugs were to be permitted, the State's ability to enforce its drug legislation would be substantially impaired.

In a dissenting judgment, Justice Ngcobo held that the proportionality exercise involved the question of whether the granting of the religious exemption would undermine the objectives of the prohibition. The suppression of illicit drugs did not require a blanket ban on the sacramental use of cannabis when such use had not been shown to pose a risk of harm. The prohibition contained in the impugned provisions was too extensive. It followed that the prohibition was inconsistent with the constitution because it proscribed the religious use of cannabis even when such use did not threaten the government interest.

In a separate dissenting judgment, Justice Sachs expressed his general agreement with the judgment of Justice Ngcobo. He held that the real difference between the majority and minority judgments related to the extent to which the State should accommodate the religious convictions and practices of minority religious communities. The proportionality exercise had to be undertaken with due consideration of the broad historical context; the special responsibility the courts had when responding to claims by marginalised and disempowered minorities for Bill of Rights protection; South Africa's obligations in the context of international conventions dealing with drugs; the possibility of developing a notion of limited decriminalisation as a half-way house between prohibition and legalization; and the special significance of this matter for the constitutional values of tolerance, openness and respect for diversity.

In response to the minority, the majority held that granting a limited exemption for the non-invasive use of cannabis would not meet the appellant's religious

needs and would still interfere materially with the ability of the State to enforce its legislation.

Supplementary information:

This matter first came before the Constitutional Court in November 2000 in the case of *Prince v. President of the Cape Law Society and Others*, 2001 (2) *South African Law Reports* 388 (CC); 2001 (2) *Butterworths Constitutional Law Reports* 133 (CC). As the focus of the challenge had been on the decision of the Law Society, there was insufficient evidence on record to determine the constitutionality of the impugned provisions. After extensive argument, the parties were granted leave to submit further evidence in the form of affidavits dealing with, amongst other things, the circumstances under which Rastafarian use cannabis and the practical problems involved in the granting of a religious exemption.

Cross-references:

- *Christian Education South Africa v. Minister of Education*, 2000 (4) *South African Law Reports* 757 (CC); 2000 (10) *Butterworths Constitutional Law Reports* 626 (CC), *Bulletin* 2000/2 [RSA-2000-2-011].

Languages:

English.



Identification: RSA-2002-1-002

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 21.02.2002 / **e)** CCT 58/2000 / **f)** Bel Porto School Governing Body and Others v. The Premier of the Province, Western Cape and Another / **g)** 2002 (3) *South African Law Reports* (Official Gazette) 265 (CC) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 1.6 **Constitutional Justice** – Effects.
- 2.3.8 **Sources of Constitutional Law** – Techniques of review – Systematic interpretation.
- 3.4 **General Principles** – Separation of powers.
- 3.16 **General Principles** – Proportionality.
- 3.20 **General Principles** – Reasonableness.

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

4.8.2 **Institutions** – Federalism, regionalism and local self-government – Regions and provinces.

4.8.7.2 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects – Arrangements for distributing the financial resources of the State.

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

5.3.13.1.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Scope – Non-litigious administrative procedure.

Keywords of the alphabetical index:

Budget, allocation / School, financial support / School, redeployment scheme / Administrative action, validity / Parent, consultation.

Headnotes:

Courts cannot interfere with rational decisions of the Executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable.

When the purpose of a policy is to promote equality, this purpose is relevant to whether unfair discrimination has taken place. The enquiry into unfair discrimination cannot take place on the basis of only one strand of policy – it must examine the policy holistically.

Substantive fairness is not a criterion for judging whether or not administrative action is valid. The requirements of procedural fairness depend on the particular circumstances of each case.

Summary:

When the Western Cape Educational Department (WCED) took over responsibility for schools in the province of the Western Cape, there were gross disparities between schools formerly under the House of Assembly (HOA) Education Department, which catered for white children, and other departments which catered for other races. The WCED had to establish a single system to cater for the needs of all children equally. Budgetary constraints prevented all schools from being brought up to the HOA standard and posts at some had to be made redundant while new posts were created at others. Elsen schools for mentally and physically impaired children employed general assistants to help the children. For this purpose, the HOA subsidised its schools, allowing them to decide how many general assistants to

employ and on what terms. In the other departments, the general assistants were employed by the departments and not by the schools. HOA schools had better facilities and resources and more teachers and general assistants than the schools in the other departments. In attempting to introduce an equitable system throughout the province, the WCED left the existing arrangement in place while developing a general provisioning policy for all schools. To that end, it worked on a rationalisation and redeployment scheme, under which teachers and general assistants at overstuffed schools would be moved to understuffed schools.

The governing bodies of HOA Elsen schools, now racially integrated under the WCED, complained that the subsidies they received were inadequate to cover the salaries of the general assistants they employed and requested the WCED to employ them. The WCED declined as it already had a surplus of general assistants in its employ, some of whom would have to be retrenched when the rationalisation and redeployment scheme was implemented. The HOA Elsen schools sued the WCED in the Cape High Court, contending that the decision by the WCED to implement the rationalisation and redeployment scheme without first employing the general assistants at their schools infringed their constitutional rights to equality and to just administrative action. They claimed an order directing the WCED to employ the general assistants employed by them. Their application was dismissed by the Court of first instance and so they appealed directly to the Constitutional Court.

On behalf of the majority, Chief Justice Chaskalson held that the plan had to be evaluated against a standard of rationality. The WCED's plan was rational, particularly given that the WCED had its own surplus staff without having employed the Elsen staff.

Furthermore, in the overall assessment, it could not be said that the HOA Elsen schools were worse off than the other Elsen schools or had been unfairly discriminated against on the grounds of race concerning the employment of general assistants. There was thus no violation of the right to equality contained in Section 9.

The majority further held that the schools had received adequate notice of what the WCED had intended and were given adequate opportunity to make representations in that regard to the WCED and, at the highest level, to the Premier of the Province. These representations were considered but rejected and thus the WCED had acted in compliance with the right to just administrative action in the sense that it had accorded the appellants procedural

fairness. Substantive fairness is not a criterion for judging whether or not administrative action is valid.

In a joint dissent, Justices Mokgoro and Sachs held that the WCED's action was substantively unfair, since it was not justifiable in relation to the reasons given for it, as was constitutionally required. They held that to be justifiable, administrative action must be fair, which includes that it must be proportionate to its objective within a wide range of permissible discretionary options. While recognising the need for a programme of rationalisation to redress the inequities of the past, they held that the implementation needed to be fair. It also needed to take account of the impact on the children with special needs and general assistants who belong to a class that had been discriminated against and who had given the children long care.

In a separate dissent, Justice Madala held that the decision should have been set aside as procedurally unfair, in that the general assistants employed by the applicant schools had not been afforded an opportunity to be heard on the question of their retrenchment. They had a legitimate expectation that this would be afforded to them.

In a further separate dissent, Justice Ngcobo found that the WCED had acted procedurally unfairly in that it ought to have consulted the appellants about the implementation of the scheme in view of the impact it would have on them.

The majority recognised the service which the assistants had rendered to the children with special needs. Nevertheless, they held that they could not make an order which affected WCED employees who were not party to the proceedings and who might lose their jobs if such an order were made. Furthermore, neither the appellants nor the general assistants employed by them had raised questions regarding the legitimate expectation and the unfairness in the implementation of the policy.

Cross-references:

- *The Premier, Province of Mpumalanga and Another v. The Executive Committee, Association of Governing Bodies of State-Aided Schools: Eastern Transvaal*, 1999 (2) *South African Law Reports* 91 (CC); 1999 (2) *Butterworths Constitutional Law Reports* 151 (CC), *Bulletin* 1998/3 [RSA-1998-3-011].
- *Minister of Public Works and Others v. Kyalami Ridge Environmental Association and Another*, 2001 (3) *South African Law Reports* 1151; 2001 (7) *Butterworths Constitutional Law Reports* 652 (CC).

Languages:

English.



Identification: RSA-2002-1-003

a) South Africa / b) Supreme Court of Appeal / c) / d) 27.03.2002 / e) SCA 60/2000 / f) The Minister of Correctional Services and Others v. Kwakwa and Another / g) / h) CODICES (English).

Keywords of the systematic thesaurus:

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

3.13 **General Principles** – Legality.

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

5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.

5.2 **Fundamental Rights** – Equality.

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

Keywords of the alphabetical index:

Prisoner, privilege / Prisoner, treatment / Prisoner, differentiation / *Residuum*, principle.

Headnotes:

In fashioning a system of privileges for awaiting-trial and unsentenced prisoners, the State cannot undermine these prisoners' constitutional rights arbitrarily. Such a policy must take into consideration the period of incarceration and cannot prescribe a rigid system for all such prisoners.

Administrative action which does not take these considerations into account is *ultra vires* and in violation of the principle of legality. Such action must be struck down.

Summary:

In terms of Section 2 of the Correctional Services Act 8 of 1959, the Department of Correctional

Services is responsible for the administration, management and maintenance of prisons in South Africa. This department was under the control of the Commissioner of Correctional Services, the second appellant, subject to the policy determinations and directions of the first appellant. In November 1998, the second appellant, purportedly acting in terms of Section 22 of the Correctional Services Act, determined a new "privilege system" in terms of which privileges were granted on a differential basis to prisoners in specified categories. Sentenced prisoners were categorised largely on the basis of behavioural patterns, and given different privileges accordingly. One of the consequences of this new system was that several privileges previously enjoyed by unsentenced prisoners were restricted or withdrawn.

In December 1998, five unsentenced prisoners, including the two respondents, brought an urgent application in the Transvaal Provincial Division of the High Court for an interdict prohibiting the introduction of the new system pending the institution of an application for an order reviewing and setting aside the determination by the second appellant, and restoring the privileges previously enjoyed by them. They failed to obtain an interim order. In the review application, their two main arguments were, first, that the appellants had failed to observe procedural fairness, and second, that their action was *ultra vires* since it violated the respondent's Constitutional rights and was unreasonable. The High Court found in their favour and restored a number of privileges previously enjoyed by the respondents and ordered that certain privileges be extended to them on the ground that the action of the second appellant was *ultra vires*.

The appellants then appealed to the Supreme Court of Appeal (SCA), the highest court in non-constitutional matters, against this decision. At this stage, the only issue before the Court was the legality of the new system insofar as it applied to awaiting-trial and unsentenced prisoners. The SCA engaged in a lengthy analysis of the privilege system and the justifications provided for this system by the appellants. Under the new system, awaiting-trial and unsentenced prisoners were denied the use of audio equipment and televisions, access to the prison library, receiving foodstuffs from friends and relatives, pursuing of a hobby, possession of a musical instrument, and singing in the prison choir. Their visitation rights and use of the telephone were limited extensively. Furthermore, the respondents were physically locked in their cells from 15h00 to 7h00. These privileges were withdrawn despite the fact that many prisoners, such as the respondents, had been awaiting-trial prisoners for four to five years. It was against this background that the respondents

contended that the withdrawal of privileges previously enjoyed was oppressive and unlawful.

The SCA considered the case law, endorsing the pre-constitutional "residuum principle" set out in the minority judgment of Judge of Appeal Corbett in *Goldberg and Others v. Minister of Prisons and Others*, 1979 (1) *South African Law Reports* 14 (A), and subsequent decisions. According to the residuum principle, a prisoner retains all the basic rights and liberties of an ordinary citizen unless these are taken away from him or her by law or they are necessarily inconsistent with the circumstances in which he or she, as a prisoner, is placed.

Writing on behalf of the majority of the SCA, Judge of Appeal Navsa held that the term "privilege", as used in the new "privilege system", is a misnomer: curtailed as their rights may be, unsentenced prisoners retain certain personal rights. Moreover, some of these rights are enshrined in the Constitution: Section 35.2.e of the Constitution states that "[e]veryone who is detained, including every sentenced prisoner, has the right – to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment".

Judge of Appeal Navsa further held that the actions of the second appellant amounted to administrative action. As such, these actions are regulated by Section 33 of the Constitution, which requires that administrative action be just and fair. He found that the second appellant had failed to take into account that a substantial part of the prison population spends a lengthy period of time waiting for their trial to commence or be finalised. In the light of this, he found that there had been a fundamental failing by the second appellant to consider the needs and rights of awaiting-trial and unsentenced prisoners in fashioning a system which catered for their circumstances and which did not violate their rights. The "privilege system" failed to give effect to the residuum principle. The system also discriminated against these prisoners in a manner which is unjustified in law and in logic, in a manner which is not countenanced by the Correctional Services Act. Judge of Appeal Navsa concluded that the second appellant had acted beyond his powers, and accordingly set aside the privilege system insofar as it related to awaiting-trial and unsentenced prisoners, in its entirety.

Cross-references:

- *Goldberg and Others v. Minister of Prisons and Others*, 1979 (1) *South African Law Reports* 14 (A).

- *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others*, 2000 (2) *South African Law Reports* 674 (CC); 2000 (3) *Butterworths Constitutional Law Reports* 241 (CC), *Bulletin* 2000/1 [RSA-2000-1-003].

Languages:

English.



Identification: RSA-2002-1-004

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 11.04.2002 / **e)** CCT 36/2001 / **f)** The Islamic Unity Convention v. The Independent Broadcasting Association and Others / **g)** / **h)** 2002 (5) *Butterworths Constitutional Law Reports* 433 (CC); CODICES (English).

Keywords of the systematic thesaurus:

- 1.3.4.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of fundamental rights and freedoms.
- 3.12 **General Principles** – Clarity and precision of legal provisions.
- 3.16 **General Principles** – Proportionality.
- 3.18 **General Principles** – General interest.
- 4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Court, ordinary, verification of the constitutionality of laws / Holocaust, denial.

Headnotes:

The right to freedom of expression in Section 16 of the Constitution does not extend to propaganda for war, incitement of imminent violence or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. The right may be limited but only if reasonable and justifiable in an open and democratic society. In

order to be justifiable, the limitation must be sufficiently clear and precise to serve as a guide to broadcasters. In terms of Section 172 of the Constitution, a court must declare any law which is inconsistent with the Constitution, to be invalid to the extent of the inconsistency. This duty differs significantly from the duty imposed by the Supreme Court Act 59 of 1959, which gives a judicial officer the discretion to grant a declaratory order.

Summary:

The Islamic Unity Convention (IUC), the owner of a community radio station, had broadcast an interview with a Dr. Zaki, who was described as an historian and author. In the interview he denied, amongst other things, that six million Jewish people had been gassed in concentration camps during the Holocaust. Instead, he asserted that only one million Jewish people had died and that it was as a result of infectious diseases. The South African Jewish Board of Deputies laid a complaint with the Broadcasting, Monitoring and Complaints Commission in terms of clause 2.a of the Code of Conduct for broadcasting licensees. Clause 2.a states that broadcasters shall not broadcast any material which, amongst other things, is likely to prejudice relations between sections of the population. The IUC approached the High Court for relief, arguing that the Commission had followed the incorrect procedure in dealing with the complaint and that clause 2.a was unconstitutional as it unjustifiably limited the right to freedom of expression provided for in Section 16 of the Constitution.

The High Court found that it was unnecessary to deal with the constitutional question since it found for the applicant on the procedural grounds. The IUC appealed directly to the Constitutional Court against this aspect of the decision. In a unanimous decision of the Court, Deputy Chief Justice Langa held that an application for a declaratory order in terms of the Constitution has different requirements to an application in terms of the Supreme Court Act 59 of 1959. In terms of Section 172 of the Constitution, a court must declare any law or conduct that is inconsistent with the Constitution to be invalid to the extent of its inconsistency. The High Court therefore erred in declining to deal with the constitutional issue. Deputy Chief Justice Langa further held that it was in the interests of justice for such an important issue to be decided by the Constitutional Court.

The right to freedom of expression is one of the most fundamental rights in a democratic society, particularly in a new democracy like South Africa where, in the past, much expression was brutally suppressed and restricted. Certain expression, however, can

undermine the values that inform the protection of a free and democratic society and has the potential to impair human dignity and the achievement of equality, values foundational to the constitutional order. The right is therefore not absolute; it is defined in such a way that certain expression is not included within the ambit of its protection. Section 16.2 of the Constitution thus excludes propaganda for war; incitement of imminent violence and advocacy of hatred that is based on race, gender, ethnicity or religion and that constitutes incitement to cause harm, from the protection of the right. If the State wishes to limit the protected right, the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Clause 2.a was held to have a wider ambit than those areas excluded from constitutional protection in terms of Section 16.2. It therefore limited the right to freedom of expression. It was also not justifiable because the clause could not be read in any way that was sufficiently clear and precise to serve as a guide to broadcasters of what they may or may not broadcast.

It was therefore declared that the portion of the clause which referred to material which is likely to prejudice relations between sections of the population was invalid, but that the order did not extend to propaganda for war, incitement of imminent violence and advocacy of hatred based on race, gender, ethnicity or religion and that amounted to incitement to cause harm.

Cross-references:

- *S v. Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)*, 2001 (3) *South African Law Reports* 409 (CC); 2001 (5) *Butterworths Constitutional Law Reports* 449 (CC).

Languages:

English.



Identification: RSA-2002-1-005

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 11.04.2002 / **e)** CCT 37/2001 / **f)** Van der Walt v.

Metcash Trading Limited / g) / h) 2002 (5) *Butterworths Constitutional Law Reports* 454 (CC); CODICES (English).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.19 **General Principles** – Margin of appreciation.
- 3.22 **General Principles** – Prohibition of arbitrariness.
- 4.7.2 **Institutions** – Judicial bodies – Procedure.
- 4.7.3 **Institutions** – Judicial bodies – Decisions.
- 4.7.7 **Institutions** – Judicial bodies – Supreme court.
- 5.2.1 **Fundamental Rights** – Equality – Scope of application.
- 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Access to courts.
- 5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Double degree of jurisdiction.

Keywords of the alphabetical index:

Equal benefit of the law / Appeal, leave to appeal / Appeal, decision of Supreme Court.

