THE BULLETIN

The Bulletin is a publication of the European Commission for Democracy through Law. It reports regularly on the case-law of constitutional courts and courts of equivalent jurisdiction in Europe, including the European Court of Human Rights and the Court of Justice of the European Communities, as well as in certain other countries of the world. The Bulletin is published three times a year, each issue reporting the most important case-law during a four months period (volumes numbered 1 to 3). The last two volumes of the series concerning the same year are actually published and delivered in the following year, i.e. volume 1 of the 2002 Edition in 2002, volumes 2 and 3 in 2003.

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

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

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Strasbourg, October 2003

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Albania
Constitutional Court

Important decisions

Identification: ALB-2002-3-007

a) Albania / **b)** Constitutional Court / **c)** / **d)** 23.09.2002 / **e)** 186 / **f)** Constitutionality of the international agreement / **g)** *Fletorja Zyrtare* (Official Gazette), 64/02, 1801 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.2.1.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and constitutions.
3.1 **General Principles** – Sovereignty.
3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.
4.16.1 **Institutions** – International relations – Transfer of powers to international organisations.
5.3.14 **Fundamental Rights** – Civil and political rights – *Ne bis in idem*.

Keywords of the alphabetical index:

Treaty, constitutional requirements / International Criminal Court, statute, ratification / Immunity, criminal.

Headnotes:

The main principles concerning the protection of fundamental human rights and freedoms enshrined in and guaranteed by the Constitution – such as the *nullum crimen sine lege* and *nullum poena sine lege* principles, the non-retroactive effect of the law, the right to be defended by a lawyer, the independence of judges, etc, are also guaranteed by the Rome Statute of the International Criminal Court.

The Constitution provides the necessary space to allow for the transfer of competencies to other international organs, when this is important for the benefit of peace, democracy and prosperity, but always through bilateral or multilateral agreements, where Albania presents itself as a sovereign country. The activity and functions of the Rome Statute do not violate the constitutional provisions concerning the exercise of state sovereignty. The provisions of the Rome Statute are not in conflict with the Constitution and, as such, this instrument can be incorporated into the domestic law.

Summary:

The Prime Minister, who had standing to do so, requested the opinion of the Constitutional Court on the compatibility of the Rome Statute of the International Criminal Court with the Constitution, as a necessary condition for the ratification of this instrument by the Assembly. Having examined the Rome Statute in its entirety the Constitutional Court came to the following conclusions:

The main principles concerning the protection of fundamental human rights and freedoms enshrined in and guaranteed by the Constitution are also guaranteed by the Rome Statute.

The Constitution recognises justice, peace, harmony and cooperation between nations as the highest values of humanity, and, in the name of these values, it also provides for the possibility of the State taking part in collective security arrangements. At the same time, the Constitution guarantees the sovereignty of the Albanian State. From this viewpoint, the Rome Statute did not infringe the constitutional provisions concerning the exercise of sovereignty, since the possibility of contracting international commitments in the field of criminal law is an attribute of state sovereignty. The transfer of some competencies in a specific field of judicial power does not go beyond these limits.

With regard to the fact that the Rome Statute, in contrast with domestic law, does not recognise the immunity of certain subjects, the Court found that, nevertheless, this was not in conflict with the Constitution, because the immunity granted under domestic law provided protection only from the national judicial power. It could not prevent an international organ, like the International Criminal Court, from exercising its jurisdiction over persons vested with immunity under domestic law.

The Court affirmed that the generally accepted rules of international law are part of domestic law. Thus the lack of immunity against international criminal proceedings for specific crimes is part of the Albanian legal system. This was already accepted under the Treaty of Versailles, the Charter of the International Military Tribunal of Nuremberg, the Convention on the Prevention and Punishment of the Crime of Genocide and the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda.

On the trial of an individual by the International Criminal Court for acts for which he or she has previously been tried by a domestic court, the Court found that the Rome Statute did not run counter to the principle of "*ne bis in idem"*, which is guaranteed by the Constitution. This was because the Constitution provided for the retrial of a case by a higher court in accordance with the law. This role will be played by the International Criminal Court, which thereby supplements the role of domestic courts when the domestic legal authorities have failed to conduct genuine proceedings. According to the Constitutional Court, such a regulation serves the purpose for which the International Criminal Court was established.

In conclusion, examining the Rome Statute as a whole and comparing it with the Constitution, the Court found that the Statute was not in conflict with the Constitution. Consequently, there were no obstacles to its ratification by the Assembly.

Languages:

Albanian, English (translation by the Court).

Identification: ALB-2002-3-008

a) Albania / **b)** Constitutional Court / **c)** / **d)** 29.10.2002 / **e)** 212 / **f)** Constitutionality of the law / **g)** *Fletorja Zyrtare* (Official Gazette), 69/02, 1923 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.2.1.3 **Constitutional Justice** – Types of claim – Claim by a public body – Executive bodies.
1.3 **Constitutional Justice** – Jurisdiction.
1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.10.6 **Institutions** – Public finances – Auditing bodies.

Keywords of the alphabetical index:

Civil servant, dismissal, procedure.

Headnotes:

The statutory provision providing for the dismissal from office of the Head of the High State Control (the highest institution of economic and financial auditing) is unconstitutional. According to Article 162.2 of the Constitution, the President makes the relevant proposal and the Assembly decides on this proposal, evaluating the reasons for dismissing such a high-ranking official from office. Such a constitutional guarantee is sufficient to ensure the independence of the Head of the High State Control. The Constitution deals with the organisation and functioning of the constitutional bodies, the status of persons in charge of them, as well as the limits of their rights. The law should not exceed the boundaries established by the Constitution. Thus, it should not provide for cases of dismissal from office other than those provided for in the Constitution.

Furthermore, the Constitutional Court has no authority to review the decision of the Assembly concerning the discharge from office of the Head of the High State Control.

Summary:

The Prime Minister sought the abrogation of Article 14 of the Law on the High State Control (Law no. 8270, dated 23.12.1997), which provides for the dismissal from office of the Head of the High State Control, on the grounds that it was unconstitutional. The Court found that the Constitution provided for the manner of dismissal from office of some of the highest ranking officials, whereas for others it did not. This did not mean, however, that this category of officials was unprotected and that they could not exercise their duties independently. In the instant case, the Constitution provided for the involvement of two of the highest state bodies: the President, who proposes the dismissal, and the Assembly, which decides on this proposal. The statutory provision governing the dismissal from office of the Head of the High State Control went beyond these boundaries, however, defining other cases of dismissal. This was not in conformity with the Constitution. The law should not exceed the limits imposed by the Constitution. In consequence, in the case under review, the statutory provision had limited the possibilities for dismissing the Head of the High State Control from office or ending his or her term of office prematurely, compared with the cases foreseen by the Constitution.

The Court distinguished between immunity and irremovability. The first has to do with the protection of a certain category of officials against the jurisdiction of the criminal courts, including the element of

exemption from criminal prosecution. In contrast, irremovability, according to the constitutional context, is an element that guarantees the independence of the relevant bodies and protects high-ranking officials from dismissal from office.

The above-mentioned statutory provision also exceeded the boundaries established by the Constitution, by giving the Constitutional Court the authority to review the decision of the Assembly concerning the dismissal from office of the Head of the High State Control. No such authority was provided for by the Constitution, and thus it should not be exercised by the Constitutional Court. The Court maintained the same point of view in its Decision V-34/96.

For these reasons, this provision should be abrogated as unconstitutional.

The Court rejected the interested party's argument that the Prime Minister did not have standing to refer this question to the Constitutional Court, since he has no authority to appoint or discharge the Head of the High State Control. The Court referred to Article 134 of the Constitution, in accordance with which the Prime Minister has standing to refer questions to the Constitutional Court in all cases.

Cross-references:

- Decision no. V-34/96 of 24.09.1996, *Bulletin* 1996/3 [ALB-1996-3-005].

Languages:

Albanian, English (translation by the Court).

Argentina
Supreme Court of Justice of the Nation

Important decisions

Identification: ARG-2002-3-004

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 27.06.2002 / **e)** G. 152. XXXVI / **f)** Gaifer S.R.L. c/ Compañía Argentina de Seguros Visión S.A. / **g)** *Fallos de la Corte Suprema de Justicia de la Nation* (Official Digest), 324 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

1.3.5.12 **Constitutional Justice** – Jurisdiction – The subject of review – Court decisions.
1.6.9.1 **Constitutional Justice** – Effects – Consequences for other cases – Ongoing cases.
2.1.3.1 **Sources of Constitutional Law** – Categories – Case-law – Domestic case-law.
4.8.6.3 **Institutions** – Federalism, regionalism and local self-government – Institutional aspects – Courts.
4.8.8.3 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Supervision.

Keywords of the alphabetical index:

Supreme Court, decision, binding.

Headnotes:

Any decision that ignores the case-law of the Supreme Court without giving reasons for so doing shall be considered ill-founded and therefore null and void.

Summary:

The High Court of the province of Entre Ríos based a decision on an interpretation deriving, in respect of the rules applicable to the case in question, from a legal precedent of its own, whereas this interpretation contrasted markedly with that of a Supreme Court precedent.

In an extraordinary appeal lodged by the party concerned, the Supreme Court set aside the contested judgment on the grounds mentioned in the headnotes.

Supplementary information:

There is no legal rule binding lower courts to the case-law of the Supreme Court or compelling them to follow it. This judgment is therefore based on a long line of decisions by the Supreme Court.

Languages:

Spanish.

Identification: ARG-2002-3-005

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 20.09.2002 / **e)** Z. 74. XXXV / **f)** Zofracor S.A. c/ Estado Nacional s/ amparo / **g)** *Fallos de la Corte Suprema de Justicia de la Nation* (Official Digest), 324 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.6.3.1 **Institutions** – Executive bodies – Application of laws – Autonomous rule-making powers.
4.10.7 **Institutions** – Public finances – Taxation.
4.18 **Institutions** – State of emergency and emergency powers.
5.3.35.4 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Taxation law.

Keywords of the alphabetical index:

Parliament, powers, restrictions / Decree, urgency, validity / Finance, Act.

Headnotes:

Legislative decrees passed “on grounds of necessity and urgency” are null and void if they relate to fiscal matters of any kind.

Subsequent parliamentary ratification of a decree of this kind has no retroactive effect, since the decree was unconstitutional from the outset.

Such ratification may, however, have an effect *per se* as from its publication.

If Parliament introduces restrictions on the exercise of its own powers, these restrictions may be abolished by subsequent laws.

Summary:

A commercial undertaking had challenged the constitutionality of Decree 285/99, passed for reasons of necessity and urgency, on the grounds, *inter alia*, that it violated Article 99.3 of the Constitution. This article states: “The Executive may not under any circumstances, on threat of absolute and incurable nullity, introduce provisions of a legislative nature. It may pass decrees on grounds of necessity and urgency only when exceptional circumstances make it impossible to comply with the ordinary procedures laid down in the Constitution for the approval of laws, and when the decrees in question do not concern criminal, fiscal or electoral matters or the political party system...”. Such decrees must subsequently be submitted to Parliament for consideration.

The Supreme Court, which heard the plaintiff's case, took the view, firstly, that Decree 285/99 reflected the exercise by the Executive of fiscal powers, which it is expressly prohibited from exercising under the aforementioned Article 99.3.

The Court went on to consider the implications of the Finance Act (25.237) for the year 2000, Article 86 of which enshrined parliamentary ratification of Decree 285/99. The Court ruled that the decree had been unconstitutional from the outset; therefore, its parliamentary ratification had no retroactive effect.

The Court held, however, that Article 86 of Law 25.237 revealed that Parliament intended to give the content of Decree 285/99 a legal character and that, if the law was not unconstitutional, it would come into force from its publication on words.

The Court rejected the argument that the law was invalid because previous laws provided that Finance Acts could not deal with fiscal matters. The Court held that, despite their laudable aims, the laws stating that Finance Acts could not deal with such matters could not, given their place in the hierarchy of laws, take precedence over other laws passed by Parliament. As a result a subsequent law could depart from their content: Parliament was not definitively bound by its

own restrictions. Moreover, there was no constitutional reason why Parliament should not introduce, abolish or modify taxes by means of the Finance Act.

Supplementary information:

Three judges, who had concurring opinions, took the view that Decree 285/99 was also void for lack of the exceptional circumstances required by Article 99.3 of the Constitution.

The aforementioned Article 99.3 was included in the Constitution following the 1994 reform.

Languages:

Spanish.

Armenia
Constitutional Court

Statistical data
1 September 2002 – 31 December 2002

- 32 referrals, 32 cases heard and 32 decisions delivered, including:
  - 31 decisions concerning the compliance of international treaties with the Constitution. All the treaties examined were declared compatible with the Constitution.
  - 1 decision concerning the compliance of a law with the Constitution. The referral was initiated by the President of the Republic. The Constitutional Court decided that the challenged provision of the Electoral Code of the RA was incompatible with the Constitution.

On 4-5 October 2002, the VIIth Yerevan International Seminar, on "International Experience and Perspectives of Human Rights Protection before the Constitutional Court", was held.

The seminar was organised by the Constitutional Court of the Republic of Armenia, the European Commission for Democracy through Law (Venice Commission) and the Commissioner for Human Rights of the Council of Europe, and the international Conference of the Constitutional Control Organs of the Countries of Young Democracy.

L. Wildhaber, President of the European Court of Human Rights, R. Liddell, Head of the Cabinet of the European Court of Human Rights, S. Langer, expert of the Venice Commission (Federal Constitutional Court of Germany), G. Buquicchio, Secretary of the Venice Commission, B. Ebzeev, Judge of the Constitutional Court of the Russian Federation, L. Chubar, Judge of the Constitutional Court of Ukraine, A. Marini and V. Onida, Judges of the Constitutional Court of Italy, L. Dobrik, Judge of the Constitutional Court of Slovakia, S. Havrilla, Adviser of the Constitutional Court of Slovakia, F. Duchon and V. Guttler, Judges of the Constitutional Court of Czech Republic, M. Salikhov, President of the Constitutional Council of the Republic of Tajikistan, L. Abdulaev, Judge of the Constitutional

Council of the Republic of Tajikistan, J. Prapiestis and A. Abramavicius, Judges of the Constitutional Court of the Republic of Lithuania and D. Pededze, Adviser to the Chairman of the Constitutional Court of Latvia, as well as researchers, officials, politicians, professors, students and media representatives participated in the seminar.

Important decisions

Identification: ARM-2002-3-003

a) Armenia / **b)** Constitutional Court / **c)** / **d)** 16.12.2002 / **e)** DCC-401 / **f)** On the conformity with the Constitution of obligations set forth in the Protocol on the Accession of the Republic of Armenia to the World Trade Organisation (WTO), in the attached schedules and in the Marrakesh Agreement Establishing the World Trade Organisation / **g)** *Tegekagir* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

3.25 **General Principles** – Market economy.
4.4.1.5 **Institutions** – Head of State – Powers – International relations.
4.5.2.1 **Institutions** – Legislative bodies – Powers – Competences with respect to international agreements.

Keywords of the alphabetical index:

World Trade Organisation, accession, obligations / Trade agreement, international, constitutionality, assessment.