Headnotes:

The right to equality before the law, and equal protection and benefit of the law, is not violated by a difference in outcome of orders refusing leave to appeal, provided that the same procedure is employed to reach these outcomes. The test for granting leave to appeal is whether there are reasonable prospects of success on appeal, which is determined through the exercise of discretion. If this discretion is not exercised arbitrarily it is neither a violation of the rule of law, of the right to equality, nor of access to court.

Summary:

On two successive days, the Supreme Court of Appeal (SCA), which is the highest court in non-constitutional matters, refused leave to appeal to one petitioner and granted leave to appeal to another. The two petitions resulted from two orders which originated from different divisions of the High Court. The essential facts and grounds for appeal in both petitions were substantially identical. The SCA granted the second petition, but dismissed the case of the applicant, Mr van der Walt.

The issues before the Constitutional Court were, first, whether granting the one application and refusing the other was arbitrary and in violation of the rule of law; second, whether it was a violation of the applicant's

right of access to court; and third, whether the applicant's right to equality before the law and the right to equal protection and benefit of the law had been violated by the difference in outcome of the two SCA orders.

On behalf of the majority of the Constitutional Court, Justice Goldstone held that although it is unfortunate that contrary orders should be issued by the SCA in substantially identical cases, this did not result in the breach of any constitutional right. The majority held that there was nothing to suggest that either of the orders was arbitrary. The panels were required to exercise a discretion in determining the prospects of success on appeal. In exercising such a discretion, reasonable minds may well differ. This does not make either order incorrect.

The majority decided further that the applicant's right of access to court was not violated. Section 21.3 of the Supreme Court Act 59 of 1959 provides that litigants who dispute the correctness of an order made by the High Court, are entitled to apply to the SCA for leave to appeal. In terms of this Act, the decision of the SCA to grant or refuse leave to appeal is final. There is no suggestion that this provision is inconsistent with the Constitution. Access to court for this purpose, to which litigants are entitled, was accorded to the applicant.

Lastly, Justice Goldstone held that Section 9.1 of the Constitution, which provides that everyone is equal before the law and has the right to equal protection and benefit of the law, does not guarantee equality of outcome in litigation. Section 9.1 of the Constitution guarantees that all persons in a similar position must be afforded the same right of access to court and just procedure, and that the applicant was not denied such rights. In terms of the order of the Court, the application was dismissed with costs.

There were three dissenting judgments by Justices Madala, Ngcobo and Sachs who held that the issuing of the two diametrically opposed orders by the SCA on two successive days, in two cases involving identical issues, was manifestly unequal, unjust and inconsistent with the Constitution. They held that similarly situated litigants are entitled to be treated alike, unless there is a principled reason or a distinguishing factor for doing so. In this case there was no such exception. Placing two identical cases before different panels resulted in different treatment which violated the equal protection principle. The conflicting orders, although made by different panels, were made by the same Court, and were therefore arbitrary.

Languages:

English.



Sweden

Supreme Administrative Court

There was no relevant constitutional case-law during the reference period 1 January 2002 – 30 April 2002.



Switzerland

Federal Court

Important decisions

Identification: SUI-2002-1-001

a) Switzerland / **b)** Federal Court / **c)** Second Civil Court / **d)** 06.12.2001 / **e)** 5A.15/2001 / **f)** M.W. and K.S. v. the Grisons Cantonal Court / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 128 III 113 / **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.
 3.16 **General Principles** – Proportionality.
 3.17 **General Principles** – Weighing of interests.
 3.18 **General Principles** – General interest.
 5.1.1.4.1 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Minors.
 5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.
 5.3.32 **Fundamental Rights** – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Marriage, right, restriction / Marriage, child of spouse, prohibition.

Headnotes:

The provision in Section 95.1.2 of the Civil Code prohibiting marriage between a person and the child of the person's spouse applies even when the two have had children together.

The purpose of this restriction is to contribute to the fulfilment of the child's personality and sexuality, free of any dependence. This purpose prevails over the absolute right to marry a member of the opposite sex and is proportional.

Summary:

In 1985, Mr M.W. married Ms V.S., who already had two children, a daughter, K.S., born in 1971, and a

son, N.S., born in 1976. In May 1991 the couple divorced.

In June 1991 K.S. had a son by M.W. Another son was born of this relationship in 1994. The two sons initially bore the S. family name; in 1995 they took the W. family name.

After living together for a number of years, in 2000 M.W. and K.S. applied to the registry office in Coire (Grisons canton) to get married. The application was rejected on the grounds that Section 95.1.2 of the Swiss Civil Code, as modified, in force since 1 January 2000, prohibits marriage between a person and the child of the person's spouse. The decision was upheld by the competent cantonal department and by the Grisons Cantonal Court.

M.W. and K.S. lodged an administrative appeal with the Federal Court to set aside the cantonal decisions and grant them the right to marry. They argued that the provision of the Civil Code had not been correctly applied and that there was a legal lacuna when the two people concerned had had children together. They also argued that prohibiting marriage was a violation of Article 12 ECHR. The Federal Court rejected the administrative appeal.

Prior to the revision of the Civil Code, marriage was prohibited *inter alia* between relatives in direct line, for example between uncle and niece or between aunt and nephew, irrespective of whether the kinship was legitimate or illegitimate. The new provision of the Civil Code relaxes the restrictions on marriage, in particular between uncle and niece and between aunt and nephew, as well as those based on relationship by marriage, thereby making due allowance for social change; the need to protect family life no longer justifies such restrictions. However, the new provision expressly maintains the prohibition of marriage between a person and the child of the person's spouse, the aim being to protect children of former unions in the same way as those born to the couple. The genesis of the provision concerned clearly shows that Section 95.1.2 of the Civil Code is absolute and makes no distinction according to whether or not the relationship between a person and the child of the person's spouse has produced children. Insofar as the applicants criticise the application of the Civil Code, the appeal is unfounded.

The Federal Court also examined the conformity of the Civil Code with Article 12 ECHR, under which men and women have the right to marry and to found a family. This right is not absolute, however, and is subject to national laws. The purpose of prohibiting marriage between a person and the child of the person's spouse is to protect the family. Although the

family has lost some of its functions, it remains the basic community in which parents and children live. The aim of the impugned prohibition – which exists in a number of other European countries – is to contribute to the fulfilment of the child's personality and sexuality, free of any dependence. This purpose takes precedence over the absolute right of men and women to marry and is proportional. The applicants are free to live together without being married, a practice largely accepted in today's society, with no negative consequences for the children. For all these reasons, the prohibition of marriage between a person and the child of the person's spouse embodied in Section 95.1.2 of the Swiss Civil Code is compatible with the provisions of Article 12 ECHR.

Languages:

German.



Identification: SUI-2002-1-002

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 04.03.2002 / **e)** 1P.460/2001 / **f)** A.A. v. B.B. and the *Conseil d'État* and the Lucerne Cantonal Court / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 128 I 63 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

- 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.
- 2.1.1.4.12 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Convention on the Rights of the Child of 1989.
- 3.17 **General Principles** – Weighing of interests.
- 3.22 **General Principles** – Prohibition of arbitrariness.
- 5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.
- 5.3.13.7 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Right of access to the file.
- 5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.

5.3.31.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.

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

Keywords of the alphabetical index:

Child, right to know parents / Registry office records, consultation / Adoption, right to know biological parents.

Headnotes:

In view of the personal freedom provided for in the Federal Constitution and the European Convention on Human Rights, and the guarantees enshrined in the conventions on children's rights, an adopted child who has come of age has an absolute right to know about his or her parents as well as to consult the masked entries in the register of births without any need to ponder the interests.

Summary:

Ms A.A., while unmarried, gave birth to a son, C.A., on 7 August 1968. Immediately after the birth, the child was taken in by foster parents, who adopted him in 1973 and gave him the name B.B.

In 1998, B.B. asked the Prefect of Lucerne to reveal the identity of his biological parents. The Prefect approached the mother, who did not want her name revealed to B.B., arguing that she was in no fit state psychologically and that at the time of the adoption she had received a promise that her identity would never be disclosed.

The Prefect, by formal decision, then ordered the identity of the mother to be revealed to the son. The mother appealed to the *Conseil d'État*, then to the Lucerne Cantonal Court, to prohibit the disclosure of her identity to B.B. Both dismissed the appeal, as the arguments put forward, in particular concerning the fact that B.B.'s birth had been the result of a rape, and the alleged psychological difficulties that ensued, did not appear in the file. Furthermore, B.B.'s right to know who his parents were prevailed over the mother's difficult situation.

In a public law appeal A.A. asked the Federal Court to set aside the cantonal decisions. She alleged violation, in particular, of the ban on arbitrary treatment enshrined in Article 9 of the Federal Constitution, of the personal freedom guaranteed by Article 10 of the Federal Constitution, of Article 8 ECHR and of Article 7 of the Convention on the

Rights of the Child. The Federal Court dismissed the appeal.

The Federal Court has tried several cases concerning access to files containing information on a child's biological parents. In so doing it has taken into account, *inter alia*, the personal freedom guaranteed by the Federal Constitution and the European Convention on Human Rights, and weighed up the interests involved. It has recalled the importance for the child to know his or her background and for the parents not to have to divulge their past.

Attitudes to the question of the right to know one's parentage changed with the entry into force of a provision of the Constitution and a federal law on medically assisted procreation granting children born in this way the right to obtain information concerning their biological origins. Article 7 of the United Nations Convention on the Rights of the Child stipulates that a child has the right to be registered, to have a name, to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. The term "as far as possible" must not be taken as a legal limitation, but as a reference to facts that can hamper the enjoyment of certain rights. In a similar spirit, the Hague Convention on protection of children and co-operation in respect of inter-country adoption asks states to make sure that data concerning the parents are stored and that children have access to the information. Following ratification of that Convention, the Federal Parliament adopted Section 268c of the Civil Code providing adopted children, from the moment it enters into force, probably in summer 2002, with a right to know their biological parents, while bearing in mind the personality rights of the biological parents.

Adopted children who reach adulthood thus have the right to know who their biological parents are, and therefore the right to consult the masked entries in the register of births, marriages and deaths, regardless of any conflicting interests that may exist. In this case, therefore, it was not necessary to examine the circumstances of the conception and birth of B.B. more closely. The appeal by A.A., being unfounded, was dismissed.

Languages:

German.



“The Former Yugoslav Republic of Macedonia” Constitutional Court

Important decisions

Identification: MKD-2002-1-001

a) “The Former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 06.02.2002 / **e)** U.br. 210/2001 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 16/2002 / **h)** CODICES (Macedonian).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.13 **General Principles** – Legality.
- 3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.
- 5.2 **Fundamental Rights** – Equality.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.13.22 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Presumption of innocence.

Keywords of the alphabetical index:

Criminal Code / Sanction, criminal, enforcement / Verdict, legal effects.

Headnotes:

The legal consequences of conviction regarding criminal matters consisting or loss of rights, other than those subject to the conviction cannot come into force automatically by virtue of law. They can only appear on the basis of a final irrevocable court decision. Any such loss of rights can appear only as a content of the convicting judgment. There is no possibility, if not strict provided for by the Constitution, for further punishments that restrict citizens’ rights.

Summary:

The Court annulled from Article 110.2 of the Criminal Code the words “come into force by virtue of the law

that prescribes them”, because it ascertained that this was inconsistent with some constitutional provisions.

According to Article 110.1, the legal consequences of a conviction accompanying sentences for certain offences cannot arise when the perpetrator is fined, put on probation, when a court warning was issued or in cases when he or she is released from sentencing. According to paragraph 2, only law can establish legal consequences and they come into force by virtue of law.

The Court passed its decision taking into consideration the fundamental value of the constitutional order of the country, respectively the rule of law and the separation of powers. The Court also took into consideration the principle of equality of citizens in enjoying human rights and freedoms, the principle of constitutionality and legality, the presumption of innocence (Article 13.1 of the Constitution) and the principle of *nullum crimen nulla poena sine lege* (Article 14.1 of the Constitution). Article 54.1 of the Constitution provides that human rights and freedoms can be restricted only in cases enshrined within the Constitution.

The Criminal Code itself does not treat the legal effects of a conviction as penalties nor as other types of criminal sanctions. It entails that the perpetrator of a criminal act cannot be deprived of certain rights or freedoms. Article 4 of the Criminal Code enumerates criminal sanctions: penalties, probation and judicial admonition, measures of insurance and educational measures. Article 33 defines custody and fines as types of penalties. Article 5 provides for the restriction or deprivation of certain rights or freedoms in enforcing the criminal sanction under certain terms: in a scope which is appropriate to the nature and contents of that sanction and in a way which respects the perpetrator’s personality and human dignity. Bearing in mind the contents of Article 110 of the Code, it means that the legal consequences of a conviction accompany sentences for certain offences. It means that although the legal consequences of a conviction are not treated as penalties, still, due to their nature, character and possibility to be set up by virtue of law, without forms and terms for their delivery being prescribed by the Criminal Code itself, they are given features close to those of a penalty. Therefore, they can greatly affect the length of the sentence.

Due to these reasons, the Court judged that the legal consequences of a conviction could not come into force by virtue of law automatically, but in pursuance to an irrevocable court decision. Further effects of enforcing the sentence, being shaped as a restriction or deprivation of certain rights are not allowed, if not explicitly stated in the Constitution. Since the provision in question stated that the legal consequences of a

conviction come into force by virtue of law, and not as a penalty sentenced by the court within the range of sanctions, the Court ascertained the alleged unconstitutionality of the respective part of the disputed provision.

Languages:

Macedonian.



Identification: MKD-2002-1-002

a) "The Former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 13.02.2002 / **e)** U.br. 196/2001 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 16/2002 / **h)** CODICES (Macedonian).

Keywords of the systematic thesaurus:

- 3.13 **General Principles** – Legality.
- 3.15 **General Principles** – Publication of laws.
- 3.22 **General Principles** – Prohibition of arbitrariness.
- 4.7.15.1.2 **Institutions** – Judicial bodies – Legal assistance and representation of parties – The Bar – Powers of ruling bodies.
- 5.2.1.2.1 **Fundamental Rights** – Equality – Scope of application – Employment – In private law.
- 5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.
- 5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.

Keywords of the alphabetical index:

Bar, admission, subscription fee / Bar, public service, exercise / Lawyer, admission to practice, conditions.

Headnotes:

The subscription fee charged for new Bar Association members for registering within the Directory of Lawyers has no constitutional and statutory basis. According to the manner and the time in which it is charged (namely whilst registering in the Directory), this fee is considered an additional condition for practicing law, which is beyond what is stipulated by the Bar Law. The introduction of this fee charged only

for new members of the Bar violates the principle of equality.

The non-publication of disputed decision, which introduced and determined the amount of the fee (four times the net salary earned in the business sector during the previous month) contradicts the constitutional principle of publication of laws and other regulations before their entry into force.

Summary:

Taking a petition lodged by an individual from Skopje being upheld by 96 citizens into consideration, the Court repealed Article 65 of the by-law of the National Bar Association and the decision on the amount of the subscription fee for new members of the Bar, delivered by the Bar's Managing Board.

According to the disputed article, when registering in the Bar Directory, lawyers are obliged to pay a certain fee, which is determined by the Bar Managing Board. The amount cannot be lower than three times the average net salary paid in the preceding month. According to disputed decision, new lawyers must pay a fee of four times the net average salary as a subscription fee when registering in the Bar Directory. The decision itself entered into force when adopted, and should be published within the National Official Gazette.

In making its decision, the Court took into consideration constitutional provisions relating to the principle of equality of citizens before the Constitution and laws (Article 9.2 of the Constitution), the right to work and the accessibility to each post under equal terms (Article 32.2 and 5 of the Constitution), as well as the principle of publication of laws and regulations before their entry into force (Article 52.1 of the Constitution).

Article 53 of the Constitution, defining the position of the Bar, was also taken as ground for decision-making.

The Bar Law provides for legal assistance to individuals and entities in attaining and safeguarding their rights and legally-grounded interests in procedures before the courts, other bodies and institutions. It also provides for the organisation of the Bar, terms for registering in the Bar Directory and rights and duties of lawyers. The law also regulates that the Bar's independence is fulfilled by the free and impartial exercise of its activity, by the free appointment of lawyers, by organising the relation of attorneys within the Bar Association, by autonomous adoption of internal acts of the National Bar Association, and by adoption of the Code on Legal Ethics etc. The right to practice as a lawyer is attained by registering in the Bar Directory. The Law

stipulates the terms which a candidate must fulfil in order to be fit for registration in the Directory: to have Macedonian citizenship, to be a law graduate who has passed the bar exam, and to have the capacity to work as a lawyer.

The Bar Association, as an independent and impartial organisation, decides on the acquisition and cessation of the right to practice law, and on the registration and striking off the Bar Directory. It also adopts general acts of the Association.

The Court found the Bar to be an independent and impartial public service providing legal assistance and exercising public powers and duties, as determined by law. It found that the right to work as a lawyer is acquired by registering in the Bar Directory and that terms for its exercise are determined by law. It is accessible to everybody under equal terms. Besides, it is inevitable that lawyers are organised in the Bar Association, whose committees decide on the acquisition and termination of the right to practice law, and for registering in and striking off the Bar Directory, but under terms and procedures determined by the Law. However, the right to decide in each case does not encompass the right to establish new terms (not determined by statute) for matriculation in the Bar Directory, nor to introduce the payment of a subscription fee as an additional condition for being entitled to practice law.

Bearing in mind the above, the Court found the subscription fee imposed on new members of the National Bar Association to be unconstitutional and unlawful. It found it was an additional condition for being entitled to practice law, which went beyond what was established by statute. It also stated imposing of this fee only on new members of the Bar violates the principle of equality.

Since Article 2 of the decision in question provided for it entering into force immediately (before being published), the Court found it did not comply with Article 52.1 of the Constitution.

Languages:

Macedonian.



Identification: MKD-2002-1-003

a) “The Former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 24.04.2002 / **e)** U.br. 218/2001 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 31/2002 / **h)** CODICES (Macedonian).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
 3.18 **General Principles** – General interest.
 3.25 **General Principles** – Market economy.
 5.1.1.5.1 **Fundamental Rights** – General questions – Entitlement to rights – Legal persons – Private law.
 5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship.
 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Capital, investment / Concession, procedure / Competition / Public service, privatisation / Sewerage, evacuation / Water, supply / World Bank, credit, conditions.

Headnotes:

It is legally impossible to invest private capital into a public water utility and consequently restructuring it as limited liability or joint stock company. Water supply and sewerage is not an activity that can be commercialised. The provision of the decision rendered by the city of Skopje violates the principle of freedom of market and entrepreneurship and the equal legal position of all market entities.

Summary:

The issue at stake was part of the conditions by the World Bank for giving the city of Skopje credit, according to which the Council of the city of Skopje could “use the credit only if a private international operator participates as a service provider in the sphere of water supply and sewerage, chosen by a tender process”.

The decision in dispute determined the use of the credit: the rehabilitation and extension of water supply and the sewage system, and for procuring equipment for maintaining communal hygiene in the city.

The Court upheld the alleged unconstitutionality and illegality of the provision in dispute and found it did not comply with Articles 55, 56 and 58 of the

Constitution and with several provisions stipulated in the Law on public utilities, the Water Law, the Law on public undertakings and the Law on Commercial Concessions.

According to Article 55.1 of the Constitution, the freedom of the market and entrepreneurship is safeguarded. Paragraph 2 of this article obliges the State to ensure the equal legal position of all market entities and to take measures against monopolistic positions and conduct on the market.

According to Article 56.3 of the Constitution, the law regulates the terms under which certain public amenities can be provided.

According to the Law on public utilities, water supply and sewerage can be performed by setting up a public undertaking (state- or locally-owned), by granting a concession (in a legally determined way) and by providing permission for performing such services. Public undertakings can be organised as limited liability or joint stock companies if private capital is invested in them, provided that individuals and legal entities can not invest in those undertakings providing water and sewerage services. The possibility for investing private capital into a public undertaking is granted for those providing other public utility services, except for water supply and sewerage.

The Water Law regulates that water, as a public commodity, enjoys special protection and is state owned. It also states that water can be provided by granting a time-limited concessionary right to domestic or foreign individual or legal entities, under terms determined by law. Such a possibility exists for the following services: production of electricity, fish-farming, lake traffic and tourist services.

The Law on Commercial Concessions determines the way and terms under which the public interest can be safeguarded for by granting commercial concessions. The provider of such concessions is the State, represented by the Government, which decides on the election of concessionaires by way of a public or direct tender. Thereby, all bidders are parties to the procedure.

In respect of the cited legislation, the Court stated that the public utilities of water and sewerage cannot be exercised by granting concessionary rights to private entities, which should invest money into the existing public undertaking and reorganise it as trade company. Also, the Court ascertained that the determination of the potential beneficiary of the public tender for exercising this service in advance (an international private operator) violates the principle of freedom of the market and entrepreneurship, as well

as the equal legal position of all market entities (Article 55 of the Constitution).

Languages:

Macedonian.



Turkey

Constitutional Court

Important decisions

Identification: TUR-2002-1-001

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 16.11.2000 / **e)** K.2000/48 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 24696, 15.03.2002 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

- 3.5 **General Principles** – Social State.
- 3.9 **General Principles** – Rule of law.
- 3.16 **General Principles** – Proportionality.
- 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:

Real estate, owner / Rent, pricing, regulation / Housing, rent, increase, limitation / Revenue, just distribution.

Headnotes:

A law establishing that the levels of rent determined in leases may not exceed 25% for the year 2000 conforms to the Constitution insofar as it represents a justified restriction to the right to property introduced with the aim of improving social relations and public order, and to restore the soured economic relationship between landlord and tenant.

Summary:

The Pazaryeri Peace Court brought an action before the Constitutional Court in order to annul Provisional Article 7 of the Law on Rents of Real Estate. The Peace Court claimed that the challenged provision as a restriction on increases on renting property is contrary to the Constitution.

The Constitutional Court observed that it is normal that the rental prices increase in countries with a shortage of living and office accommodation if the State does not take necessary measures. However,

in Turkey rental prices are high on the retail prices index, which runs contrary to principles of social justice. Therefore, in accordance with the rule of law, the State must take measures in order to restore social harmony, to preserve public order, and thus create a just distribution of revenues.

Article 35 of the Constitution provides that “Everyone has the right to own and inherit property. This right may only be limited by law, if in the public interest. The exercise of the right to own property shall not be in contravention of the public interest”. The right to own and inherit property ensures individuals benefit from their property provided that they do not infringe the rights of others, and comply with the limitations made by laws. Article 48 of the Constitution gives to a state the competence to regulate on this issue.

The Constitutional Court observed that in a democratic state, limitations may be made if there are conditions to prefer the interests of society over that of individuals in order to maintain the democratic social order.

The aim of the challenged provision was stated to be the balance of the situation of the landlord and tenant, and the limiting of the increase in rental prices since this is always higher than the general inflation rate.

Therefore, the Constitutional Court considered that the challenged article had been drafted in order to realise social harmony and public order, and to restore the soured economic relationship between landlord and tenant. Rental prices are related to public law. It is clear that if the necessary measures have not been taken, rental prices would abnormally increase. It was also emphasised that when the phenomenon of rental prices is regarded as a social problem, this restriction is not contrary to Articles 2, 13, 35 and 48 of the Constitution. Hence, the objection was dismissed by a majority vote.

Languages:

Turkish.



Identification: TUR-2002-1-002

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 03.01.2002 / **e)** K.2002/9 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 24728, 16.05.2002 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

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:

Media, statement, false, retraction / Publication, time-limit.

Headnotes:

In accordance with Article 32.2 of the Constitution “If a retraction or apology is not published, the judge will decide, at least within seven days from appeal by the person concerned, whether or not this publication is required”.

For the purpose of informing people about the retraction before the effects of the publication or broadcasting have been forgotten, the law may determine a time-limit that is shorter than seven days.

Summary:

The Ankara 11 Peace Court brought an action before the Constitutional Court in order to annul Article 19.3 of the Law on the Press. According to this provision, the peace judge shall decide within two days whether the rectification or retraction is related to the publication, and whether it conforms to the forms and conditions stipulated by law. The Peace Court alleged that the sentence “within two days” is contrary to Article 32.2 of the Constitution.

The Constitutional Court noted that according to Article 32.1 of the Constitution “The right of rectification and retraction shall be accorded only in cases where one's personal reputation and honour is attacked or in cases of an unfounded allegation and shall be regulated by law”. If the rectification or retraction is not published, the judge shall decide at least within seven days.

The media should supply news and information in an accurate way. While performing their duties, they have an obligation to respect the reputation and

honour of others. According to the Constitutional Court, the time-limit provided by Article 32.2 of the Constitution is the maximum time limit. Since seven days is the maximum time-limit, the parliament may determine a time-limit that is shorter than seven days.

Therefore, the Constitutional Court concluded that the challenged provision is not contrary to the Constitution, and the application was unanimously rejected.

Languages:

Turkish.

*Identification:* TUR-2002-1-003

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 13.02.2002 / **e)** K.2002/28 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 24730, 18.04.2002 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

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

5.4.7 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

4.10.8.1 **Institutions** – Public finances – State assets – Privatisation.

Keywords of the alphabetical index:

Energy sector, regulation / Contract, nullity.

Headnotes:

The freedom of contract as guaranteed by Article 48 of the Constitution comprises the right to conclude contracts as well as the prohibition of intervention into concluded contracts. The parties to a contract are free to arrange the terms and conditions of the contract, and to decide when and how it shall be terminated.

Summary:

The main opposition party appealed to the Constitutional Court alleging that some provisions of the Law on the Electric Energy Market are contrary to the Constitution.

It was projected that parts of the electricity sector should be privatised provided that the companies concerned operate these institutions for a certain period of time, and pay a certain amount of money. After the determined period, the establishments shall again be transferred to the public sector. This kind of privatisation is called “operate and transfer”. The contracts regarding these establishments had been signed, but the actual transfer had not been realised since the necessary procedures had not been completed.

The challenged provisions stipulated that the contracts relating to a transfer of the electrical plants to the private sector shall be null and void if their actual transfer could not have been realised by 30 June 2001.

Article 48 of the Constitution provides that “Everyone has the freedom to work and conclude contracts in the field of his or her choice. Establishment of private enterprises is free”. The Constitutional Court noted that according to that provision, the parties to a contract may arrange terms and conditions with their free will. It is for them to decide when and how a contract shall be terminated.

The challenged provisions stipulate that the contracts concluded by the free will of the parties (on the one hand the administration and on the other hand private companies) shall be annulled under certain conditions. On the contrary, to terminate a contract or to solve a dispute relating to the terms and conditions of a contract is subject to general rules.

For these reasons, the Constitutional Court concluded that the termination of contracts by law is contrary to Articles 2 and 48 of the Constitution. Thus, the challenged provisions were unanimously annulled.

Languages:

Turkish.



Ukraine Constitutional Court

Important decisions

Identification: UKR-2002-1-001

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 29.01.2002 / **e)** 1-rp/2002 / **f)** Official interpretation of Article 5.1 of the Law of Ukraine “On avoiding discrimination in taxation of business activities founded on domestic property and funding” and Article 19.1 of the Law of Ukraine “On investment activities” (case on taxation of companies with foreign investment) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

2.2.1.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and legislative acts.

2.2.1.3 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and other domestic legal instruments.

2.3.8 **Sources of Constitutional Law** – Techniques of review – Systematic interpretation.

3.13 **General Principles** – Legality.

3.21 **General Principles** – Equality.

3.25 **General Principles** – Market economy.

4.10.4 **Institutions** – Public finances – Currency.

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

Keywords of the alphabetical index:

Investment, foreign / Customs / Tax, preferential treatment.

Headnotes:

A concept of “national treatment” and “treatment not less favourable than that of a country’s own citizens and companies” are, in fact, identical. The application of the national treatment of currency regulation and taxation to companies involved with foreign capital complies to the international obligations taken by Ukraine.

Summary:

The Law of Ukraine “On avoiding discrimination in taxation of business activities founded on property and domestic funding” stipulates that for all companies engaging in investment, whether domestic or foreign, there shall be established equal terms as to currency and customs regulation and taxation, collection of charges (compulsory payments).

Regulation of investment activity is provided not only by the laws of Ukraine, but also by international treaties. The Parliament (*Verkhovna Rada*), in conformity with Article 9.1 of the Constitution, stated that international treaties to which the Ukraine is a signatory are to be considered part of the national legislation of Ukraine. A systematic analysis of the provisions contained in international treaties on mutual protection of investment, concluded by Ukraine in 1994-2001, shows that they do not provide for establishment of preferential treatment of investment activity for foreign investors. The relevant articles of such agreements, as a rule, emphasise that the recipient party shall provide for the treatment of foreign investors which is no less favourable than that of Ukrainian citizens or companies or citizens or companies of any third country.

Article 5.1 of the Law of Ukraine “On avoiding discrimination in taxation of business activities founded on property and domestic funding” provides the basis for either refusal in granting or termination of previously granted benefits in the sphere of currency and customs regulation and taxation of companies engaging in foreign investment, irrespective of the time of making such foreign investment and registration thereof.

At the same time, according to Article 32 of this law, companies involved with foreign capital were given a number of tax benefits unavailable to companies with domestic investment. In addition, in conformity with the provisions contained in Article 9 of the Law of Ukraine “On foreign investment”, Article 8 of the Decree of the Cabinet of Ministers “On foreign investment treatment”, in the event of amendments made to the legislation on the request of the foreign investor, the special legislation, valid at the time of registration of the investment, shall apply for a period of 10 years. The Law of Ukraine “On foreign investment” and the Cabinet of Ministers' Decree “On foreign investment treatment” have become null and void according to the provisions contained in Article 27 of the Law of Ukraine “On foreign investment treatment”.

With the adoption of the Law of Ukraine “On avoiding discrimination in taxation of business activities founded on property and domestic funding” it was

decided that the special legislation on foreign investment and state guarantees of such investment protection “shall not regulate the currency, customs, and tax legislation, valid on the territory of Ukraine, unless otherwise stipulated in the international treaties of Ukraine, consent to be bound by which was given by the Parliament” (Article 3).

Languages:

Ukrainian.

*Identification:* UKR-2002-1-002

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 30.01.2002 / **e)** 2-rp/2002 / **f)** Constitutionality of the provisions contained in Article 43 of the Law of Ukraine “On election of people's deputies of Ukraine” (case on the electoral deposit) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 6/2002 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

3.25 **General Principles** – Market economy.
 4.9.7.3 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Candidacy.
 4.9.9.5 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Record of persons having voted.
 5.2 **Fundamental Rights** – Equality.
 5.3.39.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Election, candidate, registration procedure / Deposit, amount, socially oriented.

Headnotes:

The voting qualification and financial deposit are each of a different legal nature. The voting qualification is a qualifying condition regarding the availability of the electoral rights while the electoral deposit is simply a condition for the registration of candidates.

Indeed, the deposit envisaged by the provisions contained in Article 43 of the Law “On election of people's deputies of Ukraine”, is not a property or means-tested qualification and as such does not contradict the provisions of Articles 21 and 24 of the Constitution.

Summary:

The petitioner believed that the requirements stipulated in Article 43 of the Law “On election of people's deputies of Ukraine” as to the necessity of paying a deposit to establish the property qualifications for citizens of Ukraine contradicts the provisions contained in Articles 5 and 24 of the Constitution.

The Constitutional Court proceeded from the following: the Constitution establishes a number of restrictive requirements to the right to be elected as a people's deputy of Ukraine: candidates must be Ukrainian citizens, twenty one years of age as of the day of elections, resident in Ukraine for the last five years, have no criminal convictions, unless such convictions are cancelled and erased by the procedure established by law (Article 76.2 and 76.3). These requirements are referred to as “voting qualification”. The Constitution contains no other restrictive requirements to the citizens of Ukraine exercising their passive electoral rights, in particular the need to have sufficient financial means.

The deposit is used with the purpose to ensure that candidates are properly responsible, to assist with making of the balanced decision by the candidates, including both those candidates elected by the first past the post system and those elected by the proportional representation list system. The deposit is also to prevent possible unjustified expenditure from state funds. The deposit may not be deemed as a restriction of citizens' passive electoral rights due to their wealth. At the same time, the establishment of the deposit does not violate the constitutional principle of equality of citizens before the law and equality of their constitutional rights and freedoms, as well as the principle of equality of political parties before the law. The Constitutional Court indicated that the determination of the socially oriented amount of the deposit is a matter of political expediency and does not belong to the competency of the Constitutional Court.

The provisions contained in Article 43 of the Law of Ukraine “On election of people's deputies of Ukraine” comply with the Constitution.

Languages:

Ukrainian.



Identification: UKR-2002-1-003

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 12.02.2002 / **e)** 3-rp/2002 / **f)** Conformity of the Law of Ukraine “On amending the Law of Ukraine “On the electric power industry” with the Constitution of Ukraine (the case on the electric power industry) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
 3.25 **General Principles** – Market economy.
 4.10.2 **Institutions** – Public finances – Budget.
 4.10.6 **Institutions** – Public finances – Auditing bodies.
 5.3.37.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Energy, sector / Electricity, supply, payment / Confiscation, penalty.

Headnotes:

The customers' making payment for electric power sold to them exclusively to the “distribution account” of the supplier with an authorised bank does not infringe the operation mechanism of the electric power industry and legal model of economic relations.

The Accounting Chamber is not authorised to provide control of the finances of the electricity sector, to the extent of the funds that are not part of the state budget of Ukraine.

Summary:

The legal nature of the rights of businesses in the energy sector is based on the general concept of contractual grounds incorporated into the civil law. The consumption of electric power is possible exclusively due to the agreement with energy suppliers. Any offence in this area shall entail civil liability established by the legislation. In case of necessity, any subject of such relations is entitled to appeal to court requesting the restoration of violated rights on a general basis.

Article 151 of the Law of Ukraine "On the electric power industry" introduced terms of money settlement at the energy market using a "distribution account" with an establishment of an authorised bank. The provisions contained in Article 15.21 of the Law of Ukraine "On the electric power industry", which state that in case of the consumer not being refunded within three days of the money being paid to any account other than the "distribution account", such money shall be subject to confiscation by the State, comply with the Constitution.

State confiscation of money paid by customers to any account other than "distribution account" is a penalty for the offence of late refunding of customers' money. The procedure for imposing this penalty is not determined in the legislation so that there is no case-law on the point.

Granting to the Accounting Chamber the right to control the use of the energy market funds beyond the state budget of Ukraine changes the constitutionally established purpose of this special competency body and, therefore, fails to comply with the application field of its authorities stipulated in Article 98 of the Constitution.

Supplementary information:

The "distribution account" is a special kind of account in the authorised bank (determined by the Decree of the Cabinet of Ministers of Ukraine) designed for payment for the energy used.

Languages:

Ukrainian.



Identification: UKR-2002-1-004

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 20.03.2002 / **e)** 4-rp/2002 / **f)** Official interpretation of the provisions contained in Article 86 of the Constitution of Ukraine, Articles 15.2 and 16.1 of the Law of Ukraine "On the status of the people's deputies of Ukraine" (case on inquiries and appeals of people's deputies of Ukraine to the bodies of investigation and preliminary enquiry) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 13/2002 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

1.3.4.2 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between State authorities.

4.5.2.2 **Institutions** – Legislative bodies – Powers – Powers of enquiry.

4.5.7 **Institutions** – Legislative bodies – Relations with the executive bodies.

4.8.2 **Institutions** – Federalism, regionalism and local self-government – Regions and provinces.

Keywords of the alphabetical index:

Inquiry, by a member of parliament / Inquiry, criminal law / Investigation, preliminary, procedure.