Headnotes:

By joining the World Trade Organisation (WTO), Armenia has not made a commitment to amend national legislation, but to guarantee the irreversibility of the structural and legislative reforms implemented in order to further the development of the market economy and free economic competition. Thus, concrete guarantees have been established in the framework of the WTO, with the aim of achieving mutually beneficial and friendly co-operation between states, in accordance with Article 9 of the Constitution and international law norms. The fulfilment of these commitments, taken on in the framework of the WTO Agreement, does not constitute an obstacle to the fulfilment of other international commitments taken on by Armenia in the field of trade.

Summary:

On the basis of an appeal lodged by the President of the Republic, the Constitutional Court considered the conformity with the Constitution of the commitments set forth in the Protocol on the Accession of the Republic of Armenia to the World Trade Organisation (WTO), in the schedules attached to the Protocol and in the Marrakesh Agreement Establishing the World Trade Organisation ("the WTO Agreement").

The Court found, *inter alia*, that in the report it presented to the General Council of the WTO as part of the accession process laid down in Article XII of the WTO Agreement, the WTO Accession Working Party noted the important measures taken by Armenia and directed towards the improvement of the mechanisms of legal regulation in the various fields of economic activity that are necessary for accession to the WTO, according to the current requirements of the WTO. Such measures have been taken in accordance with the schedule determined by Armenia and aimed at improving the legislation governing a number of areas, in particular customs, tax, banking, bankruptcy, the regulation of economic activity and licensing of some kinds of economic activity, land, trade, pricing, privatisation, criminal and civil matters, advertising activities, judicial protection of economic activity and certain other fields.

As a result of the realisation of these measures, the Working Party found, favourable conditions had been created for the further development and equal legal protection of the market economy, free economic competition and all kinds of property, as well as for the creation of the conditions and legal grounds for the fuller integration of the Republic of Armenia into the world economy.

Based on the announcement of the official representative of the President of the Republic, the Court noted that Armenia did not subscribe to the voluntary multilateral trade agreements at this stage.

The Court further stated that within the framework of the WTO Agreement, Armenia had taken on some obligations, which are set forth in the WTO Agreement and obligatory multilateral trade agreements, as well as in the Report of the Working Party to which the draft Protocol of Accession is attached, and in the Annexes to the Report of the Working Party containing the Schedule of Concessions and Commitments on Goods, the Schedule of Specific Commitments on Services, the list of products subject to mandatory conformity assessment, the list of VAT exemptions, and information on export subsidies and internal assistance. These obligations and commitments mostly concern privatisation, pricing and tariff

policies, judicial and extra-judicial protection of economic activity, domestic and foreign trade, legal regulation of goods in transit, customs, tax and criminal legislation and information on the legislation, licensing and certification of goods or services, investment-promoting policies and the management of state-owned companies, as well as economic policy, industry financing and state purchase fields.

In its decision, the Court noted the importance of the fact that the fulfilment of the above-mentioned obligations, taken on within the framework of the WTO Agreement, did not constitute an obstacle to the fulfilment of other international obligations taken on by Armenia in the field of trade, because, as stated in the Report of the Working Party, Armenia, especially in the framework of the CIS, realises free trade policy without customs duties or the implementation of unjustified obstacles in the field of imports and exports. The obligations taken on by Armenia under other bilateral and multilateral trade and economic treaties also do not obstruct the commitments taken on in the context of accession to the WTO.

The Court found that the obligations laid down in the Protocol on the Accession of the Republic of Armenia to the World Trade Organisation, in its attached schedules and in the WTO Agreement were in conformity with the Constitution.

Languages:

Armenian.

Austria
Constitutional Court

Statistical data

Sessions of the Constitutional Court during September/October 2002

- Financial claims (Article 137 B-VG): 2
- Conflicts of jurisdiction (Article 138.1 B-VG): 2
- Review of regulations (Article 139 B-VG): 39
- Review of laws (Article 140 B-VG): 148
- Review of treaties (Article 140a B-VG): 3
- Challenge of elections (Article 141 B-VG): 1
- Complaints against administrative decrees (Article 144 B-VG): 386
  (256 refused to be examined)

and during November/December 2002

- Financial claims (Article 137 B-VG): 131
- Conflicts of jurisdiction (Article 138.1 B-VG): 1
- Review of regulations (Article 139 B-VG): 4
- Review of laws (Article 140 B-VG): 38
- Challenge of elections (Article 141 B-VG): 3
- Complaints against administrative decrees (Article 144 B-VG): 365
  (213 refused to be examined)

Composition of the Court:

In October 2002 the Federal President appointed Prof. Karl KORINEK, a member of the Court since 1978 and Vice-President since 1999, President of the Court. In November 2002 Brigitte BIERLEIN was appointed Vice-President and Prof. Herbert HALLER was appointed to the Court (all appointments on the proposal of the Federal Government; all with effect as from 1 January 2003).

The former President Prof. Ludwig ADAMOVICH and member of the Court Kurt GOTTLICH retired and left office at the end of 2002.

Important decisions

Identification: AUT-2002-3-003

a) Austria / **b)** Constitutional Court / **c)** / **d)** 08.10.2002 / **e)** G 348/01 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.19 **General Principles** – Margin of appreciation.
5.1.1.4.1 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Minors.
5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Immigration, rule / Foreigner, residence permit, age-limit / Family reunification.

Headnotes:

Imposing an upper age limit of 15 for minors who seek residence on the basis of family reunification is within the legislator's margin of appreciation. The assumption that the main objective of members of this age group in coming to Austria is to work and not to join their families seems to be founded and justified.

Summary:

A Turkish citizen having exceeded the age of 14 was denied permission to establish her residence in Austria because of the age limit fixed in § 21.3 of the Aliens Act *(Fremdengesetz 1997)*. After this decision was overruled by the Administrative Court, the Minister of the Interior finally granted her a residence permit, but only for a "private stay". Residence permits granted on these grounds are limited to one year.

The minor appealed to the Constitutional Court, alleging that her rights had been infringed insofar as she had been denied residence on family reunification grounds, and that § 21.3 of the Aliens Act, fixing an upper age limit of 15 for minors, was unconstitutional.

The Court began its *ex officio* review by raising essentially the same questions as it had raised with respect to the previous provision of the Aliens Act, which had fixed an age limit of 14 in the same matter (G 16/00, *Bulletin* 2000/2 [AUT-2000-2-004]).

However, in the present case the Court came to the conclusion that the legislator had now amended the provision in question so as to have brought it into conformity with the Constitution.

Cross-references:

- Decision G 16/00 of 19.06.2000, *Bulletin* 2000/2 [AUT-2000-2-004].

Languages:

German.

Identification: AUT-2002-3-004

a) Austria / **b)** Constitutional Court / **c)** / **d)** 02.12.2002 / **e)** B 942/02 / **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.
4.7.2 **Institutions** – Judicial bodies – Procedure.
5.3.13.12 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Trial within reasonable time.

Keywords of the alphabetical index:

Proceedings, re-opening, conditions / European Court of Human Rights, judgement, execution / Individual complaint, grounds.

Headnotes:

No constitutional requirement can be derived from the European Convention on Human Rights according to which domestic proceedings must be reopened in every case where a judgment of the European Court of Human Rights has found a breach of the Convention. The reopening of disciplinary proceedings could only be taken into account in proceedings that had

(already) been found to be unreasonably long by the European Court of Human Rights. However, the European Court of Human Rights had itself observed in the judgment pertaining to the present case that there was “no causal link” between the penalty imposed on the applicant under domestic law and the breach of the Convention.

Summary:

The European Court of Human Rights had found that the duration of certain disciplinary proceedings – among a group of disciplinary proceedings – against a practising lawyer was unreasonably long (seven years and four months), thus violating Article 6.1 ECHR (*W.R. v. Austria*, judgment of 14 December 1999, Application no. 26602/95).

On the basis of this judgment, the lawyer in question filed an application “to renew the disciplinary proceedings under § 363.a of the Code of Criminal Procedure” *(Strafprozeßordnung)*, the provisions of which must be applied in disciplinary proceedings according to the Disciplinary Act *(Disziplinarstatut* 1990*)*. In his application of 28 May 2001 the lawyer argued that it could not be excluded that the unreasonable length of the proceedings had had a disadvantageous influence on the decision of the Appeals Board *(Oberste Berufungs- und Disziplinarkommission)*.

His application was rejected by the Appeals Board on 25 February 2002. The lawyer appealed to the Constitutional Court, complaining (again) of the length of the disciplinary proceedings (Article 6.1 ECHR).

As the complainant's disciplinary conviction had not yet been erased *(Tilgung)* in the disciplinary penal record the complaint was considered admissible.

As to the merits of the appeal, the Court found that § 363.a of the Code of Criminal Procedure was enacted in 1996 in order to fulfil Austria's obligations arising under the Convention, in particular “to abide by the final judgment of the Court” (Article 46 ECHR) in criminal matters. It provides for the reopening *(Erneuerung)* of criminal proceedings where a breach of the Convention is found by the European Court of Human Rights and where this breach may have had an unfavourable impact on the decision by the domestic courts.

According to the established Strasbourg case-law, it is for each member State to choose the means to be used in its domestic legal system for discharging its obligations under Article 46 ECHR (the former Article 53). Considering that case-law, the Constitutional Court concluded that although a general constitutional requirement that domestic proceedings be reopened where a violation of the Convention is found by the European Court of Human Rights could be derived from the Convention, this requirement does not cover every case of violation found by the European Court of Human Rights.

As there were no doubts as to the constitutionality of the provision applied, nor any violation of constitutionally guaranteed rights, the Court dismissed the complaint.

Languages:

German.

Identification: AUT-2002-3-005

a) Austria / **b)** Constitutional Court / **c)** / **d)** 12.12.2002 / **e)** G 151, 152/02 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.2.2.1 **Constitutional Justice** – Types of claim – Claim by a private body or individual – Natural person.
1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.
2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
3.4 **General Principles** – Separation of powers.
3.9 **General Principles** – Rule of law.
3.17 **General Principles** – Weighing of interests.
4.6.6 **Institutions** – Executive bodies – Relations with judicial bodies.
4.7.1.1 **Institutions** – Judicial bodies – Jurisdiction – Exclusive jurisdiction.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Double degree of jurisdiction.

Keywords of the alphabetical index:

Extradition, powers / Extradition, granting authority / Receiving state, guarantees / Remedy, effective.

Headnotes:

Under § 33 of the Extradition and Legal Assistance Act *(Auslieferungs- und Rechtshilfegesetz*; "the Act") it is exclusively for the Court of Appeal to decide whether a request for extradition is permissible, taking into account all aspects of the rights granted by the Act as well as all rights guaranteed by the Constitution, including the rights guaranteed by the European Convention on Human Rights.

The final decision on a request for extradition lies with the Minister of Justice, but only if the Court of Appeal has first found that the extradition is permissible. The Minister has to weigh other interests such as, in particular, aspects of international law. As his or her decision might interfere with a person's individual rights the Minister has to issue a formal decree *(Bescheid)*, against which the person concerned is entitled to lodge a complaint with the Administrative and/or the Constitutional Court.

The exclusion of appeals against the decision of the Court of Appeal as laid down in § 33.5 of the Act is unconstitutional. It contradicts the principle of the rule of law as well as the right to an effective remedy under Article 13 ECHR.

Summary:

A citizen of the United States (as well as of Israel) was convicted of fraud and sentenced to 845 years' imprisonment in the USA. He fled to Austria before the judgment was pronounced. He was arrested in October 2000 and the US Embassy requested his extradition in December 2000.

The Vienna Court of Appeal *(Oberlandesgericht Wien)* refused to grant the request for extradition because the requesting state had not guaranteed that the person concerned could have his conviction reviewed by a higher court. For this reason, extradition would contravene Article 2 Protocol 7 ECHR.

Upon appeal by the Prosecutor General *(Generalprokurator)* on the basis of a plea of nullity for the preservation of law *(Nichtigkeitsbeschwerde zur Wahrung des Gesetzes)*, the Supreme Court quashed the decision on 9 April 2002. The Supreme Court found that the legal question of the guarantee of access to appeal proceedings in criminal cases (Article 2 Protocol 7 ECHR) was not to be answered by the Court of Appeal but by the Minister of Justice. Considering the principle of the separation of powers (Article 94 of the Constitution) and §§ 33 and 34 of the Act, the Court of Appeal and the Minister of Justice share jurisdiction on the granting of a request for extradition. The Supreme Court returned the case to the Vienna Court of Appeal.

On 26 April 2002 the Constitutional Court received an (individual) application of the person, whose extradition proceedings were again pending. The applicant alleged that his rights were directly violated by the unconstitutionality of certain provisions of the Act, including the provision stipulating that no appeal lies against the decisions of the Court of Appeal in the relevant matters (§ 33.5 of the Act). He further argued that the term for his custody *(Haftfrist)* was about to expire. The Court of Appeal would therefore have to decide quickly on his extradition and this time, owing to the above-mentioned Supreme Court decision, could not find in favour of him. The Court of Appeal, deciding this matter as court of first and last instance, was not entitled to request a constitutional review of the provisions applied (Article 140 of the Constitution), while the Minister of Justice was not at all entitled to do so. Moreover the Minister's final decision would not even be qualified as a decree against which one could lodge a complaint with the Administrative and/or the Constitutional Court. The Minister's decision would simply be qualified as an order.

With respect to the admissibility of this application, the Court found that § 33.5 of the Act, which excluded appeals in cases such as the present one, had already directly forestalled the applicant since the Supreme Court's quashing of the Vienna Court of Appeal's earlier decision. Furthermore, the Vienna Court of Appeal had in the meantime allowed the extradition of the applicant on 8 May 2002. The Court accepted the applicant's argument that there was no other possibility to have the relevant provision reviewed. The applicant could not be expected to appeal against his extradition, precisely because this avenue was barred by the law, nor could he be expected to lodge an appeal for the protection of fundamental rights *(Grundrechtsbeschwerde)* as this recourse was barred by the Supreme Court's relevant precedents. Therefore his (individual) application to the Constitutional Court was admissible.

Pursuant to Article 94 of the Constitution, the judicial and executive branches of power "shall be separate at all levels of proceedings". Considering all aspects of this (organisational) principle of the separation of powers the Court found – unlike the Supreme Court – that §§ 33 and 34 of the Act do not provide for shared jurisdiction. Accordingly the jurisdiction to decide

whether to grant extradition is exclusively assigned to the Court of Appeal (§ 33 of the Act), which must consider all aspects of rights granted by the Act and by the Constitution. Therefore, where the Court of Appeal gives reasons based on rights guaranteed by Article 2 Protocol 7 ECHR, it is not exceeding its jurisdiction but may only be wrong as to its decision on the merits. The Minister can only decide on the basis of a decision by the Court of Appeal granting a request for extradition. He or she considers above all questions of international law or the political aspects of the extradition (§ 34 of the Act). As the Minister must use his or her discretionary power lawfully, his or her decision is consequently subject to review by the Administrative and/or the Constitutional Court.

Finally the Court ruled that the exclusion of appeals (§ 33.5 of the Act) contradicted the principle of the rule of law. The Court recalled that it is the essence of the rule of law that all actions of state organs must have a statutory and at least indirectly a constitutional basis (Article 18 of the Constitution) and that a system of judicial review must guarantee that each action is consistent with the law and the Constitution. Furthermore the rule of law requires that such a system of review grants a certain degree of efficiency.