Headnotes:

No people's deputy of Ukraine is entitled to address bodies and officials exercising the function of investigation and preliminary enquiry, with a request or an offer on any matters concerning the investigation and preliminary enquiry in particular criminal cases.

Whether requests and suggestions of people's deputies of Ukraine on these issues are received by bodies and officials exercising the function of investigation and preliminary enquiry, the heads of relevant bodies, investigators and officials carrying on an investigation should act with observance of the requirements defined by the Criminal Procedural Code of Ukraine.

Summary:

The bodies which a people's deputy of Ukraine may petition, are determined only as the bodies of the Parliament (*Verkhovna Rada*) and the Cabinet of Ministers of Ukraine. In addition, the inquiries of people's deputies of Ukraine may be addressed to the senior officials of other state power authorities and local self-government bodies as well as to the managers of enterprises, institutions and organisations located on the territory of Ukraine, irrespective of their importance and form of ownership. At the same time, by implication of Article 86.1 of the Constitution, no people's deputies of Ukraine may make inquiries of bodies or officials that, according to the procedural law, are authorised to exercise the function of investigation and preliminary enquiry.

The investigation and preliminary enquiry in particular criminal cases are envisaged by the procedural law and are to be carried on exclusively by the officials authorised and in the manner as established by law. An inquiry in any form addressed to an employee of

the investigation body or investigator with the purpose of influencing the exercising of his or her duties is prohibited by law. The heads of relevant bodies, investigators and officials exercising the function of investigation, in the case of the receipt of people's deputy's appeals on issues related to investigation and preliminary enquiry in particular criminal cases, are not obliged to consider them subject to the examination procedure and shall bear no responsibility for the non-performance of the requests and suggestions contained therein.

Languages:

Ukrainian.



Identification: UKR-2002-1-005

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 20.03.2002 / **e)** 5-rp/2002 / **f)** Conformity of the provisions contained in Articles 58, 60 of the Law of Ukraine "On the state budget of Ukraine for 2001" and Section 1.1 of the Law of Ukraine "On some measures for the budget funds saving" with the Constitution of Ukraine (case on benefits, compensation and guarantees) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 13/2002 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

3.5 **General Principles** – Social State.
 3.11 **General Principles** – Vested and/or acquired rights.
 3.18 **General Principles** – General interest.
 4.10.2 **Institutions** – Public finances – Budget.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.4.13 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.
 5.4.17 **Fundamental Rights** – Economic, social and cultural rights – Right to a sufficient standard of living.

Keywords of the alphabetical index:

Law, suspension / Benefit, right, abolition, restriction / Nuclear disaster, compensation / Judiciary, financing / Poverty level.

Headnotes:

The provisions contained in Article 28.4 of the Law of Ukraine "On the budget system of Ukraine" as to the prohibition of amending existing legislation by the law on the state budget of Ukraine also mean the impossibility of terminating existing laws on benefits, compensations and guarantees established by these laws and financed from the budget of any level of state authority.

Summary:

Article 1 of the Constitution proclaimed Ukraine as a social state and fixed a number of social rights and guarantees at the constitutional level. The suspension of benefits, compensations and guarantees for 2001 provided by law, caused the violation of constitutional rights of a significant part of the citizens of Ukraine.

The termination of benefits, compensations and guarantees for those categories of citizens whose pensions and wages (including other sources of income) are lower than those determined by law or the poverty level established by law, fails to comply with the requirements of Articles 43.4, 46.3 and 48 of the Constitution.

The additional guarantees of social protection are foreseen by the Constitution for those citizens that are employed in state authorities ensuring the sovereignty and territorial integrity of Ukraine, its economic and information security. The termination of benefits, compensations and guarantees for these categories of citizens without appropriate material consideration is a violation of their and their family members' right to social protection guaranteed by the state.

According to Article 16 of the Constitution, providing ecological security and maintaining ecological balance on the territory of Ukraine, overcoming consequences of the Chernobyl disaster is the responsibility of the state. The withdrawal of benefits from citizens who have suffered from the Chernobyl disaster contradicts Articles 16, 46 and 49 of the Constitution.

The Constitution establishes the responsibility of the state to provide proper conditions for financing of courts and maintenance of judges by the determination in the state budget of a separate cost item for the recompense of judges. The reduction in financing of courts and judges by the termination of certain legal acts does not provide for complete and independent administration of justice, and for the functioning of the judicial system. The material maintenance of judges

and their social protection cannot be abolished or reduced without appropriate compensation.

For a considerable number of the Ukrainian citizens, state benefits, compensations and guarantees are an addition to their main source of income, a required component of their constitutional right to an acceptable standard of living (Article 48 of the Constitution), that shall not be lower than the poverty level established by law (Article 46.3 of the Constitution). The contents and scope of this right by adoption of new laws or introduction of amendments to existing laws may not be limited, and their termination is only possible in case of declaring, in accordance with Articles 85 and 92 of the Constitution, a state of emergency.

Languages:

Ukrainian.



Identification: UKR-2002-1-006

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 26.03.2002 / **e)** 6-rp/2002 / **f)** Official interpretation of the provisions contained in Article 28.2 of the Law of Ukraine “On the status of deputies of local councils of people’s deputies” (case on protection of the labour rights of local councils’ deputies) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 14/2002 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

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

5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.

Keywords of the alphabetical index:

Local council, deputy, status / Deputy, mandate, termination.

Headnotes:

The matters of personnel policy, service career, the evaluation of the discharge of employees' duties in relevant enterprises, institutions and organisations, state authorities, considered by the council in granting (and not granting) preliminary consent according to the first and second parts of Article 28 of the Law “On the status of deputies of local councils”, are not of local importance in the sense of Article 140 of the Constitution.

Delegating the court functions as well as the assumption of these functions by other authorities or officials are not permitted.

Summary:

Article 28 of the Law of Ukraine “On the status of deputies of local councils”, hereinafter referred to as “the Law” settled the matters of protection of labour and other rights of deputies of local councils. Examining the issue of official interpretation of Article 28.2 of the Law, the Constitutional Court found certain elements of non-conformity to the Constitution in both the provisions thereof and the first paragraph of this article.

The Constitutional Court stated that at the time of adoption of the Law, on 4 February 1994, the local councils, according to the 1978 Constitution, constituted a part of the integrated system of representative bodies of state power, which determined both their functions and the status of deputies of such councils, including the guarantees of deputies' employment rights stipulated of Article 28.1 and 28.2 of the Law. The current Constitution changed the political and legal nature of local councils essentially: they are not state power authorities but representative bodies of local self-government, via which the right of a territorial community to decide independently on matters of local significance within the limits of the Constitution and laws of Ukraine is exercised.

The Constitutional Court also noted that granting by an appropriate local council of preliminary consent to dismissal of a deputy of such a council, from office or service or imposing on him or her extra-legal penalties, contained elements of the council's preliminary review of legality of actions performed by the administration (owner) of the enterprise, institution, organisation, military unit command as to an employee (officer), and thus assumed the function of the court, while Article 124 of the Constitution expressly prescribes that justice in Ukraine shall be provided exclusively by courts.

The provisions contained of Article 28.1 and 28.2 of the Law of Ukraine “On the status of deputies of local councils” do not conform to the Constitution.

Languages:

Ukrainian.



Identification: UKR-2002-1-007

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 27.03.2002 / **e)** 7-rp/2002 / **f)** Official interpretation of the provisions contained in the second and third paragraphs of Section 1 of Article 150.1 of the Constitution of Ukraine (case on acts as to election/appointment of judges and their dismissal) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

- 1.3 **Constitutional Justice** – Jurisdiction.
- 1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.
- 1.3.5.6 **Constitutional Justice** – Jurisdiction – The subject of review – Presidential decrees.
- 4.4.1 **Institutions** – Head of State – Powers.
- 4.5.2 **Institutions** – Legislative bodies – Powers.
- 4.7.4.1.2 **Institutions** – Judicial bodies – Organisation – Members – Appointment.
- 4.7.4.1.4 **Institutions** – Judicial bodies – Organisation – Members – End of office.
- 4.7.5 **Institutions** – Judicial bodies – Supreme Judicial Council or equivalent body.

Keywords of the alphabetical index:

Act, statutory, individual / Judicial Council, act, judicial control.

Headnotes:

The Constitutional Court decides on conformity of both statutory and individual legal acts of the Parliament (*Verkhovna Rada*) and the President of Ukraine to the Constitution.

The acts of the Parliament and the President of Ukraine on the election, appointment and dismissal of judges are subject to examination by the Constitutional Court as to their conformity with the Constitution in their legal nature and observance of the procedure for their examination, adoption or entering into force as established by the Fundamental Law of Ukraine.

Summary:

The President of Ukraine, according to the Constitution and laws of Ukraine, issues decrees and orders, which may have both a statutory and individual legal nature. The Parliament (*Verkhovna Rada*) adopts laws, resolutions and other legal acts that, according to the Constitution, are subject to constitutional control.

The jurisdiction of the Constitutional Court includes constitutional control over legal acts of the Parliament and the President of Ukraine regardless of their statutory or individual legal nature. The individual legal acts of the head of the state and parliament on the appointment, election and dismissal of judges have a constitutional and legal nature.

The authorities of the Constitutional Court include, in particular, a review of all legal acts of the Parliament and the President of Ukraine with a view to their conformity with the Constitution by both legal nature and observance of the constitutional procedure for their examination, adoption and entering into force.

The acts of the Higher Council of Justice, as to pre-term dismissal of judges considering the provisions of Article 55 of the Constitution, may be subject to adjudication by general courts.

Languages:

Ukrainian.



United Kingdom

House of Lords

Important decisions

Identification: GBR-2002-1-001

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 21.03.2002 / **e)** / **f)** Regina v. Shayler / **g)** [2002] *United Kingdom House of Lords* 11 / **h)** [2002] *2 Weekly Law Reports* 754; *The Times*, 22.03.2002; 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.
 3.20 **General Principles** – Reasonableness.
 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Confidentiality, obligation, breach / Criminal proceedings / Secret, information, disclosure / State secret.

Headnotes:

An Act of Parliament making it a criminal offence for state agents to disclose secret information was not unlawful or incompatible with Article 10 ECHR even though there was no public interest defence to the offence. The interference with Article 10 ECHR rights was proportionate considering the alternative means of limited disclosure available and the possibility of judicial review.

Summary:

S. appealed from the decision of the Court of Appeal upholding a decision, in a criminal case against him, that no public interest defence was open to him under the Official Secrets Act ("the Act"), and that the Act was compatible with Article 10 ECHR.

S. was a member of the Security Service from 1991 to 1996. He had signed a declaration under the Act acknowledging the confidential nature of documents and other information relating to security or intelligence that might come into his possession. He disclosed a number of documents relating to security matters to newspaper journalists. He also had published an article based on disclosed information. On being charged with various offences of unlawfully disclosing secret information contrary to the Act, S. claimed the disclosures were in the public interest because they exposed unlawful acts by the security services, and he relied on his right of freedom of expression under Article 10 ECHR.

The right to freedom of expression protected by Article 10 ECHR had been held by the Strasbourg court to constitute one of the essential foundations of a democratic society. It protected not only information that was favourably received but also that which offended, shocked, or disturbed. The central importance of the right was reflected in Section 12 of the Human Rights Act 1998. S. was therefore entitled to disclose information in his possession unless the law imposed a valid restraint on him.

According to Article 10.2 ECHR a national restriction on freedom of expression must be prescribed by law, directed to one or more of the objectives specified in the article and shown by the State to be necessary in a democratic society. "Necessary" does not mean "indispensable", "admissible", "ordinary", "useful", "reasonable" or "desirable". The interference complained of must correspond to a pressing social need, be proportionate to the legitimate aim pursued and the reasons given to justify it must be relevant and sufficient.

The Act restricted the right to freedom of expression. Such restriction was directed to objectives specified in Article 10.2 ECHR and was prescribed by law.

It was established in English law that the secret service be secure. If it is not those working against the interests of the State will be alerted, its own agents may be unmasked, members of the service will feel unable to rely on each other, informants will feel unable to rely on their identity remaining secret, and foreign countries will decline to entrust their own secrets to an insecure recipient. The Strasbourg Court also recognised the need to preserve the secrecy of information relating to intelligence and military operations, emphasising the need for adequate safeguards to ensure the restriction does not exceed what is necessary to achieve the end in question. The question was whether the interference with the individual's European Convention on Human

Rights right is greater than is required to meet the legitimate object which the State seeks to achieve.

The ban on disclosure of intelligence information imposed by the Act is not an absolute ban, it is a ban on disclosure without lawful authority. A former member of the security service may make disclosure to a specified Crown servant in relation to anxieties relating to staff relations, the lawfulness of the service's activities, misbehaviour, irregularity, maladministration, waste, or incompetence. Hopefully, if disclosure were made to one of the specified persons, effective action would be taken to ensure that abuses were remedied and offenders punished. But the possibility must exist that such action would not be taken when it should be or that there would remain facts which should in the public interest be revealed to a wider audience. In this case, a former member may seek official authorisation to make disclosure to a wider audience from his former superior or the head of the service, who may, in turn, seek authority from the secretary to the cabinet or a minister.

Whoever considers the grant of authorisation must weigh the merits of that request bearing in mind the object or objects which the statutory ban on disclosure seeks to achieve and the harm (if any) which would be done by the disclosure in question. If the information in question were liable to disclose the identity of agents or compromise the security of informers, authorisation would not be expected. If, on the other hand, the information revealed matters which, however, scandalous or embarrassing, would not damage any security or intelligence interest or impede the effective discharge by the service of its very important public functions, another decision might be appropriate. Consideration of a request for authorisation should be undertaken bearing in mind the importance attached to the right of free expression and the need for any restriction to be necessary, responsive to a pressing social need and proportionate.

The possibility that authority to disclose would be refused without adequate justification exists. In this situation the former member is entitled to seek judicial review of the decision to refuse, a course which the Act does not inhibit. In considering a claim for judicial review of a decision to refuse authorisation to disclose, the court must apply the same tests described above. It also will bear in mind the importance attached to Article 10 ECHR, the need for any restriction to be necessary to achieve one or more of the ends specified in Article 10.2 ECHR, to be responsive to a pressing social need and to be no more restrictive than is necessary to achieve that end. The doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is

within the range of rational or reasonable decisions. The proportionality test may also go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.

Considering these safeguards existed, the Court found that the Act was compatible with Article 10 ECHR and dismissed the appeal.

Languages:

English.



United States of America

Supreme Court

Important decisions

Identification: USA-2002-1-001

a) United States of America / **b)** Supreme Court / **c)** / **d)** 09.01.2002 / **e)** 00-9280 / **f)** Kelly v. South Carolina / **g)** 122 *Supreme Court Reporter* 726 (2002) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

4.7.2 **Institutions** – Judicial bodies – Procedure.
 4.7.8.2 **Institutions** – Judicial bodies – Ordinary courts – Criminal courts.
 5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial.
 5.3.13.9 **Fundamental Rights** – Civil and political rights – Procedural safeguards and fair trial – Trial by jury.

Keywords of the alphabetical index:

Danger, criminal offence / Danger, community / Death penalty / Jury, instruction, requirement / Mental disturbance, evidence / Circumstance, aggravating.

Headnotes:

Under the constitutional requirement of procedural due process, a lay jury making a sentencing decision when the only choice is between death or life imprisonment, and when the future dangerousness of the defendant is at issue in the proceeding, must be informed that the latter sentence prohibits a guilty defendant's release from imprisonment during his or her lifetime.

Summary:

A lay jury in a state court in the State of South Carolina found William Kelly guilty of murder and related crimes including kidnapping and armed robbery. The trial then proceeded to a separate sentencing phase.

Under South Carolina law, if the prosecution seeks imposition of the death penalty, the jury is asked after the presentation of evidence in the sentencing phase to decide whether the prosecution has proven the existence of an "aggravating circumstance" beyond a reasonable doubt. The possible aggravating circumstances (for example, commission of the murder during an act of kidnapping or armed robbery) are enumerated by statute. If the jury cannot agree unanimously on the existence of an aggravating circumstance as defined by the statute, the defendant must be sentenced to either life imprisonment with the possibility of parole (early release), or a minimum term of imprisonment for thirty years. If the jury does find an aggravating circumstance, the defendant must be sentenced either to death or life imprisonment without the possibility of early release, and the jury is required to decide which of these sentences to recommend to the trial judge. If the recommendation is death, the trial judge must sentence the defendant to death.

In the proceeding against Kelly, during the sentencing phase, the prosecutor conducted a cross-examination of a psychologist that brought out evidence of Kelly's sadism at an early age. Also, in his closing argument at different times, the prosecutor described Kelly as "dangerous" and a "butcher". As a result, Kelly's defence attorney asked the judge to inform the jury, as one of the judge's instructions to the jury just prior to its deliberations, that under the relevant statute Kelly would never be eligible for release during his lifetime if given the sentence of life imprisonment. This request for such a jury instruction was based on the holding of the U.S. Supreme Court in *Simmons v. South Carolina*, a 1994 decision. In the *Simmons* decision, the Court stated that when the future dangerousness of a murder defendant is at issue, and life imprisonment without possibility of parole is the only sentence available to the jury other than the death penalty, the constitutional requirement of procedural due process (as applied to the states, found in the Fourteenth Amendment to the Constitution) entitles the defendant to have the jury informed that he or she would never be eligible for parole.

The trial judge denied the defence attorney's request, stating that the State's evidence was related to Kelly's character, not to the question of his future dangerousness. The jury then in its deliberations found the existence of aggravating circumstances and recommended imposition of the death penalty. On appeal, the Supreme Court of South Carolina affirmed the death sentence and upheld the trial judge's decision not to provide the requested instruction to the jury. This decision was based on two grounds: that the State's evidence in the sentencing proceeding was not related to the question of future dangerousness; and that a third sentencing option – imprisonment for at

least thirty years – was an available sentencing option in addition to those of death and life imprisonment without possibility of parole.

The U.S. Supreme Court, in a decision from which four of the nine Justices dissented, reversed the decision of the Supreme Court of South Carolina. In so doing, it concluded that the record of the sentencing proceeding did not support the contention that Kelly's future dangerousness was not at issue. Instead, the Court stated that a jury hearing evidence of a defendant's demonstrated violent tendencies reasonably would conclude that he presented a risk of violent behaviour. Also, while acknowledging that the statute provided for a sentence of less than life imprisonment without possibility of parole, the Court noted that this option is not available once the jury has made the finding of the existence of an aggravating circumstance. The U.S. Supreme Court therefore reversed the judgment of the Supreme Court of South Carolina and remanded the case to the South Carolina courts for further proceedings.

Cross-references:

- *Simmons v. South Carolina*, 512 *United States Reporter* 154, 114 *Supreme Court Reporter* 2187, 106 *Lawyer's Edition Second* 133 (1994).

Languages:

English.



Identification: USA-2002-1-002

a) United States of America / **b)** Supreme Court / **c)** / **d)** 16.04.2002 / **e)** 00-795 / **f)** Ashcroft v. Free Speech Coalition / **g)** 122 *Supreme Court Reporter* 1389 (2002) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.

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

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

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

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

Keywords of the alphabetical index:

Child, sexual abuse / Obscenity / Pornography, child, encouragement / Pornography, virtual, prohibition.

Headnotes:

Under the First Amendment to the Constitution, expression may not be outlawed simply because it concerns subjects that many people find offensive.

As a general rule, prohibitions against pornography will be constitutionally valid only if the material is obscene, but pornography showing actual children engaged in sexually explicit conduct may be banned even if it is not obscene.

Pornographic material that uses computer images to depict children engaged in explicit sexual activity, or uses adult actors to portray children engaged in such activity, does not create any victims and is not intrinsically related to the sexual abuse of children; therefore, the protection of actual children cannot serve as a constitutionally valid basis for its prohibition.

The fact that expressive material has a tendency to encourage unlawful conduct is not a sufficient reason under the Constitution for prohibiting it.

The First Amendment does not permit the State, in an effort to shield children, to silence completely expression that adults have a right to receive.

Summary:

A trade association of adult entertainment businesses (the Free Speech Coalition) and other plaintiffs challenged the constitutional validity of two provisions in the Child Pornography Prevention Act of 1996 (the "CPPA"), a federal statute. Both provisions sought to expand upon previously enacted statutory criminal prohibitions against child pornography that included prohibitions against pornographic images made using actual children. The CPPA provisions expanded these prohibitions by establishing criminal liability for:

1. any visual image that "appears to be" one of a minor (defined as a person under eighteen years of age) engaging in sexually explicit conduct (Section 2256.8.B of the CPPA); and

2. any explicit image that “conveys the impression” that it depicts a minor engaging in sexually explicit conduct (Section 2256.8.D of the CPPA).

The CPPA provisions thereby made it a crime to create, distribute, or possess so-called “virtual” child pornography that uses either computer images or adults instead of actual children. A person found guilty of violating the CPPA for the first time could be subject to a prison term of no more than fifteen years, and second-time offenders could be sentenced to as many as thirty years in prison.

In review (sought by the government) of a judgment by the U.S. Court of Appeals for the Ninth Circuit, the U.S. Supreme Court ruled that both of the CPPA provisions in question were inconsistent with the First Amendment to the U.S. Constitution, which provides that the U.S. Congress “shall make no law...abridging the freedom of speech”. The constitutional infirmity, the Court concluded, was due to the overbreadth of the prohibitions, which included within their scope much material that would be protected expression under the First Amendment. In this regard, the Court reiterated the principle that expression may not be prohibited simply because it concerns subjects that many people find offensive. The Court ruled that the provisions in question extended to images that were not “obscene”, as well as to images that did not represent the kind of “pornography” that may legitimately be prohibited. Under the Court’s First Amendment jurisprudence, the Constitution does not protect material determined to be “obscene” under the test established in the 1973 case of *Miller v. California*. Under *Miller*, to be obscene, the work in question, taken as a whole, must appeal to the prurient interest, be patently offensive in light of community standards, and lack serious literary, artistic, political, or scientific value. In the case of the CPPA provisions, the Court concluded that they would prohibit much material that would, among other things, have serious redeeming artistic and literary value and therefore would not be obscene under the *Miller* test.

In addition, the Court concluded that the CPPA provisions did not govern the kind of pornographic material that may be prohibited under the First Amendment. The Court distinguished the provisions from those outlawing child pornography that were found constitutionally valid in the 1982 case of *New York v. Ferber*. In *Ferber*, the Court ruled that the First Amendment permits prohibitions against the use of minors in sexually explicit material even if the images are not obscene under the *Miller* standards. The reason, according to the Court, was that the acts of producing, distributing, and selling pornography involving actual children are intrinsically related to the

sexual abuse of children. For one thing, the Court concluded, the on-going use of the images represented a permanent record of a child’s abuse, and therefore each new presentation would cause new harm to the reputation and emotional well being of the child who had participated in the production. For another, the State had an interest in closing the distribution network because the traffic in child pornography was an economic motive for its production. Thus, where the images themselves are the product of child sexual abuse, the State has a legitimate interest in outlawing them without regard to any considerations about their content. The CPPA provisions, on the other hand, prohibited virtual child pornography, which the Court concluded is not intrinsically related to the sexual abuse of children. In this regard, the Court noted that the expressive material prohibited under the CPPA provisions does not record any actual criminal acts, and its production does not create any victims. In contrast to the facts in *Ferber*, the CPPA prohibitions were based on what was being communicated, not the manner in which the material was produced.

A key element in the Court’s reasoning was its rejection of the argument that the use of virtual images, while not harming children in the production process, can lead indirectly to actual instances of child abuse by sustaining the market for child pornography and encouraging persons who would engage in exploitation of children. According to the Court, the fact that expressive material has a tendency to encourage unlawful conduct is not a sufficient reason for prohibiting it. Put another way, the Court stated that the State may not, in an effort to shield children, silence completely expression that adults have a right to receive.

Supplementary information:

This decision was another setback in the Congress’s efforts to regulate Internet communications in the interest of protecting children. In 1997, the Court invalidated provisions of the 1996 Communications Decency Act in the case of *Reno v. American Civil Liberties Union*, 521 *United States Reporter* 844, 117 *Supreme Court Reporter* 2329, 138 *Lawyer’s Edition Second* 874.

Cross-references:

- *Miller v. California*, 413 *United States Reporter* 15, 93 *Supreme Court Reporter* 2607, 37 *Lawyer’s Edition Second* 419 (1973);
- *New York v. Ferber*, 458 *United States Reporter* 747, 102 *Supreme Court Reporter* 3348, 73 *Lawyer’s Edition Second* 1113 (1973).

Languages:

English.

*Identification:* USA-2002-1-003

a) United States of America / **b)** Supreme Court / **c)** / **d)** 23.04.2002 / **e)** 00-1167 / **f)** Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency / **g)** 122 *Supreme Court Reporter* 1465 (2002) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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:

Compensation, just, right / Environment, protection / Property, private, use / Property, taking, physical / Property, taking, regulatory.

Headnotes:

A governmental regulation that imposes a temporary restriction on economic use of property, but does not transfer ownership of the property, must be examined under a fact-specific balancing test, not a categorical approach, to determine if it is a “taking” requiring payment of just compensation under the Fifth Amendment to the Constitution.

In cases where it is claimed that a “taking” has occurred that requires payment of compensation to affected property owners, courts must distinguish between “physical” takings that transfer ownership of the property and categorically constitute a taking, and “regulatory” takings where the governmental action has an economic impact but does not transfer ownership and which require the court to conduct a fact-specific balancing test that weighs the governmental interest against the legitimate expectations of the landowner.

Summary:

The Tahoe Regional Planning Agency (TRPA), a governmental entity established by the States of California and Nevada to coordinate land use and conserve natural resources in the area of a large mountain lake (Lake Tahoe, which straddles the line dividing California and Nevada), issued two orders in 1983 and 1984 that prohibited construction activity for a period of 32 months. The goal of the orders (moratoria) was to maintain the status quo while the TRPA studied the impact of land-use development on Lake Tahoe and designed a comprehensive strategy for growth that would adequately protect the area's natural environment.

Approximately 400 individual owners of land in the Lake Tahoe area, along with an association representing some 2,000 owners, filed actions against the TRPA's moratoria. They claimed that the moratoria automatically constituted a “taking” of property that requires payment of compensation to affected property owners under the Fifth Amendment to the Constitution. The so-called “Takings Clause” or “Just Compensation Clause” of the Fifth Amendment states: “...nor shall private property be taken for public use without just compensation”. The landowners claimed that the moratoria were a regulatory taking that imposed such severe restrictions on the economically viable use of the property that they produced approximately the same result as a direct governmental acquisition of the land.

In a review sought by the landowners, the U.S. Supreme Court affirmed the judgment of the U.S. Court of Appeal for the Ninth Circuit, which had held that the moratoria did not constitute a categorical taking of private property. In so doing, the Supreme Court initially noted the long-standing distinction in its jurisprudence between “physical” and “regulatory” takings. When the government directly acquires private property, it is treated categorically as a taking, and the issue will be the remedial one of determining the proper amount of compensation; however, the Court explained, when a regulatory action placing restrictions on property use is at issue, it calls for an *ad hoc* factual inquiry that entails a court's careful examination and weighing of all the relevant circumstances to determine if a taking has occurred. The reason for this distinction, the Court explained, was that land-use regulations are widespread and often affect property values in some way; however, to treat them all as categorical takings would transform them into a luxury that few governments could afford. In contrast, physical acquisitions of property are relatively rare, easily identified, and usually have a greater impact on property owners.

The Court therefore ruled that a categorical approach was not warranted in the case of the TRPA's moratoria. Instead, the proper approach was a fact-specific balancing test that weighs the governmental interests against the legitimate expectations of the landowners, and examines factors such as the nature of the governmental action and the regulation's economic impact on the landowner. The Court established such an approach for analysis of claimed regulatory takings in the 1978 case of *Penn Central Transportation Company v. New York City*. The Court rejected the landowners' argument that its ruling in the 1992 case of *Lucas v. South Carolina Coastal Council* was controlling. In *Lucas*, the Court ruled for the first time that a land-use regulation that, even though it did not remove ownership of the property from the affected landowner, permanently deprived him of all economic use of the property and therefore was a categorical taking that required compensation. In the instant case, the Court distinguished *Lucas* because the moratorium on economic use in that case was permanent, whereas the TRPA's moratoria were temporary, even though prolonged.

Three of the nine Justices dissented from the Court's judgment. According to the dissenters, the distinction between temporary and permanent prohibitions should not be significant, and the reasoning of the *Lucas* case should apply just as strongly to regulations that are not permanent.

Cross-references:

- *Lucas v. South Carolina Coastal Council*, 505 *United States Reporter* 1003, 112 *Supreme Court Reporter* 2886, 120 *Lawyer's Edition Second* 798 (1992);
- *Penn Central Transportation Company v. New York City*, 438 *United States Reporter* 104, 98 *Supreme Court Reporter* 2646, 57 *Lawyer's Edition Second* 631 (1978).

Languages:

English.



Identification: USA-2002-1-004

a) United States of America / **b)** Supreme Court / **c)** / **d)** 29.04.2002 / **e)** 01-344 / **f)** Thompson v. Western States Medical Center / **g)** 122 *Supreme Court Reporter* 1497 (2002) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
- 3.18 **General Principles** – General interest.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
- 5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.
- 5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

Keywords of the alphabetical index:

Advertising, drug, restriction / Drug, compounded, regulation / Speech, commercial, freedom.

Headnotes:

Freedom of speech under the First Amendment to the Constitution permits regulation of commercial speech that is about lawful activity and is not misleading only if: the asserted governmental interest to be served by the regulation is substantial; the regulation directly advances that interest; and the regulation is not more extensive than necessary to serve that interest.

Freedom of speech under the First Amendment to the Constitution requires that if the government can achieve its interests in a manner that does not restrict commercial speech, or can do so in a manner that is less restrictive than the regulation in question, the government must do so.

Summary:

Generally, federal legislation requires that the Federal Drug Administration must approve a new drug before it can be made available to consumers. However, a section of the Food and Drug Administration Modernization Act of 1997 (the "FDAMA"), a federal statute, provided an exemption from this requirement for so-called "compounded drugs". Drug compounding is a process by which a pharmacist or doctor combines, mixes, or alters ingredient to create a medication that is designed for the particular needs of an individual patient. For example, drug compounding is used to prepare medications that are not regularly

available, such as medication that for a patient who is allergic to an ingredient in a mass-produced product.

Under the FDAMA, the exemption from FDA approval requirements was made available to compounded drugs only if the providers of those drugs would not advertise or otherwise promote particular drugs. A group of licensed pharmacies that specialise in preparation of compounded drugs initiated a legal action to prohibit the federal government from enforcing the prohibitions against advertising and solicitation. The pharmacies claimed that the prohibitions were a violation of the First Amendment to the Constitution, which provides that the U.S. Congress “shall make no law... abridging the freedom of speech”.

In review of a judgment of the U.S. Court of Appeals for the Ninth Circuit, the U.S. Supreme Court held that the FDAMA prohibitions did not satisfy the test for acceptable regulation of commercial speech and were therefore invalid under the First Amendment. According to the applicable test, which the Court first set forth in the 1980 case of *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, the First Amendment permits regulation of commercial speech that is about lawful activity and is not misleading only if: the asserted governmental interest to be served by the regulation is substantial; the regulation directly advances that interest; and the regulation is not more extensive than necessary to serve that interest.

The Court concluded that the FDAMA prohibitions failed to satisfy the *Central Hudson* test for several reasons. The Court found that the government's asserted interest in promoting the practice of drug compounding by small-scale producers was substantial, but concluded that even if the prohibitions against advertising and solicitation could be said to advance that interest directly, the speech restrictions were more extensive than necessary to serve that interest. In this regard, the Court stated that if the government can achieve its interests in a manner that does not restrict commercial speech, or can do so in a manner that is less restrictive than the regulation in question, the government must do so. In concluding that the FDAMA prohibitions were more extensive than necessary, the Court offered several examples of provisions that could satisfy the same purposes and noted that the government had not explained why such measures, alone or in combination, would be insufficient to prevent drug compounding from occurring on a large scale that would negatively affect the drug approval process. In addition, the Court stated that the prohibitions against advertising and solicitation would unduly restrict the flow of potentially

important information from small-scale pharmacists to doctors who treat patients with special medical needs.

Four of the nine Justices dissented from the Court's judgment. According to the dissenting Justices, the Court's decision seriously undervalued the importance of the government's interest in protecting the health and safety of the public. In addition, the dissenters stated that the Court's application of commercial speech doctrine was too strict, failing to distinguish between commercial speech and other categories of speech that require stricter constitutional protection.

Cross-references:

- *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 United States Reporter 557, 100 Supreme Court Reporter 2343, 65 Lawyer's Edition Second 341 (1980).

Languages:

English.



European Court of Human Rights

Important decisions

Identification: ECH-2002-1-001

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 02.10.2001 / **e)** 29225/95, 29221/95 / **f)** Stankov and the United Macedonian Organisation Ilinden v. Bulgaria / **g)** *Reports of Judgments and Decisions* 2001-IX / **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.
 3.13 **General Principles** – Legality.
 3.16 **General Principles** – Proportionality.
 3.19 **General Principles** – Margin of appreciation.
 5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

Public assembly, permission / Demonstration, legal, prior authorisation, peaceful conduct / Association, registration.

Headnotes:

The notion of “peaceful assembly” in Article 11 ECHR does not cover a demonstration where the organisers and participants have violent intentions.

Article 11 ECHR has to be considered in the light of Article 10 ECHR, the protection of opinions and the freedom to express them being one of the objectives of freedom of assembly and association. Moreover, freedom of assembly protects a demonstration that may give offence to persons opposed to the ideas or claims it seeks to promote.

The inhabitants of a region are entitled to form associations in order to promote the region's special characteristics and the fact that an association asserts a minority consciousness cannot in itself justify an interference with its rights under Article 11 ECHR.

In the absence of clear evidence of a threat of violence or serious disturbance, neither the fact that

an organisation has been refused registration as anti-constitutional nor the probability that demands for fundamental constitutional and territorial changes will be made can automatically justify a prohibition on freedom of assembly.

Summary:

The United Macedonian Organisation Ilinden is an association founded in 1990, its aims being to unite all Macedonians in Bulgaria and to secure the recognition of the Macedonian minority in Bulgaria. The first applicant was chairman of a branch of the association at the relevant time. The association's application for registration was refused by the Regional Court and its appeal was rejected by the Supreme Court, on the ground that the aims of the association were directed against the unity of the nation and thus contrary to the Constitution. In 1994 and 1995, the association requested authorisation to hold a meeting at a particular location in commemoration of a historical event. Permission was refused without any reasons being given and the association's appeals were dismissed by the District Court, on the ground that such a meeting would endanger public order. A similar request was refused in 1997, on the ground that the association was not a “legitimate organisation” and an appeal was rejected by the District Court, which found that the association was not duly registered and that it was unclear who had organised the event, resulting in a lack of clarity which endangered public order.

In 1995 and 1997, the association also requested permission to hold a meeting at the grave of a historical figure. In 1995, permission was refused on the ground that the association was not duly registered. Supporters of the association were nevertheless allowed to visit the grave and lay a wreath but they were not permitted to take placards, banners or musical instruments or to make speeches. In 1997, permission was again refused and the association's appeal was not examined because the association was not registered. The Government submitted material which they maintained showed the separatist aims of the association and indicated that some of its members were armed.

In the application lodged with the Court, the applicants complained that the refusal of permission to hold public meetings violated their right to freedom of peaceful assembly. They relied on Article 11 ECHR.