Taking into account the case-law of the European Court of Human Rights on Articles 3 and 6 ECHR, granting extradition may give rise to issues of interference with and encroachment on certain constitutionally guaranteed rights. With regard to the right to an effective remedy (Article 13 ECHR) the decision to extradite a person must be subject to appeal. It is, however, also required by the principle of the rule of law that such a decision must be subject to appeal. The Court annulled § 33.5 of the Act insofar as it denied this right.

Languages:

German.

Azerbaijan
Constitutional Court

Important decisions

Identification: AZE-2002-3-007

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 29.11.2002 / **e)** 1/12 / **f)** / **g)** *Azerbaycan* (Official Gazette), *Azerbaycan Respublikasi Konstitusiya Mehkemesinin Melumati* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
3.5 **General Principles** – Social State.
5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.
5.4.13 **Fundamental Rights** – Economic, social and cultural rights – Right to housing.
5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to a sufficient standard of living.

Keywords of the alphabetical index:

Employment contract, cessation / Leave, unused, right to compensation / Labour Code, application / International Labour Organisation, regulation / International Labour Organisation, Convention no. 052 / International Labour Organisation, Convention no. 132.

Headnotes:

The principle of the social state implies the legal commitment of the state to ensuring a fair social system. This principle proceeds from the Preamble to the Constitution, which declares that everybody shall be entitled to adequate standards of living in accordance with fair economic and social norms.

Employees who have not used their paid leave entitlements for the last years before the entry into force of the Labour Code have the right to financial compensation for such unused leave.

Summary:

The Supreme Court sought the interpretation of Article 144.2 of the Labour Code (regulating the payment of financial compensation for unused leave regardless of the reasons and grounds for such compensation stipulated in the employment contract and without any conditions and limitations), and in particular whether this article covered employees who had not used their leave entitlements of the last years before the entry into force of the Labour Code.

Article 37 of the Constitution indicates that everyone has the right to rest. Persons working based on labour agreements are guaranteed a working day not exceeding eight hours, as provided for by legislation. They are also guaranteed time off on national holidays and at least one paid vacation with a duration of at least 21 calendar days.

The provisions connected with the right to work are also reflected in a number of international documents to which the Azerbaijan Republic is a party.

According to Article 3 of Convention no.052 of the International Labour Organisation (ILO), the Holidays with Pay Convention, adopted in 1936, "every person taking a holiday… shall receive in respect of the full period of the holiday either his usual remuneration, calculated in a manner which shall be prescribed by national laws or regulations, including the cash equivalent of his remuneration in kind, if any; or the remuneration determined by collective agreement".

According to Article 3 of ILO Convention no. 132, the Holidays with Pay Convention (Revised), which was adopted on 24 June 1970 and came into force on 30 June 1973, "every person to whom this Convention applies shall be entitled to an annual paid holiday of a specified minimum length".

In accordance with these provisions of the Constitution and international conventions, and along with provisions governing working time, employment contracts, labour standards, the remuneration of labour, labour and administrative discipline and other matters, the Labour Code regulates rest periods and the granting of leave.

Based on Article 113 of the Labour Code, leave means rest time, or time away from work, the duration of which cannot be less than that indicated in the Labour Code and which is used by the worker at his or her discretion for the purpose of normal rest, recovery of working ability and the protection and strengthening of health.

According to Article 32 of the Law on Leave and with the exception of social leave and maternity leave, upon the termination of an employment contract financial compensation shall be paid for unused days of leave.

In contrast with Article 32 of the Law on Leave, the parliament *(Milli Mejlis)*, in accordance with its constitutional right, provided in Article 144.2 of the Labour Code adopted in 1999 that irrespective of the reasons for the termination of the employment contract, the worker shall be paid financial compensation without any conditions and limitation for unused basic leave for all years until the day of his or her dismissal.

As is obvious, there are different approaches to the regulation of financial compensation for unused leaves of working years in legislation.

The Court decided that in cases of the termination of employment contracts, financial compensation for unused leave until 1 June 1999 should be regulated by the legislation that was in force at that time and financial compensation for leave unused after that date should be regulated by Article 144.2 of the Labour Code currently in force.

Languages:

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

Identification: AZE-2002-3-008

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 27.12.2002 / **e)** 1/13 / **f)** / **g)** *Azerbaycan* (Official Gazette), *Konstitusiya Mehkemesinin Melumati* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.17 **General Principles** – Weighing of interests.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.36 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Right, realisation / Debt, settlement / Court, fee, reimbursement.

Headnotes:

Any claim by a creditor is based on the understanding that the debtor has undertaken a commitment to carry out the relevant actions in the future with the view to reimbursing the interests of the creditor. Such an understanding proceeds first of all from the fact that the creditor's rights are ensured by means of coercive measures implemented by the state.

Article 440.4 of the Civil Code and Article 74.1 of the Law on the Execution of Court Decisions, providing for the satisfaction of creditors' claims only after the payment of the debtor's court expenses, cannot be considered as the allowing for the coercive restoration of violated rights, and thus do not correspond to the concept of justice. Furthermore, they violate the principle of striking a fair balance between public and private interests, and are therefore contrary to the Constitution.

Summary:

The Supreme Court sought the interpretation of Article 440.4 of the Civil Code and Article 74.1 of the Law on the Execution of Court Decisions. According to these provisions, in cases where a debtor has insufficient funds to cover his or her debts this leads first of all to the restriction of the possibility for a claimant to recover his or her legal costs and expenses, as well as to the non-execution of his or her lawful claims, and to the creation of contradictions between private and individual interests at the stage of the execution of court decisions.

The Civil Code determines the coercive measures and other legal means available to the state in cases of a breach of obligations, as well as the procedure for the implementation of such measures.

For instance, Article 440.4 of the Civil Code and Article 74.1 of the Law on the Execution of Court Decisions prescribe that creditors' claims should be reimbursed last, i.e. only after the debtor has paid his or her own legal costs and expenses.

Article 12 of the Constitution proclaims that the supreme objective of the state is to guarantee the rights and liberties of individuals and citizens; Article 13.1 of the Constitution provides that property shall be inviolable and protected by the state; Article 29 of the Constitution provides that every person shall have the right to own property and that no one shall be dispossessed without the decision of a court; Article 60 of the Constitution guarantees that every person shall have the right to the protection of their rights and freedoms by the courts.

Article 71.1 and 71.2 of the Constitution provide that the executive, legislative and judicial branches of power shall observe and protect the human rights and freedoms enshrined in the Constitution. No one may restrict the implementation of human rights and freedoms.

A number of international instruments also ensure the right to property and the right of access to the courts to protect that right. According to Article 17 of the Universal Declaration of Human Rights, “Everyone has the right to own property alone as well as in association with others.” No one shall be arbitrarily deprived of his or her property; in accordance with Article 1 Protocol 1 ECHR, “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law”; on the basis of Article 8 of the Universal Declaration of Human Rights, “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”; Article 6.1 ECHR provides that “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

In a number of its decisions the Court has previously noted that in international law the protection of fundamental rights by law is considered as an efficient restoration of these rights based on a fair trial held by an independent court. By its nature a fair trial must provide the restoration of violated rights and must conform to the concept of justice.

The Court found that the distribution of money laid down by Article 440.4 of the Civil Code and Article 74.1 of the Law on the Execution of Court Decisions was not in conformity with Articles 12, 13, 29, 60 and 71 of the Constitution and declared the impugned provisions null and void.

Languages:

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

Belgium
Court of Arbitration

Important decisions

Identification: BEL-2002-3-009

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 15.10.2002 / **e)** 151/2002 / **f)** / **g)** *Moniteur belge* (Official Gazette), 10.02.2003 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.2 **General Principles** – Republic/Monarchy.
3.9 **General Principles** – Rule of law.
3.24 **General Principles** – Loyalty to the State.
4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
5.2.2.9 **Fundamental Rights** – Equality – Criteria of distinction – Political opinions or affiliation.
5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of opinion.

Keywords of the alphabetical index:

Municipality, councillor, assumption of duties, condition / Oath, political allegiance / Constitutional system, allegiance.

Headnotes:

In a state governed by the rule of law, the leaders are subject to the law. The oath of allegiance to the King and of obedience to the Constitution and the laws of the Belgian people must be understood as a solemn declaration of submission to the rules of the Belgian legal system. These rules make it possible to express a preference for a regime, but not to disregard the regime in force. The words "allegiance to the King" should be understood to imply recognition of the monarchy as an institution, which itself derives from the Constitution. These words have no significance other than that of a promise of allegiance to a constitutional system that a democracy has chosen.

Summary:

A municipal councillor took the statutory oath when he was appointed to the municipal council. The oath provided for by law is worded as follows: "I swear allegiance to the King and obedience to the Constitution and the laws of the Belgian people". He then instituted legal proceedings before the Brussels Court of First Instance, claiming compensation from the Belgian state for non-pecuniary damage resulting from the fact that, in order to exercise his mandate, he had had to swear allegiance to the King, which was contrary to the political opinions he held as a republican. The Court referred a preliminary question to the Court of Arbitration for a decision concerning the compatibility of Article 80 of the new Municipal Act, which lays down the wording of the oath, with the constitutional rule concerning equality (Article 10 of the Constitution). The question was a specific one: Does the obligation of municipal councillors who have other views, and more particularly those who are republicans, to take an oath of allegiance to the King undermine the principle of equality?

The Court of Arbitration again held that under the constitutional rules concerning equality and non-discrimination, categories of people in substantially different situations should not, in the absence of reasonable grounds, be treated identically.

It then pointed out that the law required that an oath be taken by those taking office and that, as a result, municipal representatives who were in favour of a republic were at a disadvantage in relation to others since they were required, if they did not want to forfeit office, to take an oath which might seem contrary to their convictions. The Court then considered whether there were objective and reasonable grounds for equal treatment of this kind.

The purpose of the oath was to hear municipal councillors declare solemnly at a public hearing that they would observe the law of the state in which they were to hold public office. Accordingly, the oath was of as much interest to those who heard it as to those who took it.

The words "allegiance to the King" should be taken to mean recognition of the monarchy as an institution, which itself derives from the Constitution. These words had no significance other than that of a promise of allegiance to the constitutional system that a democracy had chosen.

The Court concluded that the obligation to take an oath of allegiance to the King was not contrary to the constitutional rule concerning equality.

Languages:

French, Dutch, German.

Identification: BEL-2002-3-010

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 06.11.2002 / **e)** 155/2002 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
5.2.2.7 **Fundamental Rights** – Equality – Criteria of distinction – Age.

Keywords of the alphabetical index:

Hooliganism / Football / Minor, ban from stadium / Youth, protection / Penalty, administrative.

Headnotes:

The introduction of a system of administrative penalties (fines and bans from stadiums) for unruly, even reprehensible, behaviour at football matches, which may apply to minors, where the juvenile courts may, as a rule, adopt only certain specific measures in relation to minors, is contrary to the constitutional rules concerning equality and non-discrimination (Articles 10 and 11 of the Constitution).

Summary:

In order to counter hooliganism at football matches, the Law of 21 December 1998 on security at football matches provides, in addition to criminal sanctions, for a system of administrative penalties (fines and bans from stadiums) for certain forms of violence in football stadiums. The so-called “Football Act” also governs procedural rules concerning the application of the administrative sanctions and provides for the possibility of appeal to the Court of Summary Jurisdiction (*tribunal de police*).

Someone who had been banned from a stadium for 18 months appealed to the Court of Summary Jurisdiction against the decision. Although he was under the age of majority at the time of the events in question, administrative proceedings were instituted against him directly, whereas under the Youth Protection Act of 8 April 1965, only the juvenile courts may, as a rule, order certain measures to be taken against minors in Belgium.

The Court of Summary Jurisdiction had doubts as to whether the application of administrative penalties to minors under the Football Act was consistent with the constitutional rules concerning equality and non-discrimination (Articles 10 and 11 of the Constitution). It noted that the conduct in question infringed both the provisions of the Football Act and the provisions of the Criminal Code. It also noted that minors on whom administrative penalties were imposed and to whom the procedure concerning the administrative measures provided for in the Football Act was applied were treated differently from minors to whom the Youth Protection Act of 8 April 1965 alone was applied. The Court of Summary Jurisdiction asked the Court of Arbitration a number of questions concerning this difference in treatment.

The Court of Arbitration considered whether these measures would comply with the criterion of proportionality if administrative penalties were applied to minors under the Football Act.

It observed that under the Youth Protection Act the juvenile courts could adopt, in respect of minors, only custody, protective and educational measures: that ruled out fines. These measures could, however, include banning a minor from a stadium. However, there were no reasonable grounds, in the case of football matches, for the legislative body to set aside its concern to protect minors and safeguard their future by affording them special procedural safeguards.

Minors over the age of sixteen may admittedly, in certain circumstances, also be bought before an ordinary (criminal) court but this does not stop the measures in question from being disproportionate.

The Court concluded that the contested provisions of the Football Act were contrary to Articles 10 and 11 of the Constitution on the ground that they were applicable to minors.

Languages:

French, Dutch, German.

Identification: BEL-2002-3-011

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 06.11.2002 / **e)** 161/2002 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.19 **General Principles** – Margin of appreciation.
5.2.2.1 **Fundamental Rights** – Equality – Criteria of distinction – Gender.
5.3.31.1 **Fundamental Rights** – Civil and political rights – Right to family life – Descent.

Keywords of the alphabetical index:

Descent, lawful, child's surname / Child, born out of wedlock, surname / Modern society, changing traditions.

Headnotes:

The preference given to the paternal surname may be explained by the patriarchal concepts of the family and household that have long prevailed in society.

Other systems could meet the objectives pursued in assigning a surname in today's society. This does not, however, constitute sufficient grounds for the existing system to be considered discriminatory.

Summary:

A child was born out of wedlock. His father recognised him under Belgian law before his birth. Before the Antwerp Court of First Instance argued the mother, that Article 335.1 of the Civil Code, which provided that a child whose paternal and maternal descent were established at the same time bore the father's surname, was unconstitutional. The Court of First Instance therefore asked the Court of Arbitration whether this provision was compatible with the constitutional rules concerning equality and non-discrimination (Articles 10 and 11 of the Constitution). More specifically, it asked whether the principle of equality between men and women was not being disregarded, since the law made it compulsory for the father's name to be passed on and deprived the mother of any possibility of giving her surname to a child when the child was born either in wedlock or out of wedlock but simultaneously recognised by the father.

The Court of Arbitration first pointed out that the assignment of a surname was based mainly on considerations of social interest. The assignment of a surname, unlike that of a first name, was governed by law, the aim being, firstly, to establish surnames in a simple, uniform fashion; and, secondly, to give surnames a certain constancy. It added that the rules set out in Article 335 of the Civil Code were consistent with this aim.

The link between surname and paternal descent, which was originally based on custom, was expressly set out in Article 335 of the Civil Code.

The Court pointed out that, unlike an individual's right to bear a name, a person's right to pass on his or her surname to a child could not be considered a fundamental right. Parliament therefore had extensive powers of discretion when laying down rules governing the assignment of a surname.

Since there was no evidence that the law was not based an objective criterion, was inappropriate, or that the rights of the persons concerned were disproportionately affected, the Court concluded that the Constitution had not been infringed.

Languages:

French, Dutch, German.

Identification: BEL-2002-3-012

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 27.11.2002 / **e)** 169/2002 / **f)** / **g)** *Moniteur belge* (Official Gazette), 12.12.2002 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
3.11 **General Principles** – Vested and/or acquired rights.
3.16 **General Principles** – Proportionality.
3.19 **General Principles** – Margin of appreciation.
5.1.1.3.1 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
5.2 **Fundamental Rights** – Equality.

5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.
5.3.10 **Fundamental Rights** – Civil and political rights – Rights of domicile and establishment.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to family life.
5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to a sufficient standard of living.

Keywords of the alphabetical index:

Foreigner, obligation to register with a centre / Exemption, conditions / Social welfare, arrangements / Parliament, "standstill" obligation.

Headnotes:

The obligation for certain applicants for refugee status to register with a centre, where they receive assistance in kind, is not contrary to the constitutional rules concerning equality and non-discrimination (Articles 10 and 11 of the Constitution), taken together with the right to social welfare (Article 23 of the Constitution), because it ensures that assistance continues to be granted. Assistance in kind is one of the forms of social welfare provided for when Article 23 was included in the Constitution ("standstill" effect).

Nor does this provision infringe the constitutional rules concerning equality and non-discrimination, taken together with Article 12 of the Constitution, Article 2 Protocol 4 ECHR and Article 12 of the International Covenant on Civil and Political Rights, in view of the objectives of the law and the arrangements for registering with a centre.

The provision does, however, disproportionately infringe the right to respect for family life (Article 22 of the Constitution and Article 8 ECHR), unless an exemption is made for applicants for refugee status who form a family with persons entitled to social welfare in Belgium or who have been authorised to reside there. The Court interpreted the law as being in keeping with the Constitution and dismissed the application to have it set aside, provided that to this interpretation is applied.

Summary:

Article 71 of the Law of 2 January 2001 setting out social, budgetary and miscellaneous provisions adds to the State Authorities Act of 8 July 1976 on public social welfare centres an article assigning certain categories of foreigners applying for refugee status, a centre run by a public authority, where they will receive assistance in kind, as compulsory place of registration.

The League of Human Rights, a non-profit organisation, challenged this law before the Court of Arbitration on the grounds that it was in breach of the constitutional rules concerning equality and non-discrimination (Articles 10 and 11 of the Constitution), taken together with other fundamental rights recognised in the Constitution or in treaties.

One of its arguments was that there was a discriminatory infringement of the right to social welfare, since this right was restricted to assistance in kind in a particular centre (previously, it was customary to provide financial assistance). The right to lead a life consistent with human dignity, which included the right to social welfare, was one of the economic, social and cultural rights recognised in Article 23.3 of the Constitution.

The Court first pointed out that Article 23 of the Constitution did not specify what was meant by the right to lead a life consistent with human dignity or the right to social welfare: it only set out the principle. Each parliament was responsible for safeguarding those rights. When Article 23 had come into force, however, the federal parliament had already taken steps to guarantee the right to social welfare. Parliament could not, therefore, infringe the rights guaranteed by the legislation applicable at the time (the so-called "standstill" obligation).

This obligation could not, however, be taken to mean that no parliament could, acting within its powers, modify the social welfare arrangements provided for by law. It prevented parliaments from taking measures that would significantly undermine the right safeguarded but did not deprive them of the authority to assess the way in which that right would best be assured. Since assistance in kind was one of the forms of social welfare provided for in the Act of 8 July 1976, the challenged provision did not undermine the right to social welfare.

Another plea was that there was a discriminatory infringement of the freedom to come and go and the freedom to choose one's place of residence, as enshrined in the Constitution, in Article 2 Protocol 4 ECHR and in Article 12 of the International Covenant on Civil and Political Rights. The Court replied that these international provisions allowed Parliament to restrict the exercise of the right freely to choose one's place of residence if such restriction was necessary in a democratic society for the pursuit of various objectives, including national security and the maintenance of public order. In view of the objectives

pursued by Parliament in the case in question and the applicable registration arrangements, the rules concerning equality and non-discrimination had not been infringed. The Court went on to point out that a refugee applicant's freedom to come and go was not affected by the law.

Another plea was that there was a discriminatory infringement of the right to respect for family life, a right enshrined in Article 8 ECHR. The Court pointed out that, because of its limited purpose, the law did not infringe the right of the refugee applicants concerned to establish social contacts freely. The provision might, however, breach the right to a family life of foreigners who were assigned a place where they were required to register, where they would be provided with assistance in kind and would be prevented from living with one or more people with whom they formed a family and who were entitled to social welfare in Belgium or authorised to reside there. In special circumstances, the law allowed the Minister or the Minister's deputy to waive the requirement to register with a centre but it did not state that the Minister or the Minister's deputy was required to waive it in those circumstances. As it did not provide for an exception in the case of the foreigners concerned, the measure went further than was necessary to achieve the objective and disproportionately infringed the right to respect for family life. The Court went on to provide an interpretation of the law that was in keeping with the Constitution: in the light of the legislative history of the law, the Minister or the Minister's deputy was required to grant the exemption provided for, unless special circumstances existed against doing so, in the event that the enforcement of the rule would prevent foreigners from living with one or more persons with whom they formed a family and who were entitled to social welfare in Belgium or were authorised to reside there. It was only subject to that interpretation, set out in the operative provisions, that the law in question was not discriminatory.

Languages:

French, Dutch, German.

Identification: BEL-2002-3-013

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 05.12.2002 / **e)** 175/2002 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.
5.2 **Fundamental Rights** – Equality.
5.3.13.1.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Non-litigious administrative proceedings.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.

Keywords of the alphabetical index:

Hooliganism / Police, powers / Security measure, ban from stadium / Security measure, imposition, safeguards / Penalty, nature.

Headnotes:

It is not discriminatory to empower the police to impose an immediate ban on a person from accessing a stadium as a security measure during football matches, even if they do not observe the traditional safeguards applicable to ordinary criminal sanctions.

Summary:

Under Article 44 of the Law of 21 December 1998 on security at football matches, the police may, in the event of certain types of unruly behaviour in a stadium, temporarily ban someone from the stadium as a security measure. A person who was the subject of such a ban and who also incurred administrative penalties appealed to the Court of Summary Jurisdiction (*tribunal de police*).

The latter held that an immediate ban on access to the stadium was a criminal sanction. It asked the Court of Arbitration whether the enforcement of such a sanction, without any proceedings and any possibility of appeal and of having the measure taken into account when further measures were taken by the trial court, was not contrary to the constitutional rules concerning equality and non-discrimination (Articles 10 and 11 of the Constitution), taken together with Article 6 ECHR.

The Court of Arbitration considered, firstly, that although it was up to the lower court to interpret the law, it was the responsibility of the Court of Arbitration itself to consider, when reviewing the provision in the light of Articles 10 and 11 of the Constitution, taken together with Article 6 ECHR, whether the measure in question was a criminal sanction or not.

According to the Court of Arbitration, immediately banning someone from a stadium was a temporary security measure and not a criminal sanction to which Article 6 ECHR would apply. The ban was temporary (three months at most) and applied only to specific football matches, for the duration of these matches. The ban lapsed when an administrative or judicial ban on access to the stadium was issued subsequently.

The Court took account of the purpose of the law and the very strict conditions laid down in it: specific assessment of the conduct of the persons concerned, security grounds, compulsory notification of a police report and confirmation of the measure within fourteen days by a competent official. Admittedly, there was no provision for appeal to a specific court, but there was still the possibility of appeal under ordinary law. Lastly, there was nothing to prevent the competent authorities, when they decided on sanctions, from taking into account the fact that the person concerned had already been banned from a stadium as a security measure.

In the light of all these considerations, the Court of Arbitration concluded that there was no discrimination in the case in question.

Languages:

French, Dutch, German.

Bosnia and Herzegovina
Constitutional Court

There was no relevant constitutional case-law during the reference period 1 September 2002 – 31 December 2002.

Bulgaria
Constitutional Court

Statistical data
1 September 2002 – 31 December 2002

Number of decisions: 7

Important decisions

Identification: BUL-2002-3-003

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 16.12.2002 / **e)** / 13/02 / **f)** / **g)** / *Darzaven vestnik* (Official Gazette), 118, 20.12.2002 / **h)**.

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
3.9 **General Principles** – Rule of law.
4.6.2 **Institutions** – Executive bodies – Powers.
4.6.6 **Institutions** – Executive bodies – Relations with judicial bodies.
4.7.1.1 **Institutions** – Judicial bodies – Jurisdiction – Exclusive jurisdiction.
4.7.4.1.6.3 **Institutions** – Judicial bodies – Organisation – Members – Status – Irremovability.
4.7.4.3.1 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel – Powers.
4.7.5 **Institutions** – Judicial bodies – Supreme Judicial Council or equivalent body.
4.7.16.2 **Institutions** – Judicial bodies – Liability – Liability of judges.

Keywords of the alphabetical index:

Judiciary, recruitment / Immunity, judicial, lifting / Judge, absolute security of office / Judicial Service Commission, powers.

Headnotes:

General meetings of judges, prosecutors and staff aim at unifying the practice of law enforcement and improving judges' qualifications. They cannot be transformed into employment agencies for legal professions. Such an approach may strike at the foundations of the administration of justice.

Pursuant to the Constitution, only the Public Prosecutor's Office has the power to bring charges and take steps which may give rise to criminal liability, as well as gather, check and assess any information in accordance with the requirements of the Code of Criminal Procedure. It is therefore contrary to the Constitution to grant one-fifth of the members of the Judicial Service Commission the right to request the lifting of judicial immunity.

Intervention by the executive power in the organisation and activities of courts is contrary to the Constitution and therefore unacceptable.

Summary:

The proceedings were initiated by an application brought by the full court of the Supreme Court of Cassation. The applicants claimed that the Law amending and completing the Law on the Judiciary was unconstitutional.

The Constitutional Court declared the impugned 44 provisions to be contrary to the Constitution. Nine judges voted in favour of that decision and three judges had dissenting opinions. The judges struck down some provisions by unanimous vote.

Some provisions found to be contrary to the Constitution concerned the undue increase in executive powers compared to judicial powers. The Court emphasised that Bulgaria is a state governed by law where the legislative, executive and judicial powers are separate, and that the administration of justice is a function of the State that is independent. The three powers should, therefore, cooperate. The legislature must implement measures to ensure balanced relations within the system, rather than accept the executive power’s taking over of the role of the judicial power.

The Constitutional Court declared the following provisions to be contrary to the Constitution:

- the proposals made by the courts, including by the presidents of the supreme courts and by the General Prosecutor are to be presented to the Judicial Service Commission solely by the Minister of Justice as a principal representative of executive power and an important political figure;

- the annual reports on the activities of courts, Public Prosecutor's offices and judicial investigation departments are filed with the Judicial Service

Commission by the Minister of Justice who is to draft a consolidated report of their activities;

- individual files concerning judges, prosecutors and judicial investigators are handled by the Minister of Justice. As to the separation of powers, individual files concerning members of one of the powers cannot be created or kept by a representative of another power;

- all judges, including Supreme Court judges and the prosecutors of the General Prosecutor's office are appointed to and discharged from office at the request of the Minister of Justice who is to communicate that decision to the recruitment centre;

- the Minister of Justice presents an annual report to the Parliament on the activities of the independent judicial power. However, the Constitution excludes the possibility of the independent judicial power reporting to the legislative power. Such a case is even more absurd because the report in question is presented by way of the executive power;

- the Ministry of Justice Inspectorate is to check the reports on activities of the Supreme Court of Cassation, the Supreme Administrative Court and the General Prosecutor. Pursuant to the Constitution, it should be the Prosecutor General who supervises the legality and procedural administration of all prosecutors' activities, while the Supreme Court of Cassation and Supreme Administrative Court supervise the strict and uniform enforcement of laws by the Courts; and,

- The National Institute of Justice, which is responsible for the education of judges and assistant-prosecutors and for improving the qualifications of judges, prosecutors and judicial investigators in office is controlled by the executive power instead of the judicial power.

The second group of provisions declared to be contrary to the Constitution concerns the general meetings and assignment of important functions to judges, prosecutors and judicial investigating officers as to the recruitment of legal professionals. Pursuant to the Constitution, the recruitment policy regarding legal professionals falls under the responsibility of a special body – the Judicial Service Commission. The general meetings of judges, prosecutors and judicial investigation officials are not bodies of the judicial power as set out in the Constitution.

The Constitutional Court held that one-fifth of the members of Judicial Service Commission did not have the constitutional power to initiate criminal proceedings or to gather, check and assess data in accordance with the requirements of the Code of Criminal Procedure.

The introduction of a distinction between the powers currently exercised by supervisors of judges and those exercised by administrative supervisors within the legal system and the grant of a proxy to the latter are also contrary to the Constitution. All judges, prosecutors and judicial investigators enjoy absolute security of office, which guarantees the stability of the legal system. According to that constitutional principle, a proxy cannot be introduced for only one category of judges.

The Constitutional Court also declared the legal provisions to be unconstitutional on the new grading system within the legal system that conflicts with the previously acquired rights of the judges, who face a subsequent reduction of their grades.

The Constitutional Court rejected that part of the application because it believed that the unconstitutionality of the provisions in question did not lead to the unconstitutionality of the law as a whole.

Languages:

Bulgarian.

Canada
Supreme Court

Important decisions

Identification: CAN-2002-3-003

a) Canada / **b)** Supreme Court / **c)** / **d)** 31.10.2002 / **e)** 27677 / **f)** Sauvé v. Canada (Chief Electoral Officer) / **g)** *Canada Supreme Court Reports* (Official Digest), [2002] 3 S.C.R. / **h)** Internet: http://www.lexum.umontreal.ca/csc-scc/en/index.html; [2002] S.C.J. no. 66 *(Quicklaw)*; CODICES (English, French).

Keywords of the systematic thesaurus:

3.3.1 **General Principles** – Democracy – Representative democracy.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
3.20 **General Principles** – Reasonableness.
5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.
5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.38.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.

Keywords of the alphabetical index:

Prisoner, discrimination on the basis of the length of sentence / Value, democratic.

Headnotes:

Legislation denying the right to vote in federal elections to every person imprisoned in a correctional institution serving a sentence of two years or more is unconstitutional, in so far as denying prisoners the right to vote is more likely to send messages that undermine respect for the law and democracy than messages that enhance those values and an important means of teaching prisoners democratic values and social responsibility is lost. Political theory that would permit elected representatives to deny the vote to a segment of the population finds no place in a democracy built upon the principles of inclusiveness, equality, and citizen participation.

Summary:

Pursuant to Section 51.e of the Canada Elections Act, prisoners in a correctional institution serving a sentence of two years or more were denied the right to vote in federal elections within Canada. The impugned provision was challenged on the grounds that it infringed both the right to vote and the rights to equality, respectively guaranteed by Section 3 and Section 15.1 of the Canadian Charter of Rights and Freedoms, and that this infringement was not justified under Section 1 of the Charter. The government conceded that the voting restriction violated Section 3 but maintained that the infringement was justified under Section 1. The trial court found the provision unconstitutional but the Court of Appeal reversed that decision. In a majority decision, the Supreme Court of Canada held Section 51.e to be unconstitutional.