The Court recalled that the notion of “peaceful assembly” does not cover a demonstration where the organisers and participants have violent intentions, and concluded that since in the present case those involved in the organisation of the prohibited

meetings did not have such intentions, Article 11 ECHR was applicable. Moreover, there had undoubtedly been an interference with both applicants' freedom of assembly. While the reasons given for the prohibitions varied and the lack of registration, to which reference was made, could not in itself serve under domestic law as a ground for a prohibition, the authorities also referred to a danger to public order, which was a ground provided for by domestic law. The interference could thus be regarded as "prescribed by law". Having regard to all the material, it could be accepted that the interference was intended to safeguard one or more of the interests invoked by the Government (protection of national security and territorial integrity, protection of the rights and freedoms of others, public order, prevention of disorder and crime).

As to the necessity of the interference, Article 11 ECHR had to be considered in the light of Article 10 ECHR, the protection of opinions and the freedom to express them being one of the objectives of freedom of assembly and association. Such a link was particularly relevant where, as in the present case, the authorities' intervention was, at least in part, in reaction to views held or statements made. Moreover, freedom of assembly protects a demonstration that may give offence to persons opposed to the ideas or claims it seeks to promote. The inhabitants of a region are entitled to form associations in order to promote the region's special characteristics and the fact that an association asserts a minority consciousness cannot in itself justify an interference with its Article 11 ECHR rights.

An organisation's programme may conceal objectives different from those proclaimed and in that respect it is necessary to compare the content of the programme with the organisation's actions, an essential factor being whether there has been any call for the use of violence or the rejection of democratic principles. However, an automatic reliance on the fact that an organisation has been refused registration as anti-constitutional cannot suffice to justify a practice of systematic bans on peaceful assemblies and it was therefore necessary in the present case to scrutinise the grounds invoked to justify the interference.

Firstly, if there had been preparation for armed action the Government would have been able to adduce more convincing evidence in that respect. Secondly, there was no evidence of any serious disturbances having been caused by the applicants: reference was made only to a hypothetical danger, and the risk of minor incidents did not call for a ban on the meetings. Thirdly, while it was not unreasonable for the authorities to suspect that certain of the association's leaders or related groups harboured separatist views,

so that it could be anticipated that separatist slogans would be broadcast during the meetings, the demand for fundamental constitutional and territorial changes cannot automatically justify a prohibition on freedom of assembly, as such demands do not automatically amount to a threat to the country's territorial integrity or national security. Sweeping measures of a preventive nature to suppress freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles do a disservice to democracy and often even endanger it. Consequently, the probability that separatist declarations would be made at the meetings could not justify a ban.

In so far as the Government claimed that there were indications that the association's aims would be pursued in a violent manner, the refusal of registration made no reference to this and most of the association's declarations expressly rejected violence. There was thus no indication that the meetings were likely to become a platform for the propagation of violence and rejection of democracy with a potentially damaging impact warranting their prohibition. Moreover, the fact that what was at issue touched on national symbols and national identity could not be seen in itself as calling for a wider margin of appreciation; the authorities have to display particular vigilance to ensure that national public opinion is not protected at the expense of the assertion of minority views, no matter how unpopular.

Finally, with regard to the significance of the interference, it was apparent that the time and place of the meetings were crucial to the applicants. The authorities had resorted to measures aimed at preventing the dissemination of the applicants' views in circumstances where there was no real risk of violent action, incitement to violence or any other form of rejection of democratic principles. They had thus overstepped their margin of appreciation and the measures banning the meetings were not necessary in a democratic society. There had therefore been a violation of Article 11 ECHR.

Cross-references:

- *Handyside v. the United Kingdom*, 07.12.1976, vol. 24, Series A of the Publications of the Court; *Special Bulletin ECHR* [ECH-1976-S-003];
- No. 8440/78, Commission decision of 16.07.1980, *Decisions and Reports* 21, p. 138;
- No. 13079/87, Commission decision of 06.03.1989, *Decision and Reports* 60, p. 256;
- *United Communist Party of Turkey and Others v. Turkey*, 30.01.1998, *Reports of Judgments and*

Decisions 1998-I; Bulletin 1998/1 [ECH-1998-1-001];

- *Wingrove v. the United Kingdom*, 25.11.1996, *Reports of Judgments and Decisions 1996-V*;
- *Incal v. Turkey*, 09.06.1998, *Reports of Judgments and Decisions 1998-IV*;
- *Sidiropoulos and Others v. Greece*, 10.07.1998, *Reports of Judgments and Decisions 1998-IV; Bulletin 1998/2* [ECH-1998-2-010];
- *Gerger v. Turkey* [GC], no. 23919/94, unreported;
- *Freedom and Democracy Party (ÖZDEP) v. Turkey* [GC], no. 23885/94, *ECHR 1999-VIII*;
- *Sürek v. Turkey* (no. 1) [GC], no. 26682/95, *ECHR 1999-IV*;
- *Velikova v. Bulgaria*, no. 41488/98, *ECHR 2000-VI*;
- *Basic v. Austria*, no. 29800/96, *ECHR 2001*.

Languages:

English, French.



Identification: ECH-2002-1-002

a) Council of Europe / b) European Court of Human Rights / c) Grand Chamber / d) 21.11.2001 / e) 35763/97 / f) *Al-Adsani v. the United Kingdom* / g) *Reports of Judgments and Decisions 2001-XI* / 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.
 3.16 **General Principles** – Proportionality.
 3.20 **General Principles** – Reasonableness.
 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.

Keywords of the alphabetical index:

Immunity, state / International law, generally recognised norm / Torture.

Headnotes:

A State does not have a duty to provide a civil remedy in respect of torture allegedly inflicted outwith its jurisdiction by the authorities of another State and in the absence of any causal connection.

The grant of sovereign immunity to a state in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between states. The striking out, on the ground of State immunity, of a claim against a foreign government in respect of alleged torture does not constitute a disproportionate limitation on the right of access to court, such limitations being generally accepted by the community of nations.

Summary:

The applicant, a dual British/Kuwaiti national, served as a pilot in the Kuwaiti Air Force during the Gulf War and remained in Kuwait after the Iraqi invasion. He came into possession of sexual video tapes involving a sheikh related to the Emir of Kuwait. According to the applicant, the sheikh, who held him responsible for the tapes entering general circulation, gained entry to his house along with two others, beat him and took him at gunpoint to the State Security Prison, where he was detained for several days and repeatedly beaten by guards. He was later taken at gunpoint to a palace where he was repeatedly held under water in a swimming pool before being taken to a small room where the sheikh set fire to mattresses soaked in petrol, as a result of which the applicant sustained serious burns.

After returning to the United Kingdom, the applicant instituted civil proceedings against the sheikh and the Government of Kuwait. He obtained a default judgment against the sheikh and was subsequently granted leave to serve proceedings on two named individuals. However, he was refused leave to serve the writ on the Kuwaiti Government. On appeal, the Court of Appeal concluded that leave should be granted and the writ was served, but on the application of the Kuwaiti Government the High Court ordered that the proceedings be struck out on the ground that the Kuwaiti Government was entitled to state immunity. The applicant's appeal was dismissed by the Court of Appeal and leave to appeal to the House of Lords was refused.

In the application lodged with the Court, the applicant alleged that the striking out of his claim on the ground of state immunity violated the State's positive obligation to ensure that he was not subject to torture or inhuman or degrading treatment. He relied on

Article 3 ECHR. The applicant further maintained that the application of state immunity deprived him of effective access to court. He relied on Article 6 ECHR.

In respect of the complaint under Article 3 ECHR, the Court observed that although Articles 1 and 3 ECHR taken together place a number of positive obligations on States, designed to prevent and provide redress for torture and other ill-treatment, the obligation applies only in relation to acts allegedly committed within the State's jurisdiction. Article 3 ECHR has some, limited, extraterritorial application, in so far as the State's responsibility may be engaged if it expels an individual to a country where there are substantial grounds for believing that there is a real risk of torture or ill-treatment. However, any liability would be incurred by reason of the expelling State having taken action which had as a direct consequence the exposure of the individual to such treatment. In the present case, as the applicant did not contend that the alleged torture took place within the jurisdiction of the United Kingdom or that the United Kingdom authorities had any causal connection with its occurrence, it could not be said that the State was under a duty to provide a civil remedy in respect of torture allegedly carried out by the Kuwaiti authorities. There had therefore been no violation of Article 3 ECHR.

In respect of the complaint under Article 6 ECHR, the Court recalled that whether a person has an actionable domestic claim may depend not only on the substantive content of the right as defined under national law but also on the existence of procedural bars. It would not be consistent with the rule of law or the basic principle underlying Article 6.1 ECHR if a State could, without control by the Convention organs, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities on large groups or categories. In the present case, the proceedings which the applicant intended to pursue concerned a recognised cause of action, namely damages for personal injury, and the grant of immunity did not qualify a substantive right but constituted a procedural bar on the courts' power to determine the right. There thus existed a serious and genuine dispute over civil rights and Article 6 ECHR was applicable.

The right of access to court may be subject to limitations, provided they do not impair the very essence of the right. Such limitations must pursue a legitimate aim and be proportionate. The grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States. As to proportionality, the Convention should as far as possible be interpreted in harmony with other rules of international law,

including those relating to State immunity. Thus, measures taken by a State which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court. In that respect, the relevant United Kingdom statute complies with the 1972 Basle Convention. However, the applicant contended that the prohibition of torture had acquired the status of *ius cogens*, taking precedence over treaty law and other rules of international law. While his allegations had never been proved, the alleged ill-treatment could properly be categorised as torture within the meaning of Article 3 ECHR. The right enshrined in that provision is absolute and several other international treaties also prohibit torture; in addition, a number of judicial statements have been made to the effect that the prohibition of torture has attained the status of a peremptory norm or *ius cogens*, which the Court accepted.

However, the present case did not concern the criminal liability of an individual but the immunity of a State in civil proceedings and there was no firm basis in international instruments, judicial authorities or other materials for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State in respect of alleged torture. Consequently, the United Kingdom statute was not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of State immunity and the application of its provisions could not be said to have amounted to an unjustified restriction on the applicant's access to court. There had therefore been no violation of Article 6 ECHR.

Cross-references:

- *Golder v. the United Kingdom*, 21.02.1975, vol. 18, Series A of the Publications of the Court, *Special Bulletin ECHR* [ECH-1975-S-001];
- *Soering v. the United Kingdom*, 07.07.1989, vol. 161, Series A of the Publications of the Court, *Special Bulletin ECHR* [ECH-1989-S-003];
- *Fayed v. the United Kingdom*, 21.09.1994, vol. 294-B, Series A of the Publications of the Court;
- *Aksoy v. Turkey*, 18.12.1996, *Reports of Judgments and Decisions 1996-VI*, *Bulletin 1996/3* [ECH-1996-3-017];
- *Loizidou v. Turkey*, 18.12.1996, *Reports of Judgments and Decisions 1996-VI*, *Bulletin 1996/3* [ECH-1996-3-016];
- *A. v. the United Kingdom*, 23.09.1998, *Reports of Judgments and Decisions 1998-VI*;

- *Assenov and Others v. Bulgaria*, 28.10.1998, *Reports of Judgments and Decisions* 1998-VIII;
- *Waite and Kennedy v. Germany* [GC], no. 26083/94, *ECHR* 1999-I; *Bulletin* 1999/1 [ECH-1999-1-005];
- *Selmouni v. France* [GC], no. 25803/94, *ECHR* 1999-V, *Bulletin* 1999/2 [ECH-1999-2-008];
- *Z. and Others v. the United Kingdom* [GC], no. 29392/95, *ECHR* 2001-V.

Languages:

English, French.



Identification: ECH-2002-1-003

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 13.12.2001 / **e)** 45701/99 / **f)** Metropolitan Church of Bessarabia and others v. Moldova / **g)** *Reports of Judgments and Decisions* 2001-XII / **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.
 3.16 **General Principles** – Proportionality.
 5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of worship.

Keywords of the alphabetical index:

Freedom of religion, positive / Religion, religious community / Church, registration / Religion, religious denominations, protection / Religion, religious neutrality of the state.

Headnotes:

States are entitled to verify whether a religious association's activities are prejudicial to public order or public safety. However, the State's duty of neutrality and impartiality is incompatible with any power to assess the legitimacy of religious beliefs. Moreover, the State has a duty to ensure that conflicting groups tolerate each other.

Where official recognition is a prerequisite to the carrying on of religious activities, the refusal of the State to accord such recognition to a church constitutes an interference with the right to freedom of religion of the church and its members. Moreover, in the absence of any evidence of unlawful or unconstitutional aims, the refusal of such recognition constitutes a disproportionate interference with the right to freedom of religion.

Summary:

The first applicant, the Metropolitan Church of Bessarabia, is an Orthodox church affiliated to the patriarchate of Bucharest. The other applicants are founder members of the church, which was set up in September 1992. In October 1992, pursuant to the Religious Denominations' Act (Law no. 979-XII of 24 March 1992), the applicant church applied for official recognition. No reply was forthcoming. In February 1993 the Government recognised another church, affiliated to the patriarchate of Moscow, the Metropolitan Church of Moldova. In March 1997 the Court of Appeal directed the Government to recognise the applicant's church, but in December of the same year the Supreme Court set aside that judgment on the grounds that the application was out of time and that such recognition would constitute interference in the affairs of the Metropolitan Church of Moldova. The Supreme Court noted that it was possible for adherence of the Metropolitan Church of Bessarabia to manifest their religion within the Metropolitan Church of Moldova. The applicant church alleged in particular that this refusal of official recognition had exposed its members to acts of violence and intimidation without any intervention by the authorities. It further complained that the refusal of recognition deprived it of legal personality and therefore of *locus standi*.

In the application lodged with the Court, the applicants alleged that the refusal to recognise the Metropolitan Church of Bessarabia as a church violated their right to freedom of religion. They relied on Article 9 ECHR. They further maintained, relying on Article 13 ECHR, that they had not had access to an effective remedy.

In respect of the alleged violation of the right to freedom of religion, the Court considered that the Government's refusal to recognise the applicant church constituted interference with the right of the latter and the other applicants to freedom of religion. Without giving a categorical answer to the question whether the provisions of the Religious Denominations Act satisfied the requirements of foreseeability and precision, the Court was prepared to accept that the interference was "prescribed by law". States were

entitled to verify whether a movement or association carried on, ostensibly in pursuit of religious aims, activities which were prejudicial to public order or public safety. In the present case, the interference pursued a legitimate aim, namely protection of public order and public safety. With regard to the Government's argument relating to the defence of legality and constitutional principles, the Moldovan Constitution guaranteed freedom of religion and laid down the principle of religious denominations' autonomy *vis-à-vis* the State, and the Religious Denominations' Act, of 1992 laid down a procedure for the recognition of religious denominations. The State's duty of neutrality and impartiality was incompatible with any power on the State's part to assess the legitimacy of religious beliefs, and required the State to ensure that conflicting groups tolerated each other.

In the present case, by taking the view that the applicant church was not a new denomination and by making its recognition depend on the will of an ecclesiastical authority that had been recognised – the Metropolitan Church of Moldova – the Government had failed to discharge their duty of neutrality and impartiality. Consequently, their argument that refusing recognition was necessary in order to uphold Moldovan law and the Moldovan Constitution had to be rejected. As to the alleged danger for Moldovan territorial integrity, the applicant church, in its articles of association, defined itself as a local autonomous church, operating within Moldovan territory in accordance with the laws of that State, and whose name was a historical one. There was nothing in the file which warranted the conclusion that the applicant church carried on activities other than those stated in its articles of association. Moreover, in the absence of any evidence, the Court could not conclude that the applicant church was implicated in political activities aimed at bringing about the reunification of Moldova with Romania.

As for the possibility that the applicant church, once recognised, might constitute a danger to national security and territorial integrity, this was a mere hypothesis which, in the absence of corroboration, could not justify a refusal to recognise it. As regards the need to protect social peace and understanding among believers, relied on by the Government, there were certain points of disagreement between the applicants and the Government about what had taken place during incidents that had occurred at gatherings of the adherents and clergy of the applicant church. Without expressing an opinion on exactly what had taken place during the events concerned, it appeared that the refusal to recognise the applicant church had played some part.

With regard to the proportionality of the interference in relation to the aims pursued, under the above-mentioned 1992 Act only religions recognised by a government decision could be practised. Without such recognition, the applicant church could neither organise itself nor operate. Lacking legal personality, it could not bring legal proceedings to protect its assets, which were indispensable for worship, while its members could not meet to carry on religious activities without contravening the legislation on religious denominations. As regards the tolerance allegedly shown by the Government towards the applicant church and its members, this could not be regarded as a substitute for recognition, since recognition alone was capable of conferring rights on those concerned. Moreover, on occasion the applicants had not been able to defend themselves against acts of intimidation, since the authorities had fallen back on the excuse that only legal activities were entitled to legal protection. Lastly, when the authorities had recognised other liturgical associations they had not applied the criteria which they had used in order to refuse to recognise the applicant church, and no justification had been put forward by the Moldovan Government for this difference in treatment. In conclusion, the refusal to recognise the applicant church had such consequences for the applicants' freedom of religion that it could not be regarded as proportionate to the legitimate aim pursued or, accordingly, as necessary in a democratic society. There had therefore been a violation of Article 9 ECHR.

With regard to the alleged lack of an effective remedy, the Court noted that in its judgment of 9 December 1997 the Supreme Court of Justice had not replied to the applicants' main complaints, namely their wish to join together and manifest their religion collectively within a church distinct from the Metropolitan Church of Moldova and to have the right of access to a court to defend their rights and protect their assets, given that only denominations recognised by the State enjoyed legal protection. Consequently, not being recognised by the State, the Metropolitan Church of Bessarabia had no rights it could assert in the Supreme Court of Justice. Accordingly, the appeal to the Supreme Court of Justice based on Article 235 of the Code of Civil Procedure had not been effective.