A majority of five judges found that the provision infringed Section 3 of the Charter and the infringement could not be justified under Section 1. The majority determined that the government had failed to identify particular problems that required denying the right to vote; therefore, it was difficult to conclude that the denial was directed at a pressing and substantial purpose. The government had asserted two broad objectives in support of the provision denying the right to vote to prisoners. The majority found these objectives to be vague and symbolic. Further, they determined that the government had failed to establish a rational connection between the provision's denial of the right to vote and its stated objectives. Denial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the Charter. With regard to the second objective, denying the right to vote does not comply with the requirements for legitimate punishment, namely that punishment must not be arbitrary and must serve a valid criminal law purpose. It was also found to be too broad and did not minimally impair the right to vote as it affected many people who, on the government's own theory, should not have been affected. Lastly, the negative effects of denying citizens the right to vote were found to greatly outweigh the benefits. Denying prisoners the right to vote imposes negative costs on prisoners and the penal system. It removes a route to social development and undermines correctional law and policy directed towards rehabilitation and integration.

The four dissenting judges found that while it had been conceded that the provision infringed Section 3 of the Charter, the infringement was a reasonable limit

that was demonstrably justified in a free and democratic society. The minority emphasised that Section 1 of the Charter does not constrain Parliament or authorise courts to prioritise one reasonable social or political philosophy over reasonable others, but rather only empowers courts to strike down those limitations which are not reasonable and which cannot be justified in a free and democratic society. They found the objectives of the provision denying the right to vote to be pressing and substantial as they were based upon a reasonable and rational social or political philosophy. The social rejection of serious crime reflects a moral line which safeguards the social contract and the rule of law and bolsters the importance of the nexus between individuals and the community. The symbolic or abstract purposes of the government objectives can be valid of their own accord and must not be downplayed simply for the reason of their being symbolic. The minority found that while a causal relationship between denying the vote and the government's objectives was not empirically demonstrable, reason, logic and common sense, as well as extensive expert evidence, support a conclusion that there is a rational connection between denying the vote to prisoners incarcerated for serious crimes and the objectives of promoting civic responsibility and the rule of law and the enhancement of the general objectives of the penal sanction. Secondly, they found that the impairment of the Charter right was minimal. The government is not required to adopt the absolutely least intrusive means for promoting the purpose of a statutory provision, although the government is required to prefer a significantly less intrusive means if it is of equal effectiveness. In this case, it was found that no less intrusive measure would be equally effective. The provision is reasonably tailored insofar as the denial of voting rights reflects the length of the sentence and actual incarceration, which, in turn, reflect the seriousness of the crimes perpetrated and the intended progress towards the ultimate goals of rehabilitation and reintegration. The salutary effects were viewed as outweighing the temporary denial of voting rights of serious criminal offenders. Value emerges from the signal or message that those who commit serious crimes will temporarily lose one aspect of the political equality of citizens.

The minority also found that Section 51.e of the Canada Elections Act did not infringe equality rights under Section 15.1 of the Charter as prisoners do not constitute a group protected by analogous or enumerated grounds under Section 15.1.

Supplementary information:

In 1993, the predecessor of the impugned provision in this case, which prohibited all prison inmates from voting in federal elections regardless of the length of their sentence, was held by the Supreme Court of Canada, in a unanimous decision, to be unconstitutional as an unjustified denial of the right to vote guaranteed by Section 3 of the Charter: *Sauvé v. Canada (Attorney General),* [1993] 2 S.C.R. 438. Parliament responded to that decision by enacting the provision challenged in this case.

Languages:

English, French (translation by the Court).

Identification: CAN-2002-3-004

a) Canada / **b)** Supreme Court / **c)** / **d)** 19.12.2002 / **e)** 27418 / **f)** Gosselin v. Quebec (Attorney General) / **g)** / **h)** Internet: http://www.droit.umontreal.ca/doc/csc-scc/en/index/html; [2002] S.C.J. no. 85 *(Quicklaw)*; CODICES (English, French).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.
5.2.2.7 **Fundamental Rights** – Equality – Criteria of distinction – Age.
5.3.12 **Fundamental Rights** – Civil and political rights – Security of the person.

Keywords of the alphabetical index:

Social assistance, reduction / Welfare benefits / Youth, social integration.

Headnotes:

A regulation in a social assistance scheme which provided for reduced welfare benefits for individuals under the age of 30 who did not participate in education or work experience programs did not violate the equality rights or the right to security of the person guaranteed by the Constitution.

Summary:

In 1984 the Quebec government created a new social assistance scheme. Section 29.a of the Regulation respecting social aid set the base amount of welfare payable to persons under the age of 30 at roughly one third of the base amount payable to those 30 and over. Under the new scheme, participation in one of three education or work experience programs allowed people under 30 to increase their welfare payments to either the same as, or within $100 of, the base amount payable to those 30 and over. In 1989 this scheme was replaced by legislation that no longer made this age-based distinction. The appellant, a welfare recipient, brought a class action challenging the 1984 social assistance scheme on behalf of all welfare recipients under 30 subject to the differential regime from 1985 to 1989. The appellant argued that the scheme violated the equality rights or the right to security of the person respectively guaranteed by Sections 15.1 and 7 of the Canadian Charter of Rights and Freedoms. The Quebec Superior Court, the Court of Appeal and the Supreme Court of Canada, in a majority decision, all upheld the constitutionality of Section 29.a of the Regulation.

1. Equality rights

A majority of five judges concluded that Section 29.a of the Regulation did not infringe Section 15.1 of the Charter. While Section 29.a clearly drew a distinction on a ground enumerated in Section 15.1, an examination of the relevant factors does not support a finding of discrimination and denial of human dignity. First, this is not a case where members of the appellant group suffered from pre-existing disadvantage and stigmatisation on the basis of their age. Second, the record does not establish a lack of correspondence between the scheme and the actual circumstances of welfare recipients under 30. The evidence indicates that the purpose of the challenged distinction, far from being stereotypical or arbitrary, corresponded to the actual needs of individuals under 30. In view of the deep recession in the early 1980s, the government's purpose was to provide young welfare recipients with the kind of remedial education and skills training they lacked and needed in order to integrate into the workforce and become self-sufficient. The regime constituted an affirmation of young people's potential rather than a denial of their dignity. Third, the scheme was not designed to improve the condition of another group. Finally, the trial judge's findings and the evidence do not support the view that the overall impact on the affected individuals undermined their human dignity and their right to be recognised as fully participating members of society notwithstanding their membership in the class affected by the distinction.

Four dissenting judges, in separate opinions, found that Section 29.a of the Regulation infringed Section 15.1 of the Charter. The distinction in treatment based on age did not reflect either the needs or the abilities of social aid recipients under 30 years of age and was not respectful of the basic human dignity. The ordinary needs of young people are not so different from the needs of their elders as to justify such a pronounced discrepancy between the two groups' benefits. The differential treatment also had a severe effect on an extremely important interest. When between programs, individuals like the appellant were forced to survive on far less than the recognised minimum necessary for basic subsistence received by those 30 and over. The government has not discharged its burden of proving that the infringement of Section 15.1 was justifiable.

2. Right to security of the person

The majority of the Court concluded that Section 29.a of the Regulation did not infringe Section 7 of the Charter. The factual record is insufficient to support the appellant's claim that the state deprived her of her Section 7 right to security of the person by providing her with a lower base amount of welfare benefits, in a way that violated the principles of fundamental justice. The dominant strand of jurisprudence on Section 7 sees its purpose as protecting life, liberty and security of the person from deprivations that occur as a result of an individual's interaction with the justice system and its administration. The administration of justice can be implicated in a variety of circumstances and does not refer exclusively to processes operating in the criminal law. The meaning of the administration of justice and Section 7 should be allowed to develop incrementally, as heretofore unforeseen issues arise for consideration. It is thus premature to conclude that Section 7 applies only in an adjudicative context. In the present case, the issue is whether Section 7 ought to apply despite the fact that the administration of justice is plainly not implicated. Thus far, the jurisprudence does not suggest that Section 7 places positive obligations on the state. Rather, Section 7 has been interpreted as restricting the state's ability to deprive people of their right to life, liberty and security of the person. Such a deprivation does not exist here and the circumstances of this case do not warrant a novel application of Section 7 as the basis for a positive state obligation to guarantee adequate living standards.

In a concurring opinion, one judge found that although the required link to the judicial system does not mean that Section 7 is limited to purely criminal or penal matters, it signifies, at the very least, that some determinative state action, analogous to a judicial or administrative process, must be shown to exist in

order for one to be deprived of a Section 7 right. The threat to the appellant's security was brought upon her by the vagaries of a weak economy, not by the legislature's decision not to accord her more financial assistance or to require her to participate in several programs in order to receive more assistance. While under inclusive legislation may, in unique circumstances, substantially impact the exercise of a constitutional freedom, the exclusion of people under 30 from the full, unconditional benefit package did not render them substantially incapable of exercising their right to security of the person without government intervention.

Two dissenting judges concluded that Section 7 of the Charter imposes a positive obligation on the state to offer basic protection for the life, liberty and security of its citizens and that Section 29.a of the Regulation infringed Section 7 by depriving those to whom it applied of their right to security of the person.

Languages:

English, French (translation by the Court).

Croatia
Constitutional Court

Important decisions

Identification: CRO-2002-3-021

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 06.02.2002 / **e)** U-II-2456/2001 / **f)** / **g)** *Narodne novine* (Official Gazette), 118/02 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

4.6.2 **Institutions** – Executive bodies – Powers.
4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
4.8.8 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers.
4.8.8.2.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Implementation – Distribution *ratione materiae*.

Keywords of the alphabetical index:

Property, control and use / Real estate, local government / Land, agricultural.

Headnotes:

The Statute of a local and regional self-government unit regulates the unit’s right to manage real estate, but only in respect of land that is indisputably and exclusively owned by that unit.

Summary:

The Government of Croatia requested the review of the conformity of the provisions of Article 37.2 and 37.3 of the Statute of Lanišce Municipality (“the Statute”) with the Local and Regional Self Government Act, the Law on Ownership and Other Real Property Rights and the Law on Agricultural Land.

The Ministry of Justice, Public Administration and Local Self-Government suspended, by its decision of 20 November 2001, the application of the aforementioned provisions of the Statute, and, in accordance with Article 82.1 of the Local and Regional Self Government Act, filed the proposal with the

Government to institute proceedings for constitutional review.

As Lanišce Municipality failed to submit its statement in due time, the Constitutional Court requested, and received, the registered land certificates containing information concerning the owners of the village properties *(komunela)* from the area of Lanišce Municipality for several disputed settlements.

In accordance with Article 37.2 and 37.3 of the Statute:

> The community board is a legal entity and it manages the village property, the common property of the village (*komunela*).

The manner in which this property is managed is determined by a special regulation.

The Government claimed that the above provisions were contrary to Article 35.2 of the Law on Ownership and Other Real Property Rights, which provides that:

> Objects that are property of the Republic of Croatia are disposed of, managed and used by the Government of the Republic of Croatia, or the body authorised by the Government, unless otherwise provided by a special law. Objects that are property of units of local self-government or units of local self-government and administration are disposed of, managed and used by their executive boards, unless otherwise provided by a special law.

It further claimed that they were contrary to Article 391 of the Law on Ownership and Other Real Property Rights, which reads:

1. Property owned by units of local self-government or units of local administration and self-government may be alienated or disposed of in some other way by the units' executive boards only on the basis of a public tender, and for a price determined on their market value, unless otherwise provided by a special law.

2. Agreements that are not concluded in accordance with the provisions of this article are null and void.

In addition, the Government argued that the disputed provisions were not based on Article 48.1.4 of the Local and Regional Self Government Act, which provides that:

> The executive board of units of local self-government..:
>
> 4. Manages and controls the real and personal property owned by the units of local and regional self-government as well as their income and expenditures in accordance with the law and the relevant statute.

The Government also argued that the provisions were not based on Article 22.1 of the Law on Agricultural Land, which reads as follows:

> The Republic of Croatia manages the agricultural land in its property, except land returned to previous owners according to a special law, in compliance with the general regulations on real property management, unless this Law otherwise provides.

Consequently, the Government argued that village property, being agricultural land, is owned by the Republic of Croatia, which at the same time means that units of local self-government are not competent to issue acts concerning the management of this land. Nor they can delegate such management to community boards.

The Constitutional Court, having examined the case file and reviewed the impugned provisions of the above-mentioned Statute and laws, found that the competences of the units of local and regional self-government were not established or created by their Statutes but simply regulated in more detail. Thus the right of each local self-government unit to manage real estate could be determined in accordance with such a Statute only with respect to land that was indisputably and exclusively owned by that unit. However, the documents showed that in the instant case, the land was not the property of Lanišce Municipality.

Therefore, the Court found the request for review to be well founded and repealed the disputed provisions of the Statute of the Municipality of Lanišce.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-2002-3-022

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 10.10.2002 / **e)** U-III-88/2001 / **f)** / **g)** *Narodne novine* (Official Gazette), 125/02 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

1.6 **Constitutional Justice** – Effects.
4.7.2 **Institutions** – Judicial bodies – Procedure.
5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Constitutional Court, decision, binding force / Apartment, purchase, price determination / Tenancy, right / Seller, differentiation.

Headnotes:

In their proceedings, the courts are bound by the rulings and decisions of the Constitutional Court.

Summary:

A constitutional complaint was lodged against a decision of the Supreme Court of Croatia of 13 January 2000, accepting the extraordinary legal remedy of revision and the request for the protection of legality, and modifying the decisions of lower courts (which were in favour of the proponent), with the effect that the applicant's appeal to the Supreme Court had been dismissed.

The Supreme Court of the Republic of Croatia found that in the challenged contract of sale the price was determined according to the provisions of the Law on the Sale of Apartments with Tenancy Rights, which was in force at the relevant time. ("Tenancy rights" means that in the former system of socially owned apartments, society (or the state) was the owner of apartments allocated to workers, while the worker-tenant was given the right to occupy the said apartment.)

The Supreme Court based the above-mentioned finding on its interpretation of the decision of the Constitutional Court of 29 January 1997, by which certain provisions of the Law on the Sale of Apartments with Tenancy Rights, stipulating the calculation of the prices for the apartments, were repealed as unconstitutional. The Supreme Court found that the Constitutional Court's decision repealing these provisions entered into force on the day of its publication in the Official Gazette, and could not have a retroactive effect on contractual relations emerging from the application of those provisions as legal regulations before their validity had expired. Therefore, it concluded that the challenged contractual provision determining the price was valid, that the plaintiff had not been unjustly enriched and that the appellate request could not be fulfilled.

The Constitutional Court, in assessing the constitutional complaint, referred first of all to its Decision of 29 January 1997, by which certain provisions of the Law on Amendments to the Law on the Sale of Apartments with Tenancy Rights were repealed as unconstitutional. Article 8.4 of the Law, prescribing the calculation of the price of the room surface of the apartment in excess of the standard size, was also repealed.

According to this provision, the purchase price of excess room surface is determined according to the construction value of the multi-apartment building increased by the value deriving from the location of the apartment.

In accordance with the opinion of the Constitutional Court as expressed in the above-mentioned decision, in stipulating the conditions for the purchase of such apartments, the state may not, without special reasons, provide for differences among tenants which mean that some of them are unable to buy their apartments or which severely obstruct them in this endeavour. Furthermore, there was no constitutional basis for the legislator to differentiate greatly between the state, as a public legal entity, and other vendors selling the same thing, i.e. apartments burdened by tenancy rights. Finally, there were no constitutional grounds for putting purchasers of apartments owned by the military into essentially an different position based on the owner of the tenancy right on the apartment being sold.

In a further decision, of 22 April 1997, the Constitutional Court also found that the protection of the applicant's constitutional right in a specific case cannot be denied solely because an enactment ceased to be valid, on grounds of unconstitutionality (i.e. it was repealed by the Constitutional Court), only after an individual measure had been taken on the grounds of the unconstitutional provision.

Pursuant to the above reasoning it was established, in the course of the constitutional proceedings, that, in the specific case, the sale price (according to the contract of sale concluded on the basis of the Law on the Sale of Apartments with Tenancy Rights) was determined according to legal provisions which had not been in accordance with the Constitution from the moment of their enactment.

Bearing in mind that Article 463 of the Civil Obligations Act stipulates that when a higher price than the legally prescribed one is agreed, the buyer owes only the prescribed price, and where he or she has already paid the agreed price, the buyer has the right to have the difference in price returned to him or her, it was clear that the specific case involved a civil claim between the applicant, as a buyer of the apartment, and the seller of the apartment, and that the applicant could have had recourse to the competent Municipal court, which she had done. The Court expressed the same opinion in its decision of 22 April 1998.

According to Article 55.2 of the Constitutional Act on the Constitutional Court, also emphasised by the Supreme Court in the challenged decision, repealed provisions lose their legal force on the day of publication of the Constitutional Court's decision in the Official Gazette, unless the Constitutional Court sets another term.

However, according to the abovementioned opinion of the Constitutional Court, the repealed provisions were not in accordance with the Constitution even before they were repealed, and specifically on 19 August 1996, i.e. at the time when the applicant concluded the contract of sale.

The Supreme Court, in delivering the challenged decision, had not acted in accordance with Article 31 of the Constitutional Act on the Constitutional Court, which reads: “The decisions and rulings of the Constitutional Court are obligatory and every individual or legal person shall obey them”. Thus the Supreme Court had not acted in accordance with the constitutional right under Article 14 of the Constitution, which lays down the principles of general equality and the equality of citizens before the law. The violation of these constitutional rights stems from the application of the regulation according to which certain subjects were put in unjustifiably unequal positions.

The Constitutional Court also expressed this opinion in its decision of 17 March 2000, which, from the substantive viewpoint, was identical.

With respect to the alleged violation of Article 3 of the Constitution, stressed in the constitutional complaint, it must be observed that this provision does not comprise human rights and fundamental freedoms guaranteed to natural and legal persons by the Constitution and protected in constitutional complaint proceedings on the basis of Article 62.1 of the Constitutional Act on the Constitutional Court.

For these reasons, the constitutional complaint was accepted, the challenged verdict quashed and the case returned to the Supreme Court for new proceedings.

Cross-references:

- Constitutional Court Decision no. U-I-697/1995 of 29.01.1997 (Official Gazette no. 11/97), *Bulletin* 1997/1 [CRO-1997-1-002];
- Constitutional Court Decision no. U-III-731/1994 of 22.04.1997 (Official Gazette no. 53/97);
- Constitutional Court Decision no. U-III-1341/1997 of 22.04.1998 (Official Gazette no. 66/98);
- Constitutional Court Decision no. U-III-213/2000 of 17.03.2000 (Official Gazette no. 58/00).

Languages:

Croatian, English (translation by the Court).

Identification: CRO-2002-3-023

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 10.10.2002 / **e)** U-III-554/2002 / **f)** / **g)** *Narodne novine* (Official Gazette), 125/02 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.
5.4.16 **Fundamental Rights** – Economic, social and cultural rights – Right to a pension.

Keywords of the alphabetical index:

Law, entry into force / Law, incorrect application, equality, right / Pension, payment, procedure.

Headnotes:

The right to equality before the law, guaranteed by Article 14.2 of the Constitution, may be infringed by the application of a regulation that is not in force at the time of the initiation of proceedings before entities vested with public authorities.

Summary:

In the civil action that preceded the disputed judgment, the applicant's statement of claim requesting that the Croatian Pension Institute, Branch Service S., pay him the sum of 25,378.21 HRK for outstanding pensions from 1 April 1992 to 1 December 1995, with interest on arrears from the date when each monthly sum became due until payment, was rejected.

The reasons in the disputed judgments show that the applicant's statement of claim was refused because, under the terms of Article 87.2 of the Law on Retirement Insurance ("LRI"), the limitation period for bringing an action requesting the payment had expired.

In the constitutional complaint the applicant alleged that he had suffered a violation of the constitutional rights enshrined in Articles 14.2, 19, 26, 32, 48.1 and 56.1 of the Constitution, and violations in connection with Articles 3, 5, 90 and 117.3 of the Constitution. These allegations were based on the same arguments as those he had put forward in the appeal proceedings, which can be reduced to the argument that the civil courts had, in the specific case, applied the limitation provision in the LRI, which was not even in force at the relevant time.

Article 87.2 of the LRI provides that outstanding pensions that remain owing due to circumstances caused by the beneficiary of the payment, such as failure to notify a change of address, to produce a birth certificate, and the like, may be paid subsequently. A maximum of 12 months of back-payments may be made, counting from the date on which the request for payment was submitted.

The Law at issue, on the provisions of which the courts based the disputed decisions, was published in Official Gazette no. 102/98 of 29 July 1998, entered into force on the eighth day after the date of its publication in Official Gazette, and, in accordance with the provision of Article 195 of the Law, it became applicable on 1 January 1999.

The courts found that on 1 May 1997 the applicant had submitted to the defendant a request for the payment of outstanding pensions that had fallen due and had brought an action in court on 27 May 1997, and that payment of his pension had been resumed from 1 December 1995.

Therefore, the Constitutional Court found that the civil courts, hearing the case after the LRI had come into force, had applied a regulation (the LRI) that had not been in force at the relevant time.

In accordance with Article 194 of the LRI, the Law on Retirement and Disability Insurance ("the LRDI") ceased to be applicable on the day on which the LRI became applicable, i.e. on 1 January 1999. In accordance with Article 130.2 of the LRDI, which was in force when the applicant submitted his request to the defendant and also when he brought his action in court, money owing under Article 130.1 of the LRDI, which had fallen due but which could not be paid because of circumstances caused by the beneficiary of the money, could subsequently be paid in back-payments for a maximum of three years, counting from the day on which the request for the payment was made.

Assessing the claims made in the constitutional complaint with respect to the constitutional provisions indicated by the applicant, the Constitutional Court found a violation of the applicant's constitutional right to equality before the law, guaranteed by Article 14.2 of the Constitution.

The infringement of the right to equality before the law may take the form of a misinterpretation or misapplication of a relevant regulation, which makes an individual act legally unacceptable.

In accepting the constitutional complaint, the Constitutional Court quashed the disputed court decisions, and instructed the first instance court to decide on whether the applicant's statement of claim was well founded in new proceedings, in which the court was to apply the substantive regulation that was in force at the time when the applicant submitted his request to the defendant.

The Court did not examine the violations of the other constitutional provisions alleged by the applicant, such as those of Articles 19, 26, 32, 48.1 and 56 of the Constitution, because the violation of Article 14.2 was in itself a sufficient reason for passing this decision, and Articles 3, 5, 90 and 117.3 of the Constitution do not guarantee the constitutional rights of individuals.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-2002-3-024

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 10.10.2002 / **e)** U-IIIA-834/2002 / **f)** / **g)** *Narodne novine* (Official Gazette), 126/02 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

4.7.2 **Institutions** – Judicial bodies – Procedure.
5.3.13.12 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Trial within reasonable time.

Keywords of the alphabetical index:

Length of proceedings, objective circumstances / Bankruptcy / Pension.

Headnotes:

Lengthy proceedings caused by objective circumstances which cannot be ascribed to a lack of action by a court do not violate the constitutional right under Article 29.1 of the Constitution to a court decision within a reasonable period of time.

Summary:

Pursuant to Article 63 of the Constitutional Act on the Constitutional Court, the proponent lodged a constitutional complaint against the Municipal Court in O. on 17 April 2002, based on the failure to deliver an act – a court verdict – within a reasonable period of time. In the complaint the proponent sought an order addressed to the Municipal Court in O. imposing a one-year time-period for the court to hand down its decision in case no. P-286/93, and ordering the payment of adequate compensation to the proponent in the amount of 100,000.00 HRK for the violation of the constitutional right to a decision upon the rights and obligations of the proponent within a reasonable period of time.

In the proceedings before it, the Constitutional Court determined the legally relevant facts for deciding upon the violation of the constitutional right of the proponent, guaranteed by Article 29.1 of the Constitution. It found that the length of the proceedings before the Municipal Court in O. in case no. P-286/93 was over eight years, and the legally relevant period of time with regard to the right to a reasonable length of proceedings was deemed to be the period between 5 November 1997 (that is, since the day of coming into force of the Law on the Ratification of the European Convention on Human Rights) and 11 April 2002 (that is, until the day of submission of the proponent's constitutional complaint), which amounted to a total of four (4) years, five (5) months and six (6) days.

The Municipal Court in O. had taken action with respect to the proceedings, the last one being a request made by the Court on 10 December 2001 from the relevant bodies for information concerning bankruptcy and pensions that was necessary in the case.

The long duration of the proceedings was due to objective circumstances which could not be ascribed to the lack of activity of the court. (The state of war had interrupted communication between the Republic of Croatia and the Federal Republic of Yugoslavia, in which the proponent had his residence, resulting in the suspension of the proceedings for a period of five years.)

The Constitutional Court, having conducted these proceedings in the same way as in all similar cases, found that there had been no violation of the proponent's constitutional right guaranteed by Article 29.1 of the Constitution, and therefore dismissed the complaint.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-2002-3-025

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 23.10.2002 / **e)** U-III-217/1998 / **f)** / **g)** *Narodne novine* (Official Gazette), 131/02 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.11 **General Principles** – Vested and/or acquired rights.
3.20 **General Principles** – Reasonableness.
5.1.1.4.2 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Incapacitated.
5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.
5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to a sufficient standard of living.

Keywords of the alphabetical index:

State succession, legal meaning / State, successor, liability for obligations of former state / Disabled person, social assistance.

Headnotes:

The succession of states means that one state is replaced by another as regards the responsibility for international relations on a territory, and it is only in this sense that the identity or the continuity of the state is relevant. In all other matters, the characteristic of a "successor state" or a "state whose continuity with its predecessor has been recognised" plays no role, so it is necessary to solve questions of citizenship and acquired rights of the population (proprietary rights, pensions, etc.), questions of private obligations, questions of succession in the internal legal order, etc. It is important that in the case of acquired rights, and today these are mostly rights with a monetary value, the opinion prevails that they are not influenced by territorial changes. The right to compensation for damage suffered, of the kind at issue in the present case, can certainly not be excluded from this group of rights.

The concept of assuming rights in the states forming part of the European legal order offers citizens the possibility and the right to have their claims regarding the fulfilment of their rights to be decided before a court in their own state. Moreover, the position in the citizen's own state must be equal to the position of a citizen in any other state with the same or similar legal and political standards.

Summary:

The applicant lodged a constitutional complaint against the decision of the Supreme Court of 24 September 1997 as well as against the judgments of the lower courts in Zagreb County. In the earlier civil proceedings, the applicant's claim had been rejected. This statement of claim had been made against the Republic of Croatia, as the legal successor of the former Socialist Federal Republic of Yugoslavia ("SFRY"), and the Federal Secretariat of National Defence ("FSND"), as the parties previously obliged to pay the allowance, on the basis of the argument that the Republic of Croatia was obliged, through the Ministry of Defence, to pay him, as an invalid, a fixed living allowance of 1,300.00 HRK a month, starting on 1 January 1991, under specific conditions of payment. The applicant also requested an increased allowance.

It was indisputable that the former SFRY and FSND, by an earlier judgment of the same first-instance court from 1984, had been obliged to pay the applicant a monthly living allowance based on the consequences of his injury by a military vehicle. By further judgments the former SFRY was obliged to pay the applicant an increased allowance.

All three courts had accepted the statements made by the representative of the defendant, the Attorney General of the Republic of Croatia, in response to the claim, that the Republic of Croatia was not the legal successor of the SFRY and was not responsible for the obligations incurred by that state.

The rejection of the claim was based, with some additional reasons issued by the second-instance court, on the Decree on the Taking Possession by the Republic of Croatia of the Assets of the Yugoslav National Army and the FSND on the Territory of the Republic of Croatia and the Decree on the Taking Possession by the Republic of Croatia of the Assets of the former SFRY, whereby the property rights and interests of the Republic of Croatia are protected, and on the understanding that no obligations were assumed as a consequence of these decrees.

In his constitutional complaint the applicant claimed that it was specifically on the grounds of the above-mentioned decrees that the Republic of Croatia was the legal successor to obligations such as paying the living allowance in his case. He claimed that the decisions of the competent courts were contrary to the provisions of Article 57.1 and 57.2 of the Constitution, which provide that the state shall guarantee the right to assistance of weak, helpless and other citizens unable to meet their basic needs owing to unemployment or incapacity for work, and that the state shall devote special care to the protection of disabled persons and their integration into social life.

The Office of the Attorney General stated its position on the constitutional complaint, at the invitation of the Constitutional Court, and it claimed that the disputed judgments were not contrary to the provisions of Article 57.1 of the Constitution, as asserted by the applicant. This was because after the adoption of the Decision of the Croatian National Parliament, whereby Croatia on 8 October 1991 severed the public law relations on the basis of which it constituted, together with other republics and autonomies, the former SFRY, the Republic of Croatia had not become the legal successor of the former state from the aspect of the rights and obligations of the former legal entity. On the contrary, it had entered into civil lawsuits against the former SFRY.

Furthermore, the Office of the Attorney General claimed that all civil lawsuits in which the former SFRY had appeared as a party had ended, in accordance with Article 212.3 of the Law on Civil Procedure, since the previous legal entity, the former SFRY, had ceased to exist pursuant to the Decision of the Croatian National Parliament. It considered that all the obligations incurred by the former state remained the burden of that state and would be one of the issues to be resolved in the implementation of succession, as stipulated by Article 6 of the Decision of the Croatian National Parliament, which provides as follows:

> "The Republic of Croatia shall continue the process of establishing mutual rights and obligations in relation to the other republic of the former SFRY and in relation to the former federation."

In its case-law, the Court has previously ruled on the issue of succession in legal matters of a similar kind in its Decision no. U-III-504/96 of 8 July 1999, bearing in mind the data and opinions it had received from the Ministry of Justice of Croatia and the Succession Project Office of the Government of Croatia regarding that case. The Court held a consultation meeting attended by judges of the Constitutional Court, experts from the Faculty of Law in Zagreb, the Succession Project Office of the Government of Croatia, the Ministry of Foreign Affairs of Croatia and the District Attorney's Office of Croatia.