Moreover, although the Religious Denominations Act of 1992 made the activity of a religious denomination conditional upon government's recognition and the obligation to comply with the laws of the Republic, it did not contain a specific provision governing the recognition procedure and making remedies available in the event of a dispute. Consequently, the applicants had been unable to obtain redress from a

national authority in respect of their complaint relating to their right to the freedom of religion. There had therefore been a violation of Article 13 ECHR.

Cross-references:

- *Sunday Times v. the United Kingdom*, 26.04.1979, vol. 30, Series A of the Publications of the Court; *Special Bulletin ECHR* [ECH-1979-S-001];
- *Groppera Radio AG and Others v. Switzerland*, 23.03.1990, vol. 173, Series A of the Publications of the Court;
- *Kokkinakis v. Greece*, 25.05.1993, vol. 260-A, Series A of the Publications of the Court; *Special Bulletin ECHR* [ECH-1993-S-002];
- *Pentidis and Others v. Greece*, no. 23238/94, Commission Report of 27.02.1996;
- *Manoussakis v. Greece*, 26.09.1996, *Reports of Judgments and Decisions* 1996-IV;
- *Chahal v. the United Kingdom*, 15.11.1996, *Reports of Judgments and Decisions* 1996-V; *Bulletin* 1996/3 [ECH-1996-3-015];
- *Wingrove v. the United Kingdom*, 25.11.1996, *Reports of Judgments and Decisions* 1996-V;
- *Kalaç v. Turkey*, 01.07.1997, *Reports of Judgments and Decisions* 1997-IV; *Bulletin on Freedom of Religion and Beliefs* [ECH-1997-R-001];
- *Canea Catholic Church v. Greece*, 16.12.1997, *Reports of Judgments and Decisions* 1997-VIII;
- *United Communist Party of Turkey and Others v. Turkey*, 30.01.1998, *Reports of Judgments and Decisions* 1998-I; *Bulletin* 1998/1 [ECH-1998-1-001];
- *Larissis and Others v. Greece*, 24.02.1998, *Reports of Judgments and Decisions* 1998-I;
- *Sidiropoulos and Others v. Greece*, 10.07.1998, *Reports of Judgments and Decisions* 1998-IV; *Bulletin* 1998/2 [ECH-1998-2-010];
- *Buscarini and Others v. San Marino* [GC], no. 24645/94, *ECHR* 1999-I; *Bulletin* 1999/1 [ECH-1999-1-003];
- *Hashman and Harrup v. United Kingdom* [GC], no. 25594/94, *ECHR* 1999-VIII;
- *Serif v. Greece*, no. 38178/97, *ECHR* 1999-IX, *Bulletin* 1999/3 [ECH-1999-3-011];
- *Rotaru v. Romania* [GC], no. 28341/95, *ECHR* 2000-V;
- *Cha'are Shalom Ve Tsedek v. France* [GC], no. 27417/95, *ECHR* 2000-VII; *Bulletin* 2000/2 [ECH-2000-2-006];
- *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, *ECHR* 2000-XI;

- *Stankov and United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, *ECHR* 2001-IX.

Languages:

English, French.



Identification: ECH-2002-1-004

a) Council of Europe / b) European Court of Human Rights / c) Chamber / d) 21.02.2002 / e) 46544/99 / f) Kutzner v. Germany / g) *Reports of Judgments and Decisions* 2002-I / 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.
 3.16 **General Principles** – Proportionality.
 3.17 **General Principles** – Weighing of interests.
 3.19 **General Principles** – Margin of appreciation.
 5.3.31 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Child, taking into care / Child, protection / Parent, rights / Child, right of access.

Headnotes:

The removal of two young children from their parents on the ground of the parents' lack of sufficient intellectual capacity to bring them up, and restrictions on visiting, constituted, in the absence of sufficient consideration of less radical measures, a violation of the right to respect for family life.

Summary:

The two applicants have two daughters who were born in 1991 and 1993. The District Youth Office applied to the Guardianship Court for an order withdrawing their parental rights over their daughters after a report had concluded that owing in particular to their impaired mental development they were

incapable of bringing up their children. The Guardianship Court appointed an expert in psychology to draw up a report. It made a provisional order withdrawing the applicants' rights to make decisions as to where the children should live or what medical care they should receive, primarily on the ground that they did not have the necessary intellectual capacity to bring up their daughters. The children were placed in a children's home. The director of the home expressed the opinion that the applicants should no longer have custody of the children. The expert concluded in the report that the applicants were not fit to bring up their children as they did not possess the necessary intellectual capacity.

On the basis of that report and after hearing the applicants, the Guardianship Court made an order withdrawing their parental rights over the two girls, who were then placed in separate, unidentified foster homes. The applicants lodged an appeal with the Regional Court against the decision of the Guardianship Court. The Regional Court appointed a second expert in psychology who also submitted a report that was unfavourable to the applicants. The Regional Court dismissed the appeal. An appeal by the applicants against that decision was dismissed by the Court of Appeal, and the Federal Constitutional Court dismissed a subsequent appeal. However, a number of expert witnesses instructed privately by an association that defended children's rights proved favourable to the applicants and expressed the view that the children should be returned to their family and that social services should provide additional educational support.

Owing to the fact that their daughters had been placed in unidentified foster homes, the applicants were unable to see them during the first six months of their placement. At that point the Regional Court, on an appeal by the applicants, made an order granting them visiting rights of one hour monthly. Contrary to the Regional Court's order, a number of people other than the applicants and their children were present during the visits. The applicants obtained permission from the Guardianship Court to accompany their eldest daughter on her return to school at the start of the school year but were refused a two-hour visit at Christmas.

In the application lodged with the Court, the applicants maintained that the decision of the German courts to deprive them of parental authority over their two children violated their right to respect for family life. They relied on Article 8 ECHR.

The Court considered that the continued placement of the applicants' children in foster homes and the restrictions on contact between the parents and their

children amounted to an interference with the applicants' right to respect for their family life. The measures in question were, however, prescribed by law and pursued the legitimate aims of protecting health and morals and the children's "rights and freedoms".

As to whether the measures were necessary in a democratic society, both the order for the children's placement and the implementation of such a radical measure separating them from their parents had been inappropriate. The children had been given educational support at their parents' request; the experts in psychology appointed by the courts had expressed contradictory opinions; the psychologists instructed privately, as well as a number of family doctors, had urged that the children be returned to their family of origin and had advocated additional educational support; lastly, it had not been alleged that the children had been neglected or ill-treated by the applicants. Accordingly, the national authorities and courts had not given sufficient consideration to the implementation of additional or alternative measures that were less radical than separation. Furthermore, the children's best interests had to be taken into account.

In the instant case the children, without being interviewed by a judge, had been completely separated from their family and from each other for a long period as they had been placed in separate, unidentified, foster homes. The parents' applications to the courts for visiting rights had been systematically refused and, once granted, had been extremely limited in scope. Severing contact in that way and imposing such restrictions on visiting children of such a tender age could only lead to increased alienation of the children from their parents and from each other. Accordingly, although the reasons given by the national authorities to justify such a serious interference were relevant, they were not sufficient. There had therefore been a violation of Article 8 ECHR.

Cross-references:

- *W., B. and R. v. the United Kingdom*, 08.07.1987, vol. 121, Series A of Publications of the Court;
- *Olsson v. Sweden* (no. 1), 24.03.1988, vol. 130, Series A of Publications of the Court; *Special Bulletin ECHR* [ECH-1988-S-002];
- *Eriksson v. Sweden*, 22.06.1989, vol. 156, Series A of Publications of the Court; *Special Bulletin ECHR* [ECH-1989-S-002];
- *Margarita and Roger Andersson v. Sweden*, 20.02.1992, vol. 226-A, Series A of Publications of the Court;

- *Olsson v. Sweden* (no. 2), 27.11.1992, vol. 250, Series A of Publications of the Court;
- *Keegan v. Ireland*, 26.05.1994, vol. 290, Series A of Publications of the Court; *Bulletin* 1994/2 [ECH-1994-2-008];
- *Hokkanen v. Finland*, 23.09.1994, vol. 299-A, Series A of Publications of the Court; *Bulletin* 1994/3 [ECH-1994-3-015];
- *McMichael v. the United Kingdom*, 24.02.1995, vol. 307-B, Series A of Publications of the Court; *Bulletin* 1995/1 [ECH-1995-1-004];
- *Johansen v. Norway*, 07.08.1996, *Reports of Judgments and Decisions* 1996-III;
- *Pammel v. Germany*, 01.07.1997, *Reports of Judgments and Decisions* 1997-IV;
- *Guerra and Others v. Italy*, 19.02.1998, *Reports of Judgments and Decisions* 1998-I; *Bulletin* 1998/1 [ECH-1998-1-002];
- *Bronda v. Italy*, 09.06.1998, *Reports of Judgments and Decisions* 1998-IV;
- *Buscemi v. Italy*, no. 29569/95, *ECHR* 1999-VI;
- *Ignaccolo-Zenide v. Romania*, no. 31679/96, *ECHR* 2000-I;
- *Gnahoré v. France*, no. 40031/98, *ECHR* 2000-IX;
- *K. and T. v. Finland* [GC], no. 25702/94, *ECHR* 2001-VII; *Bulletin* 2001/2 [ECH-2001-2-005].

Languages:

English, French.



Identification: ECH-2002-1-005

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 16.04.2002 / **e)** 36677/97 / **f)** *Dangeville v. France* / **g)** *Reports of Judgments and Decisions* 2002-III / **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.
- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.

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

Keywords of the alphabetical index:

European Council, directive / Directive, EU Council, implementation / Directive, direct application / Tax, exemption / Tax, refund.

Headnotes:

A claim against the State for reimbursement of VAT payments which, by virtue of a directly applicable directive of the European Union were not due, constitutes a “possession”.

The rejection of a claim for reimbursement of VAT payments which, by virtue of a directly applicable directive of the European Union were not due, constituted a disproportionate interference with the right to peaceful enjoyment of possessions, as the applicant should not have to bear the consequences of difficulties in bringing domestic law into line with such a directive.

Summary:

The applicant is a company of insurance brokers whose business activity was subject to value added tax (VAT). It paid 292,816 French francs in VAT on the business it had conducted in 1978. The provisions of the Sixth Directive of the Council of the European Communities, of 17 May 1977, which were applicable from 1 January 1978, exempted from VAT “insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents”. On 30 June 1978 the French State was notified of the Ninth Directive of the Council of the European Communities, which gave France extra time in which to implement the provisions of Article 13.B.a of the Sixth Directive. Nonetheless, as it did not have retrospective effect, the Sixth Directive was applicable from 1 January to 30 June 1978.

The applicant company, relying on the Sixth Directive, sought a refund of the VAT paid for the year 1978. The Administrative Court dismissed its claim. In a decision of March 1986, the *Conseil d'État* dismissed the claim on the ground, among other things, that a Directive could not be directly invoked against a provision of national law. In the meantime, an administrative decision of 2 January 1986 had annulled the supplementary tax assessments levied against insurance brokers who had not paid VAT for that period. The applicant lodged a second appeal, which was ultimately dismissed by a further judgment of the *Conseil d'État* in October 1996, which, in

accordance with the traditional legal principle of “distinction of means of appeal”, held that the applicant could not seek to obtain by way of an action for damages satisfaction which had been refused it in the tax proceedings in a decision (of the *Conseil d'État* in 1986) which had become *res iudicata*. However, in a judgment of the same date concerning an application brought by another company, whose business activity and claims were initially identical to those of the applicant, the *Conseil d'État* departed from its earlier decision and upheld that company's claim for a refund by the State of sums wrongly paid.

In the application lodged with the Court, the applicant alleged that the decisions of the French courts had breached its right to peaceful enjoyment of its possessions. It relied on Article 1 Protocol 1 ECHR.

The Court considered that Article 1 Protocol 1 ECHR was applicable because the sum owed by the State to the applicant on account of the VAT wrongly paid amounted to a pecuniary right and was therefore in the nature of a possession. The applicant had had at least the legitimate hope of being able to secure reimbursement of the VAT. In considering the justification for interfering with the applicant's right to respect for its possessions, it had to be established whether a fair balance had been struck between the requirements of the general interest and the need to safeguard the applicant's fundamental rights.

Regarding the first point, the 1986 administrative direction had been intended to bring domestic legislation into line with the Sixth Community Directive, which was a legitimate aim, compatible with the “general interest”. However, the *Conseil d'État*'s particularly strict interpretation of the traditional legal principle of “distinction of means of appeal” had deprived the applicant of the sole domestic procedure capable of offering a sufficient remedy to ensure compliance with Article 1 Protocol 1 ECHR. Nothing relating to the general interest could justify the *Conseil d'État*'s refusal to draw the consequences of a provision of Community law that was directly applicable. The interference in question was the consequence of Parliament's failure to bring domestic law into compliance with a Community directive. Although this compliance was achieved through the January 1986 administrative direction, the *Conseil d'État*'s decision handed down two and a half months later, in March 1986, did not draw the consequences of this.

While it appeared that there were difficulties in applying Community law at the domestic level, the applicant should not have had to bear the consequences of these difficulties and differences between the various domestic authorities. The interference in

the applicant's possessions did not therefore reflect the requirements of the general interest. Both the applicant company's inability to enforce its debt against the State and the lack of domestic proceedings providing a sufficient remedy to protect its right to respect for enjoyment of its possessions upset the fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental right. The interference with the applicant company's enjoyment of its property had therefore been disproportionate. There had therefore been a violation of Article 1 Protocol 1 ECHR.

Cross-references:

- *Delcourt v. Belgium*, 17.01.1970, vol. 11, Series A of Publications of the Court; *Special Bulletin ECHR* [ECH-1970-S-001];
- *Sporrong and Lönnroth v. Sweden*, 23.09.1982, vol. 52, Series A of Publications of the Court; *Special Bulletin ECHR* [ECH-1982-S-002];
- *Pine Valley Developments Ltd and Others v. Ireland*, 29.11.1991, vol. 222, Series A of Publications of the Court;
- *Burghartz v. Switzerland*, 22.02.1994, vol. 280-B, Series A of Publications of the Court; *Bulletin* 1994/1 [ECH-1994-1-001];
- *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, 23.02.1995, vol. 306-B, Series A of Publications of the Court;
- *Pressos Compania Naviera SA and Others v. Belgium*, 20.11.1995, vol. 332, Series A of Publications of the Court; *Bulletin* 1995/3 [ECH-1995-3-019];
- *Phocas v. France*, 23.04.1996, *Reports of Judgments and Decisions* 1996-II;
- *National & Provincial Building Society and Others v. the United Kingdom*, 23.10.1997, *Reports of Judgments and Decisions* 1997-VII;
- *Miragall Escolano and Others v. Spain*, nos. 8366/97, 38688/97, 40777/98, 40843/98, 41015/98, 41400/98, 41446/98, 41484/98, 41487/98 and 41509/98, *ECHR* 2000-I.

Languages:

French, English.



Identification: ECH-2002-1-006

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 29.04.2002 / **e)** 2346/02 / **f)** *Pretty v. the United Kingdom* / **g)** *Reports of Judgments and Decisions 2002-III* / **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.
 3.9 **General Principles** – Rule of law.
 3.16 **General Principles** – Proportionality.
 3.20 **General Principles** – Reasonableness.
 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
 5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
 5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
 5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.
 5.3.30 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Euthanasia / Suicide, assisted, prohibition / Illness, terminal phase / Personal autonomy, exercise.

Headnotes:

No right to die can be derived from Article 2 ECHR. Consequently, the refusal of the Director of Public Prosecutions to give an undertaking not to prosecute a husband for assisting the death of his terminally ill wife did not violate that provision.

Similarly, there was no positive obligation under Article 3 ECHR to require such an undertaking or to provide a lawful opportunity for any other form of assisted suicide.

Neither a blanket prohibition on assisted suicides nor the refusal in a specific case to give an undertaking not to prosecute is a disproportionate interference with the right to respect for private life under Article 8 ECHR, given that it is for States to assess the likely incidence of abuse.

Summary:

The applicant, a 43-year old woman, suffers from motor neurone disease, an incurable degenerative

disease which leads to severe weakness of the arms and legs and of the muscles involved in control of breathing, eventually resulting in death. The applicant's condition deteriorated rapidly after it was diagnosed in 1999 and the disease is at an advanced stage: she is paralysed from the neck down and has to be fed by a tube, but her intellect and capacity to take decisions are unimpaired. As the final stages of the disease are distressing and undignified, the applicant wishes to control how and when she dies. However, she is unable to commit suicide without assistance and it is a crime to assist another to commit suicide. The applicant's lawyer requested the Director of Public Prosecutions to give an undertaking that her husband would not be prosecuted if he assisted her to commit suicide. The request was refused and the Divisional Court refused an application for judicial review. The applicant's appeal was dismissed by the House of Lords in November 2001.

In the application lodged with the Court, the applicant alleged that the refusal of the Director of Public Prosecutions to give an undertaking not to prosecute her husband violated her right to life and exposed her to inhuman and degrading treatment. She further alleged that the refusal violated her right to self-determination and her freedom of thought. Finally, she alleged that it constituted discrimination. She relied on Articles 2, 3, 8, 9 and 14 ECHR.

In respect of the complaint under Article 2 ECHR, the Court recalled that the consistent emphasis in all the cases brought before it under that provision had been the obligation of the State to protect life and it was not persuaded that the right to life could be interpreted as involving a negative aspect. Article 2 ECHR was unconcerned with issues to do with the quality of living or what a person chose to do with his or her life and it could not, without a distortion of language, be interpreted as conferring a right to die, nor could it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life. Accordingly, no right to die, whether at the hands of a third person or with the assistance of a public authority, could be derived from Article 2 ECHR. Moreover, it was not for the Court in the case at issue to attempt to assess whether or not the state of law in any other country failed to protect the right to life. Even if circumstances prevailing in a particular country which permitted assisted suicide were found not to infringe Article 2 ECHR, that would not assist the applicant's case, where the very different proposition that the United Kingdom would be in breach of its obligations under Article 2 ECHR if it did not allow assisted suicide had not been established. There had therefore been no violation of Article 2 ECHR.