The Court concluded that cases that are legally comparable with the right to the payment of a living allowance or its increase due to invalidity incurred during service in the former Yugoslav National Army, and in which this invalidity has been established by a previous final judgment, do not in any way fall outside the scope of the the issues concerning the succession of states for which agreement can be considered to have been reached on the rules for their resolution, in accordance with the objective criteria set forth in various international documents (the Vienna Convention on the Succession of States in Respect of Treaties (1978) and the Vienna Convention on the Succession of States in Respect of State Property, Archives and Debts (1983), published in the Official Gazette – International Agreements, no. 16/93) and in the practice of the International Court of Justice in the Hague.

Furthermore, one of the basic principles of public international law is the principle whereby the real estate of the predecessor state is transferred to the successor state on whose territory it lies. This rule excludes the need to determine the former owner of such property, but does not exclude the possibility of subsequent compensation, and, importantly, does not exclude responsibility for obligations incurred by the former owner. In principle, the same holds true for obligations concerning acquired rights, including those that emerge from the real property rights and obligations of the predecessor state but also those that emerge from its civil obligations, and the only issue that may be the subject of subsequent regulation by relevant legal instruments is the scope and amount of each successor state's responsibility.

The Court's case-law to date has found that Croatia is the legal successor of the SFRY in cases of expropriation, in Decisions nos. U-III-630/1996, U-III-669/1996, U-III-731/1996, U-III-732/1996 of 19 November 1997.

Pursuant to these reasons, the Court held in the instant case that the lower courts had wrongly concluded that the applicant's statement of claim should be refused until such time as the succession process had been completed. In doing so, due to the misapplication of the law, they had infringed the applicant's constitutional right, laid down in Article 14.2 of the Constitution (which provides that all are equal before the law) and in Article 57.1 of the Constitution. Therefore the Court quashed all the disputed court decisions and returned the case to the first-instance court to be heard again.

Cross-references:

- Decision no. U-III-504/1996 of 08.07.1999, *Bulletin* 1999/2 [CRO-1999-2-010];
- Decisions nos. U-III-630/1996, U-III-669/1996, U-III-731/1996, U-III-732/1996 of 19.11.1997.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-2002-3-026

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 23.10.2002 / **e)** U-III-2051/2001 / **f)** / **g)** *Narodne novine* (Official Gazette), 128/02 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

5.2 **Fundamental Rights** – Equality.
5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.
5.3.13.1.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Non-litigious administrative proceedings.

Keywords of the alphabetical index:

Passport, confiscation / Conscription, avoidance / Misdemeanour proceedings.

Headnotes:

When an accused is sentenced and punished for a misdemeanour established in summary misdemeanour proceedings (without hearing the accused), and when a judgment thus delivered is contested by way of appeal or is invalidated by a competent body, these facts and circumstances can be used as grounds for the reopening of proceedings as well as for the invalidation of punitive measures ordered against the accused.

Summary:

The applicant submitted a constitutional complaint disputing the judgment of 19 September 1996 of the Administrative Court whereby the applicant's action, brought in an administrative dispute against the decision of the Ministry of Internal Affairs of Croatia of 18 August 1995, was rejected. In this decision the Ministry had rejected the applicant's motion for reopening of proceedings which had been finally decided by that same body on 18 April 1995.

In the previous administrative procedures, which the applicant sought to have reopened, the competent Police Administration confiscated the applicant's passport on the basis of Articles 34.1.3 and 35.1 of the Law on Travel Documents of Croatian Citizens ("the Law on Travel Documents"), taken together, because the applicant as a military conscript had been sentenced by a final ruling of the Misdemeanour Court for a misdemeanour under Article 187.1 of the Defence Law, for justified suspicion that he might continue to avoid conscription.

The resolution rejecting the applicant's motion for the reopening of proceedings contained the following statement, which was accepted by the Administrative Court of Croatia: "…the new facts are not such as might lead to a new decision, because the Defence Office in O., in its communication of 9 May 1995, continues to request that no passport should be issued because the impediments with regard to conscription continue to exist."

The Administrative Court rejected the applicant's motion, stating in the reasons of the judgment that the case file showed that the plaintiff had based his motion for the reopening of proceedings on the fact that the misdemeanour conviction had not become final because he had filed an appeal against it, and that the facts of the case in the misdemeanour trial, which was finally resolved by the decision, were incompletely and inaccurately established because the certificate of residence he had enclosed showed that he had not changed his place of residence.

According to the evaluation of the Administrative Court, the stated facts and circumstances could not constitute a reason for a reopening of proceedings in the matter, because the fact that the misdemeanour judge had found the plaintiff guilty in the first-instance proceedings and had fined him for the misdemeanour in Article 187.1 of the Defence Law "had been sufficient for the competent body, in the previous proceedings, to conclude that there was a justified suspicion that the plaintiff would avoid conscription, which was, in accordance with the previously cited legal provision, the reason for seizing his passport." According to the Administrative Court, even the circumstance that the misdemeanour conviction, in force when the resolution of 18 April 1995 was issued, later ceased to have effect, did not affect the legality of the disputed decision.

The applicant, in his constitutional complaint, argued that he had suffered a violation of his constitutional rights under Articles 14, 16, 19, 22, 23, 26, 28, 29, 31, 32 and 35 of the Constitution, due to the incorrectly and incompletely established facts of the case as well as the misapplication of the substantive law, and because the Administrative Court, in the proceedings for judicial review of the legality of the administrative act, had not recognised this breach of law.

The Constitutional Court found that the disputed resolutions had violated the applicant's constitutional rights under Articles 14.2, 22, 26 and 32 of the Constitution, which provide, respectively, for the equality of all before law; that the freedom and personality of all shall be inviolable, and that no one shall be deprived of liberty, nor may his liberty be restricted, except upon a court decision in accordance with the law; that all citizens and aliens shall be equal before the courts, government bodies and other bodies vested with public authority; and that anyone lawfully within the territory of Croatia shall enjoy the liberty of movement and freedom to choose his residence, that every citizen of Croatia shall have the right to leave the

territory of the state at any time and settle abroad permanently or temporarily, and to return to his homeland at any time, and that the liberty of movement within Croatia and the right to enter or leave it may exceptionally be restricted by law, if this is necessary to protect the legal order, or the health, rights and freedoms of others.

The relevant provisions of the Law on Travel Documents are contained in Article 35 of the Law, which stipulates that a travel document shall be seized when the competent body establishes the existence of the grounds specified in Article 34.1 and 2 of that Law. In accordance with Article 34.1.3 of the Law on Travel Documents, a request for the issuing of a travel document or visa shall be refused if there is cause to suspect avoidance of conscription or for other reasons provided in the regulations on conscription or service in the armed forces on the request of the competent military body.

In accordance with Article 187.1.2 of the Defence Law as in force at the relevant time, an individual shall be punished for a misdemeanour by 60 days in prison or a fine in dinars equivalent to the value of 167-833 DEM, if he does not report to the authorised body a change referred to under Article 17.1 of the Law.

Article 17 of the Defence Law provides that military and other conscripts, and members of the observation and warning service, shall, not later than 8 days from the day on which the change occurred, report to the authorised defence office in which their documentation is kept: a change of name or surname, change of permanent or temporary residence, change of marital status, change of health status, acquisition of professional or educational status, employment or termination of employment including an indication of the relevant firm or other legal entity, or the manner and place of self-employment.

Moreover, the misdemeanour conviction was made on the grounds of the provision of Article 109.3 of the Law on Misdemeanours, without hearing the applicant (a so-called summary conviction), and solely on the grounds of the request made by the relevant official.

In accordance with Article 109.1 of the Law on Misdemeanours, when a misdemeanour is reported by the police, officials of an inspection body, or other administrative body, based on personal observation, and when such a report provides sufficient grounds for establishing that the individual concerned has committed a misdemeanour for which he may be fined a specific sum, the administrative body competent for initiating misdemeanour proceedings will itself, without summoning the individual, issue a decision on the misdemeanour. In accordance with Article 109.3 of the Law on Misdemeanours, if the competent administrative body, in the cases specified in paragraph 2 of that article, does not issue the decision itself, it can file a request to initiate misdemeanour proceedings. In that case a judge can find a person guilty of a misdemeanour even without summoning the accused to a hearing, and in so doing the judge is not bound to impose the minimum fine prescribed for the misdemeanour.

In accordance with Article 109.4 of the Law on Misdemeanours the accused and the persons specified in Article 124.2 of that Law may appeal against a misdemeanour conviction based on Article 109.1, 109.2 or 109.3 of the Law, not later than 8 days from the day on which the conviction was delivered.

In accordance with the provision of Article 109.5 of the Law, if the accused files an appeal within the statutory time-limit, the judge shall invalidate the misdemeanour conviction and continue regular proceedings. Article 109.6 of the Law stipulates that a misdemeanour conviction issued in regular proceedings cannot impose a more severe sentence on the accused than the sentence in the conviction that was invalidated on his appeal.

It follows from the above-mentioned provision that a misdemeanour conviction issued in accordance with Article 198.3 of the Law on Misdemeanours, if the appeal is admissible and submitted within the relevant time-limit, will always be legally invalidated, and regular misdemeanour proceedings continued.

In accordance with Article 84 of the Law on Misdemeanours, misdemeanour proceedings are quick and short, but not such as to hinder making a proper and legal decision.

Article 249.1 of the Law on General Administrative Procedure (Decision of the Constitutional Court, no. U-I-248/94 of 13 November 1996) stipulates that proceedings ended by a ruling or a conclusion against which there is no regular legal remedy under the law of administrative procedure will be reopened if new facts are uncovered, or if it becomes possible to use new evidence that might have led, in itself or in combination with evidence already presented and used, to a different ruling had those facts or evidence been presented or used in the earlier proceedings.

Pursuant to the above-mentioned provisions of the relevant regulations, the Constitutional Court found that the appeal against the misdemeanour conviction had been submitted within the required time-limit, and that the summary misdemeanour conviction was not final,

i.e. that it was not in legal force pursuant to Article 109.5 of the Law on Misdemeanours and that regular misdemeanour proceedings were required to establish the applicant's responsibility for the misdemeanour of which he had been charged. It followed that the misdemeanour conviction no longer existed, and it was this conviction that had provided the grounds for the "justified suspicion that he would continue to avoid conscription". Therefore, the circumstance that there was no final conviction for the misdemeanour at the moment when the decision was issued to reject his motion for reopening of proceedings of 18 August 1995, was, in the opinion of the Constitutional Court, a new fact and circumstance that may have lead to a different decision in the above administrative matter in the context of Article 249.1.1 of the Law on General Administrative Procedure.

Furthermore, the Constitutional Court held that the Administrative Court, in deciding on the applicant's action in an administrative dispute and in rejecting his appeal against the decision that had rejected his motion for the reopening of proceedings, had failed to recognise the relevant breach of the law. Moreover, it had passed judgment more than one year after the misdemeanour conviction had been legally invalidated and the misdemeanour proceedings against the applicant ended, and at the same time had stated in its reasons that this did not affect the legality of the disputed decision.

In accordance with Article 76 of the Constitutional Act on the Constitutional Court, by its decision to accept the constitutional complaint, the Court shall repeal the disputed act violating the constitutional right (Article 76.1 of the Act), and if the disputed act that violated the constitutional right of the applicant no longer produces legal effects, the Constitutional Court shall pass a decision declaring the unconstitutionality of that act, and state in the dictum which constitutional right of the applicant was violated by that act (Article 76.3 of the Act).

In the specific case the applicant disputed the judgment of the Administrative Court and the Resolution of the Ministry of Internal Affairs of Croatia of 18 August 1995 rejecting the applicant's motion for a reopening of the proceedings that had finally ended in the resolution of that same Ministry of 18 April 1995. These decisions no longer produce legal effects.

The Ministry of Internal Affairs of Croatia issued a Resolution on 3 June 1996, which reversed the resolution of that Ministry of 18 April 1995 in such a way as to approve, in its Point 2, the return of the passport to the applicant of the constitutional complaint.

Supplementary information:

One judge, Milan Vukovic, issued a separate opinion in which he recalled the position adopted by the Court in its meeting of 16 October 2002 in connection with the interpretation of Article 62.1 of the Constitutional Act on the Constitutional Court. According to this position the Court shall, "as a rule", consider as "individual acts" within the meaning of Article 62.1 of that Act – that is, individual acts that may form the basis of a constitutional complaint – only decisions that have become final in proceedings to decide on the rights and obligations of the parties. This does not include decisions made in proceedings to determine whether previous proceedings should be reopened.

Justice Vukovic considered that in the specific case there were no indications that this position could be renounced. Justice Vukovic did not consider the position adopted by the Court to be any less important simply because of the use of the term "as a rule", since this kind of qualification of a principle is reasonable, given the possibility that an institution appearing in proceedings deciding on such requests may behave in a manner that runs strongly counter to the Constitution.

Justice Vukovic set forth the chronological development of the issues in the case and stressed that at the time when the disputed administrative decisions were issued, there existed a real need for control and mobilisation of military conscripts before military and police actions were taken regarding the re-establishment of the territorial integrity and sovereignty of the Republic of Croatia. He also noted that the present decision of the Constitutional Court arose in a case concerning the reopening of proceedings which had reached their final and binding conclusion, on the grounds of the amended Constitutional Act of 23 April 2002 (and specifically Article 76.3 of that Act), the application of which the applicant could not have requested prior to that date. Having regard to Article 89.4 of the Constitution, according to which laws and other regulations cannot have a retroactive effect, he considered that the Court, by acting in a manner contrary to the sense and purpose of the position it had itself adopted, had breached this very principle of non-retroactivity.

Cross-references:

- Decision no. U-I-248/1994 of 13.11.1996, *Bulletin* 1996/3 [CRO-1996-3-016].

Languages:

Croatian.

Identification: CRO-2002-3-027

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 24.10.2002 / **e)** U-III-686/1999 / **f)** / **g)** *Narodne novine* (Official Gazette), 134/02 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

4.6.9.1 **Institutions** – Executive bodies – The civil service – Conditions of access.
4.7.2 **Institutions** – Judicial bodies – Procedure.
4.7.9 **Institutions** – Judicial bodies – Administrative courts.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.

Keywords of the alphabetical index:

Supreme Court, entrance examination / Administrative proceedings.

Headnotes:

The constitutional right laid down in Article 19.2 of the Constitution guarantees not only judicial protection against unlawful administrative acts but also judicial protection against unlawful proceedings of the competent authorities conducting the administrative procedures, including cases of so-called “silence of the administration”.

Summary:

The constitutional complaint was lodged against the decision of the Supreme Court of 18 March 1999, which rejected as inadmissible the proponent's appeal in an administrative dispute against the Supreme Court’s ruling of 29 February 1996.

The Supreme Court had previously accepted the proponent's appeal against a ruling of the Supreme Court of 29 February 1996, which was then annulled. The original ruling had determined the selection amongst candidates who had replied to an advertisement for a vacant civil service post within the Supreme Court. Among the candidates who fulfilled the required conditions, a person who was already working with the Supreme Court had been selected.