In respect of the complaint under Article 3 ECHR, the Court noted that it was beyond dispute that the respondent Government had not inflicted any ill-treatment on the applicant, nor was there any complaint that the applicant was not receiving adequate care from the State medical authorities. There was thus no act or "treatment": the applicant's claim that the refusal to give an undertaking not to prosecute her husband disclosed inhuman and degrading treatment for which the State was responsible in failing to protect her from suffering placed a new and extended construction on the concept of treatment which went beyond the ordinary meaning of the word. Article 3 ECHR had to be construed in harmony with Article 2 ECHR, which was first and foremost a prohibition on the use of lethal force or other conduct which might lead to death. The positive obligation on the part of the State which was invoked by the applicant would not involve the removal or mitigation of harm by, for instance, preventing any ill-treatment by public bodies or private individuals or providing improved conditions or care; it would require that the State sanction actions intended to terminate life, an obligation that could not be derived from Article 3 ECHR. Consequently, no positive obligation arose under that provision either to require an undertaking not to prosecute or to provide a lawful opportunity for any other form of assisted suicide. There had therefore been no violation of Article 3 ECHR.

In respect of the complaint under Article 8 ECHR, the Court considered that although no previous case had established as such any right to self-determination as being contained in that provision, the notion of personal autonomy was an important principle underlying the interpretation of its guarantees. The ability to conduct one's life in a manner of one's own choosing might also include the opportunity to pursue activities perceived to be of a physically or morally harmful or dangerous nature for the individual concerned and even where the conduct poses a danger to health or, arguably, life, the case-law of the Convention institutions had regarded the State's imposition of compulsory or criminal measures as impinging on private life. In the sphere of medical treatment, the refusal to accept a particular treatment might, inevitably, lead to a fatal outcome, yet the imposition of medical treatment without consent would interfere with a person's physical integrity in a manner capable of engaging the rights protected by Article 8 ECHR. The very essence of the Convention was respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life, it was under Article 8 ECHR that notions of the quality of life took on significance and it could not be excluded that preventing the applicant from exercising her choice to avoid an undignified and

distressing end to her life constituted an interference with her right to respect for her private life. Article 8 ECHR was therefore applicable. The only remaining issue was the necessity of any interference. Although the Government's assertion that the applicant had to be regarded as vulnerable was not supported by the evidence, States were entitled to regulate through the operation of the general criminal law activities which were detrimental to the life and safety of other individuals and the relevant law in the case at issue was designed to safeguard life by protecting the weak and vulnerable. Many terminally ill individuals would be vulnerable and it was the vulnerability of the class which provided the rationale for the law in question. It was primarily for States to assess the risk and the likely incidence of abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created. A blanket prohibition on assisted suicide was not, therefore, disproportionate. It did not appear to be arbitrary for the law to reflect the importance of life by prohibiting assisted suicide while providing for a system of enforcement and adjudication which allowed due regard to be given in each particular case to the public interest in bringing a prosecution, as well as to the fair and proper requirements of retribution and deterrence. Nor was the refusal to give an advance undertaking not to prosecute disproportionate: strong arguments based on the rule of law could be raised against any claim by the executive to exempt individuals or classes from the operation of the law and, in any event, the seriousness of the act for which immunity was claimed was such that the refusal could not be said to be arbitrary or unreasonable. Consequently, the interference could be justified as necessary in a democratic society. There had therefore been no violation of Article 8 ECHR.

In respect of the complaint under Article 9 ECHR, the Court recalled that not all opinions or convictions constituted beliefs in the sense of that provision and considered that the applicant's claims did not involve a form of manifestation of a religion or belief. To the extent that her views reflected her commitment to the principle of personal autonomy, her claim was a restatement of the complaint under Article 8 ECHR. Consequently, there had been no violation of Article 9 ECHR.

In respect of the complaint under Article 14 ECHR, the Court recalled that it had been found under Article 8 ECHR that there were sound reasons for not introducing into the law exceptions to cater for those deemed not to be vulnerable, and similar cogent reasons existed under Article 14 ECHR for not seeking to distinguish between those who were and those who were not physically capable of committing suicide. The borderline between the two categories

would often be a very fine one and to seek to build into the law an exemption for those judged to be incapable of committing suicide would seriously undermine the protection of life which the legislation was intended to safeguard and greatly increase the risk of abuse. There had therefore been no violation of Article 14 ECHR.

Cross-references:

- *Ireland v. the United Kingdom*, 18.01.1978, vol. 25, Series A of Publications of the Court; *Special Bulletin ECHR* [ECH-1978-S-001];
- *Arrowsmith v. the United Kingdom*, no. 7050/77, Commission report of 12.10.1978, *Decisions and Reports* 19, p. 5;
- *Young, James and Webster v. the United Kingdom*, 13.08.1981, vol. 44, Series A of Publications of the Court, *Special Bulletin ECHR* [ECH-1981-S-002];
- *Dudgeon v. the United Kingdom*, 22.10.1981, vol. 45, Series A of Publications of the Court; *Special Bulletin ECHR* [ECH-1981-S-003];
- *Laskey, Jaggard and Brown v. the United Kingdom*, no. 10435/83, Commission decision of 10.12.1984, *Decisions and Reports* 40, p. 251;
- *X. and Y. v. the Netherlands*, 26.03.1985, vol. 91, Series A of Publications of the Court;
- *Soering v. the United Kingdom*, 07.07.1989, vol. 161, Series A of Publications of the Court; *Special Bulletin ECHR* [ECH-1989-S-003];
- *B. v. France*, 25.03.1992, vol. 232-C, Series A of Publications of the Court; *Special Bulletin ECHR* [ECH-1992-S-001];
- *Burghartz v. Switzerland*, no. 16213/90, Commission report of 21.10.1992, vol. 280-B, Series A of Publications of the Court;
- *Sigurður A. Sigurjónsson v. Iceland*, 30.06.1993, vol. 264, Series A of Publications of the Court; *Special Bulletin ECHR* [ECH-1993-S-005];
- *Burghartz v. Switzerland*, 22.02.1994, vol. 280-B, Series A of Publications of the Court; *Bulletin* 1994/1 [ECH-1994-1-001];
- *Friedl v. Austria*, no. 15225/89, Commission report of 19.05.1994, vol. 305-B, Series A of Publications of the Court;
- *McCann and Others v. the United Kingdom*, 27.09.1995, vol. 324, Series A of Publications of the Court; *Bulletin* 1995/3 [ECH-1995-3-016];
- *Laskey, Jaggard and Brown v. the United Kingdom*, 19.02.1997, *Reports of Judgments and Decisions* 1997-I; *Bulletin* 1997/1 [ECH-1997-1-005];
- *D. v. the United Kingdom*, 02.05.1997, *Reports of Judgments and Decisions* 1997-III; *Bulletin* 1997/2 [ECH-1997-2-011];
- *L.C.B. v. the United Kingdom*, 09.06.1998, *Reports of Judgments and Decisions* 1998-III; *Bulletin* 1998/2 [ECH-1998-2-008];
- *A. v. the United Kingdom*, 23.09.1998, *Reports of Judgments and Decisions* 1998-VI;
- *Osman v. the United Kingdom*, 28.10.1998, *Reports of Judgments and Decisions* 1998-VIII;
- *V. v. the United Kingdom* [GC], no. 24888/94, *ECHR* 1999-IX;
- *Bensaid v. the United Kingdom*, no. 44599/98, *ECHR* 2000-I;
- *Kiliç v. Turkey*, no. 22492/93, *ECHR* 2000-III;
- *Thlimmenos v. Greece* [GC], no. 34369/97, *ECHR* 2000-IV; *Bulletin* 2000/1 [ECH-2000-1-004];
- *A.D.T. v. the United Kingdom*, no. 35765/97, *ECHR* 2000-IX;
- *Kudla v. Poland*, no. 30210/96, *ECHR* 2000-XI;
- *Camp and Bourimi v. the Netherlands*, no. 28369/95, *ECHR* 2000-X;
- *Keenan v. the United Kingdom*, no. 27229/95, *ECHR* 2001-III; *Bulletin* 2001/1 [ECH-2001-1-003];
- *Z. and Others v. the United Kingdom* [GC], no. 29392/95, *ECHR* 2001-V;
- *Price v. the United Kingdom*, no. 33394/96, *ECHR* 2001-VIII;
- *Valašinas v. Lithuania*, no. 44558/98, *ECHR* 2001-VIII;
- *Mikulic v. Croatia*, no. 53176/99, *ECHR* 2002.

Languages:

English, French.



Identification: ECH-2002-1-007

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 16.05.2002 / **e)** 39474/98 / **f)** D.G. v. Ireland / **g)** *Reports of Judgments and Decisions* 2002-III / **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.

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

5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of worship.

Keywords of the alphabetical index:

Minor, detention / Educational supervision / Delinquency, juvenile / Minor, protection / Detention, lawfulness / Prison / Detention, conditions / Compensation, detention.

Headnotes:

Where the State adopts a system of educational supervision implemented through court orders to deal with juvenile delinquents, it has an obligation to put in place the appropriate institutional facilities.

The detention of an unconvicted minor in a penal institution which provides only optional educational facilities does not constitute “educational supervision” for the purposes of Article 5.1.d ECHR and, in not being an interim measure followed speedily by an appropriate supervisory regime, cannot be regarded as “lawful detention” under Article 5.1 ECHR.

Summary:

The applicant was in the care of the local authority from the age of two. Successive placements failed due to his behaviour and in 1996 he was sentenced in the United Kingdom to nine months' imprisonment. He served the latter part of his sentence in St. Patrick's Institution in Ireland. After his release, he stayed in a hostel for homeless boys. The local authority considered that his needs would be met by a high support therapeutic unit for 16-18 year olds but no such unit existed in Ireland. The High Court appointed a guardian *ad litem* and gave the applicant leave to apply for judicial review for a declaration that the local authority had deprived him of his constitutional rights by failing to provide suitable care and accommodation and for an injunction directing the authority to provide such care and accommodation.

On 27 June 1997 the court, noting that there was no secure unit in Ireland where the applicant could be detained and looked after, with “considerable reluctance” ordered his detention in St. Patrick's for three weeks, subject to certain conditions. The

applicant's appeal was rejected by the Supreme Court, which held that the High Court had jurisdiction to order his detention in a penal institution and that it had properly exercised that jurisdiction. The High Court subsequently continued the applicant's detention, initially until 23 July and then until 28 July, when new accommodation identified by the local authority was to be ready. The applicant was duly released and placed in the new accommodation, from which he later absconded. He was arrested and brought before the High Court, which ordered his detention in St. Patrick's until 28 August, when he was released into the custody of the local authority on the same terms as previously. In February 1998 he was placed in new temporary accommodation.

In the application lodged with the Court, the applicant alleged that his detention from 27 June to 28 July 1997 was unlawful. He relied on Article 5.1 ECHR. He further complained that he had no enforceable right to compensation in that respect. He relied on Article 5.5 ECHR. In addition, relying on Article 3 ECHR, the applicant complained that his detention in a penal institution constituted inhuman and degrading punishment. Finally, he complained under Articles 8 and 14 ECHR.

In respect of the complaint concerning the lawfulness of the applicant's detention, the Court considered that as the orders placing the applicant in St. Patrick's were made by the High Court, which did not have custodial rights over him, Article 5 ECHR applied. Moreover, the applicant was “deprived of his liberty” from 27 June to 28 July 1997. Although he turned 17 during that period and could no longer have been required to attend school, he remained a “minor” under Irish law and the question was whether his detention was lawful and “for the purpose of educational supervision” within the meaning of Article 5.1.d ECHR. The domestic lawfulness of the orders was not in doubt, given the well-established inherent jurisdiction of the High Court to protect a minor's constitutional rights.

As to lawfulness under the Convention, the Court's case-law provided that if Ireland chose a constitutional system of educational supervision implemented through court orders to deal with juvenile delinquency, it was obliged to put in place appropriate institutional facilities which met the security and educational demands of that system. While “educational supervision” must not be equated rigidly with notions of classroom teaching, St. Patrick's did not constitute “educational supervision”, being a penal institution that provided optional educational facilities of which the applicant did not avail himself. Furthermore, the applicant's detention there could not be regarded as an “interim custody measure” followed

speedily by an educational supervisory regime, as the first two detention orders were not based on any specific proposal for his secure and supervised education, while the third order was based on a proposal for temporary accommodation which turned out to be neither secure nor appropriate. Even if it could be assumed that the applicant's detention from February 1998 was secure and appropriate, it was put in place more than six months after his release from St. Patrick's. Accordingly, the detention between 27 June and 28 July 1997 was not compatible with Article 5.1.d ECHR and since no other basis for the detention had been advanced there had been a violation of that provision.

With regard to the alleged lack of an enforceable right to compensation, the Court found that as the detention orders were lawful under domestic law and the Convention had not been incorporated into Irish law, the applicant had no such right. There had therefore been a violation of Article 5.5 ECHR.

With regard to the complaint that the applicant's detention in a penal institution was inhuman and degrading, the Court considered that the High Court's intent was protective and that it could not be concluded that the applicant's detention constituted "punishment". Nor did the evidence submitted support the conclusion that the detention of the applicant, as a minor not charged or convicted of any offence, in a penal institution could in itself constitute inhuman or degrading treatment, taking into account that it had a regime adapted to juvenile detainees and that the regime was tempered by the specific conditions imposed by the High Court.

Furthermore, the fact that the applicant was subject to prison discipline did not in itself give rise to any issue under Article 3 ECHR, in the light of his history of criminal activity, self-harm and violence to others. There was no psychological, medical or other expert evidence substantiating the mental and physical impact of the regime alleged by the applicant and no evidence that he had been ill-treated by fellow-inmates on account of his unique status. Finally, as to his complaint that he was handcuffed for court appearances, the fact that he was a minor was not sufficient to bring this within the scope of Article 3 ECHR, the intent being reasonable restraint.

The Court further concluded that the unlawfulness of the applicant's detention did not give rise to any separate issue under Article 8 ECHR, given the reasoning under Article 5 ECHR. Moreover, even assuming that the restrictions and limitations of detention in St. Patrick's constituted an interference with the applicant's private and family life, they would be proportionate to the legitimate aims. Finally, the handcuffing of the applicant

did not disclose any interference with the rights guaranteed under Article 8 ECHR.

As to alleged discrimination contrary to Article 14 ECHR, the Court found that any difference in treatment between minors and adults requiring containment and education would not be discriminatory, stemming as it did from the protective regime applied to minors in the applicant's position. There was accordingly an objective and reasonable justification. As to the applicant's situation in comparison to that of other minors, no separate issue arose, given that the issue was the same as that lying at the heart of the complaint under Article 5 ECHR.

Cross-references:

- *Ireland v. the United Kingdom*, 18.01.1978, vol. 25, Series A of Publications of the Court; *Special Bulletin ECHR* [ECH-1978-S-001];
- *Tyrer v. the United Kingdom*, 25.04.1978, vol. 26, Series A of Publications of the Court; *Special Bulletin ECHR* [ECH-1978-S-002];
- *Winterwerp v. the Netherlands*, 24.10.1979, vol. 33, Series A of Publications of the Court; *Special Bulletin ECHR* [ECH-1979-S-004];
- *Guzzardi v. Italy*, 06.11.1980, vol. 39, Series A of Publications of the Court; *Special Bulletin ECHR* [ECH-1980-S-002];
- *X. v. the United Kingdom*, no. 9054/80, Commission decision of 08.10.1982, *Decisions and Reports* 30, p. 113;
- *Bozano v. France*, 18.12.1986, vol. 111, Series A of Publications of the Court; *Special Bulletin ECHR* [ECH-1986-S-005];
- *Weeks v. the United Kingdom*, 02.03.1987, vol. 114, Series A of Publications of the Court;
- *Bouamar v. Belgium*, 29.02.1988, vol. 129, Series A of Publications of the Court; *Special Bulletin ECHR* [ECH-1988-S-001];
- *Nielsen v. Denmark*, 28.11.1988, vol. 144, Series A of Publications of the Court;
- *Wakefield v. the United Kingdom*, no. 15817/89, Commission decision of 01.10.1990, *Decisions and Reports* 66, p. 251;
- *Herczegfalvy v. Austria*, 24.09.1992, vol. 242-B, Series A of Publications of the Court;
- *Johnson v. the United Kingdom*, 24.10.1997, *Reports of Judgments and Decisions* 1997-VII;
- *Raninen v. Finland*, 16.12.1997, *Reports of Judgments and Decisions* 1997-VIII;
- *Aerts v. Belgium*, 30.07.1998, *Reports of Judgments and Decisions* 1998-V;
- *Nikolova v. Bulgaria* [GC], no. 31195/96, *ECHR* 1999-II;

- *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, *ECHR* 1999-VI;
- *Smith and Grady v. the United Kingdom* (just satisfaction), nos. 33985/96 and 33986/96, *ECHR* 2000-IX;
- *Koniarska v. the United Kingdom* (dec.), no. 33670/96, 12.10.2000, unreported.

Languages:

English, French.



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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.

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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.

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.

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²⁸ Pleadings, final submissions, notes etc.

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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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).

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³⁵ Presumption of constitutionality, double construction rule.

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.

3.18	General interest ⁴³	9, 11, 26, 28, 44, 47, 53, 59, 62, 66, 82, 85, 86, 91, 101, 107, 114, 124, 129, 132, 137, 143, 145, 148, 151, 154
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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.

⁵¹ For example the granting of pardons.

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⁵² Bicameral, monocameral, 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.

⁶⁴ 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.

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⁸⁵ E.g. Auditor-General.

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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⁹⁰ Positive and negative aspects.

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.

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⁹⁷ This keyword also covers "Personal liberty" It includes for example identity checking, personal search and administrative arrest.

⁹⁸ Detention by police.

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.

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¹⁰⁴ Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

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.

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¹¹⁰ This keyword also covers "Freedom of work".

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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