The proponent, who had also applied for the vacant post, had appealed against the ruling on the selection of a candidate, claiming that not all the candidates fulfilled the requirements, since some of them had omitted to enclose all the required documents, and furthermore no tests or interviews with the candidates had been performed.

After the annulment of the ruling, the applicant wrote on several occasions to the President of the Supreme Court requesting that the decision on the selection of a candidate be sped up, but without success. He therefore submitted a claim to the Administrative Court, invoking Article 26 of the Law on Administrative Disputes. The claim was rejected on the grounds that the claimant did not have standing to initiate the administrative dispute, since a ruling had already been issued annulling the ruling challenged in his claim.

In the constitutional complaint the proponent claimed both that the Supreme Court was obliged to deliver a judgment on the merits of the selection of candidates, and that the rejection of his claim before the Administrative Court had been unlawful, and therefore his right to work had been violated (Article 54 of the Constitution).

In assessing the claims made in the constitutional complaint, the Constitutional Court found that the President of the Supreme Court, when deciding upon the objection of the proponent, had noted certain omissions in the selection procedure. However, after the annulment of the ruling on the selection, the procedure was not completed, nor was a new decision made on the selection of another candidate. Furthermore, although none of the registered candidates was selected, no act was issued annulling the whole procedure.

The case-file showed that the proponent of the constitutional complaint, after the annulment of the ruling on selection of the candidate and before submitting the claim to the Administrative Court, had addressed the President of the Supreme Court five times in writing, requesting that the procedure connected with the advertisement of the vacant post be completed.

However, the Secretariat of the Supreme Court had sent a letter to the applicant informing him that the advertised vacant post had been filled by a redistribution of staff within the Supreme Court itself, and therefore the procedure was completed. The letter stated that the Law on Civil Servants and Employees (“the Law”) imposed an obligation to issue a formal act annulling the competition (where no candidates applied or where none of the candidates was chosen) only when the vacant

position was filled by means of competition. Therefore, where a vacant post was filled by means of an advertisement, there was no obligation to terminate the procedure formally.

After examining the relevant provisions of the Law, the Constitutional Court found that these provisions regulated the employment procedure relative to civil servants, in cases where vacant posts were to be filled by competition, and that Article 22.3 of the Law laid down the obligation to issue a decision annulling the competition in cases where no candidates had applied for the post or where none of the applicants had been chosen for the post.

Article 20 of the Law clearly enumerated the cases where the announcement of a competition was not obligatory (which did not include the case at hand), also leaving the competent state authority free to issue rules regulating the cases of and the procedures governing civil service employment for posts which did not need to be filled through the announcement of a competition. However, it was established during the proceedings before the Constitutional Court that the Supreme Court had not issued such rules.

The Constitutional Court found that the decisions of both the Supreme Court and the Administrative Court were manifestly ill founded, since the appointment procedure, after the annulment of the ruling on the selection of the candidate, had returned to its previous state. Furthermore, it was the President of the Supreme Court who was competent to conduct further proceedings (according to the Judiciary Act as in force at the relevant time). Therefore, the Constitutional Court concluded that in these circumstances, a case of so-called “silence of the administration” had occurred.

The Court's conclusion was based on Article 5.2 of the Law, according to which the acts ruling on civil service employment issues, amongst other issues, are administrative acts. This means that the legal remedies and judicial review provided for by the regulations on administrative procedure are relevant, i.e. such acts may be subject to dispute under administrative law.

The procedure for appeals against administrative acts and appeals against the rejection of an administrative appeal is strictly defined by Articles 242 and 243.1 of the Law on General Administrative Procedure (Decision of the Constitutional Court, no. U-I-248/1994).

These provisions, among others, lay down the obligation of the relevant appeal body to complete the procedure itself or to return the matter to the authority acting at first instance, in cases when the appeal body establishes that the facts as found in the first-instance procedure have been incompletely or incorrectly established. If the appeal body determines that the matter has to be resolved differently on the grounds of facts already established in the proceedings at first instance, it shall annul the first-instance ruling and decide on the matter itself. The appeal body can annul the ruling and return the case to the authority deciding first instance, in which case it must instruct the authority deciding at first instance as to how to complete the proceedings. The first-instance body is bound by these instructions and must deliver its ruling with the statutory time-limit of 30 days. If the appeal body establishes that the evidence has been are incorrectly evaluated or that the conclusion reached in the first instance ruling is incorrect, it will annul the first-instance ruling and resolve the matter itself.

In cases involving the silence of the administration, i.e. when the competent body, contrary to its obligation determined by law, fails to issue an administrative act, or does not issue it within the statutory time-limit, both Article 218.3 of the Law on General Administrative Procedure and Article 26 of the Law on Administrative Disputes define the legal recourses available to individuals or legal entities concerning whose rights and obligations a decision should have been made.

Article 26 of the Law on Administrative Disputes governs a party’s right to bring an administrative dispute before the Administrative Court in the case of a failure to deliver a ruling on the appeal of the party, as follows:

1. If the appeals body does not, within the time-limit of 60 days, or within a shorter period determined by a special regulation, hand down the ruling on the party's appeal against the first-instance ruling, and also fails to do so within a further time-limit of 7 days after a repeated request for the ruling, the party may initiate an administrative dispute as if his or her appeal had been rejected.

2. When, despite the party’s request, the ruling is not delivered by the first-instance body and this body is one against whose rulings a complaint cannot be filed, the party can act in the same manner as stipulated in paragraph 1 above.

3. If the first-instance body against whose rulings a complaint cannot be filed does not, within the time-limit of 60 days, or within a shorter period determined by a special regulation, issue any ruling on the matter, the party has the right to address the appeals body with his or her request. The party can initiate an administrative dispute

against the ruling on appeal, which can also be initiated if the conditions from paragraph 1 above are fulfilled, even if the appeals body does not issue a ruling.

Contrary to the reasons stated in the challenged ruling of the Administrative Court, the rights of individuals and legal entities with respect to their direct, personal and legal interests can be violated not only where an unlawful act deciding on someone's rights and obligations is issued, but also by the failure to issue such a (lawful) act.

In the present case such an act was not issued, and the ruling annulling the earlier ruling on the selection of a candidate could not be considered as an act that decided on someone's rights and obligations and that entirely answered the legal interest in such a decision.

On the basis of Article 54.2 of the Constitution, which provides that everyone shall be free to chose his vocation and occupation, and all jobs and duties shall be accessible to everyone under the same conditions, the constitutional right of citizens to apply for every vacant post or office, and to a decision of the competent body on whether or not they fulfil the required conditions for that post or office, is guaranteed.

In accordance with Article 19.2 of the Constitution, when such a decision is taken following the rules on administrative procedure, citizens have a constitutional right to have the competent court rule on the legality of such an act; in this case the competent court is the Administrative Court. This provision guarantees not only judicial protection against unlawful administrative acts but also judicial protection against unlawful proceedings of the competent bodies conducting the administrative procedures, which undoubtedly includes situations where, contrary to the law, the relevant administrative act is not issued.

Therefore, the constitutional complaint was accepted, the challenged ruling was annulled and the file returned to the Administrative Court for the reopening of proceedings, the Administrative Court being bound by the views expressed by the Constitutional Court.

Cross-references:

- Decision no. U-I-248/1994 of 13.11.1996, *Bulletin* 1996/3 [CRO-1996-3-016].

Languages:

Croatian, English (translation by the Court).

Identification: CRO-2002-3-028

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 28.10.2002 / **e)** U-III-801/1998 / **f)** / **g)** *Narodne novine* (Official Gazette), 126/02 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

1.3 **Constitutional Justice** – Jurisdiction.

Keywords of the alphabetical index:

Constitutional Court, jurisdiction, limits / Tax, payment.

Headnotes:

When no provision guaranteeing a constitutional right within the ambit of Article 62.1 of the Constitutional Act on the Constitutional Court is referred to as the basis of a constitutional complaint in an application to the Court, the Court shall not take such an application into consideration.

Summary:

The applicant submitted a constitutional complaint against a decision of the Administrative Court of 1998 rejecting his claim with respect to the initiation of an administrative dispute against a ruling of the Ministry of Finance of 1995 regarding the payment of sales tax on goods and services and the corresponding interest. He claimed that the facts of the case had not been correctly established and that the substantive law had been misapplied. However, no violation of a constitutional right was specified in the constitutional complaint.

Bearing in mind Article 62.1 of the Constitutional Act on the Constitutional Court, which provides that, “Everyone may lodge a constitutional complaint with the Constitutional Court if he deems that the individual act of a state body, a body of local and regional self-government, or a legal person with public authority,

which decided about his/her rights and obligations, or about suspicion or accusation for a criminal act, has violated his/her human rights or fundamental freedoms guaranteed by the Constitution, or his/her right to local and regional self-government guaranteed by the Constitution", and Article 71.1 of the Constitutional Act, which provides that the Court "shall examine only the violations of constitutional rights which are stated in the constitutional complaint", the Court ruled that such an application shall not be considered.

In its reasoning, the Court stated that only those human rights and fundamental freedoms of humans and citizens that are guaranteed by the specific provisions of the Constitution are considered to be constitutional rights, and in proceedings before the Court based on a constitutional complaint, only those alleged violations of constitutional rights that are set forth in the constitutional complaint shall be examined.

The applicant in his application (i.e. the constitutional complaint) argued that there had been a violation of Article 3 of the Constitution, which does not contain a constitutional right within the meaning of Article 62.1 of the Constitutional Act on the Constitutional Court, but rather lays down the highest values of the constitutional order of the Republic of Croatia which are the grounds for the interpretation of the Constitution. Therefore the council of the Court examining the complaint decided to dismiss the application, since it did not allege a violation of any constitutional right.

Languages:

Croatian, English (translation by the Court).

Identification: CRO-2002-3-029

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 28.10.2002/ **e)** U-III-1165/2000 / **f)** / **g)** *Narodne novine* (Official Gazette), 126/02 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

1.3 **Constitutional Justice** – Jurisdiction.

Keywords of the alphabetical index:

Tenancy / Civil procedure, remedies / Constitutional Court, jurisdiction, limits.

Headnotes:

The Constitutional Court will not rule on requests for the review of the constitutionality of decisions on whether to reopen proceedings as to the substance of a case where a final and binding decision on the merits of the case has already been reached. The Court does not consider such decisions to be ones against which it is competent to provide constitutional protection under Article 62.1 of the Constitutional Act on the Constitutional Court.

Summary:

During the court proceedings that preceded the constitutional proceedings, the applicant's request for the reopening of civil proceedings in which a final and binding decision had been made with respect to the termination of a tenancy right was rejected, because the request was submitted after the expiry of the five-year statutory time-limit prescribed under Article 423.3 of the Law on Civil Procedure. Therefore, the reopening of proceedings for the reasons listed in Article 421.1.9 of the Law on Civil Procedure could not be sought.

Article 421.1.9 of the Law on Civil Procedure provides that the reopening of proceedings in which a final and binding decision has been made is allowed if the party was unlawfully prevented from arguing their case before the court. In the present case, the applicant had been represented by a personal representative appointed by a final ruling of the competent Social Welfare Centre, and from the case file it was evident that the representative had protected, within the framework of the relevant regulations, the rights and interests of the applicant and the second defendant (a member of the household).

The final judgment was handed down pursuant to Article 99.2 of the Housing Act as then in force.

Analysing Article 62.1 of the Constitutional Act on the Constitutional Court, which provides that, "Everyone may lodge a constitutional complaint with the Constitutional Court if he deems that the individual act of a state body, a body of local and regional self-government, or a legal person with public authority, which decided about his/her rights and obligations, or about suspicion or accusation for a criminal act, has violated his/her human rights or fundamental freedoms

guaranteed by the Constitution, or his/her right to local and regional self-government guaranteed by the Constitution", the Constitutional Court found that the decisions of the competent bodies handed down in proceedings initiated following a request for the reopening of civil proceedings in which a final and binding decision has been made or following a request for the reopening of administrative proceedings are not, as a rule, considered to be individual acts falling within the ambit of Article 62.2 of the Constitutional Act on the Constitutional Court in respect of which the Court is obliged to provide constitutional protection. This is because in such proceedings no decision on the rights and obligations of the parties is made, nor is there a decision on the substance of the case.

The rights and obligations of the parties had already been finally decided upon in the earlier proceedings, which the applicant sought to have reopened. The parties had the right to submit a constitutional complaint to the Court against the decisions on the substance of the case, as well as against the possible violations of constitutional rights that had occurred during the proceedings in which the decisions on the substance of the case were handed down.

This position and conduct of the Court complied with the provisions of Article 25 of the Constitutional Act on Revisions of and Amendments to the Constitutional Act on the Constitutional Court, which, in the context of harmonising the Constitutional Act with Article 1 of the Constitution, revised Article 59.1 of the Constitutional Act on the Constitutional Court, and at the same time harmonised it with the practice of the European Court of Human Rights (Case no. 45943/99 of 13 September 2001) with respect to protection against violations of Conventional rights by the decisions of competent authorities made in civil proceedings in cases when the parties requested the reopening of proceedings.

In accordance with the above reasons, the Court declared that it was not competent to rule on the relevant issues and therefore rejected the constitutional complaint.

Cross-references:

Rudan v. Croatia, Admissibility Decision of 13.09.2001, European Court of Human Rights (Case no. 45943/99).

Languages:

Croatian, English (translation by the Court).

Identification: CRO-2002-3-030

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 04.12.2002 / **e)** U-II-1185/2002 / **f)** / **g)** *Narodne novine* (Official Gazette), 149/02 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

1.3.5.10 **Constitutional Justice** – Jurisdiction – The subject of review – Rules issued by the executive.
1.4.1 **Constitutional Justice** – Procedure – General characteristics.
3.13 **General Principles** – Legality.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Double degree of jurisdiction.

Keywords of the alphabetical index:

Minister, exceeding of power / Social security, right, contribution / Profession.

Headnotes:

In proceedings for the review of the constitutionality and legality of a regulation issued for the purpose of implementing a law, it is examined whether the regulation was issued by a competent body, on what legal basis it was issued, and whether the content of the regulation corresponds to the framework defined by law.

Summary:

The Administrative Court presented a request for the concrete review of procedure before the administrative courts, and specifically for the review of the constitutionality and legality of Article 10.4 of the Rules on Conditions and Procedure for Acknowledgment of the Right of Independent Artists to Receive Social Security and Retirement and Disability Contributions Paid from the State Treasury ("the Rules"). The constitutional court proceedings were initiated with respect to Articles 5 and 8 of the Constitution, Article 7 of the Law on Independent Artist's Rights and Cultural and Artistical Encouragement ("the LIARCAE"), on which the disputed Rules were based, and Article 17 of the Public Administration System Law ("the PASL").

The Administrative Court considered that the disputed provision of Article 10.4 of the Rules was not in accordance with the above provisions of the Constitution and the law, because the Minister of Culture is not authorised to exclude by any regulation the right to appeal, in cases when the law on basis of which the regulation is issued does not exclude the appeal.

In reply, the Ministry of Culture, as the body issuing the Rules, stated that Chapter III, provisions 7 to 13 of the Rules prescribed the procedure and criteria for the acknowledgement of the rights of independent artists to the payment of the relevant contributions. The Ministry argued that the disputed provision was well founded because the Minister of Culture was involved in making the first-instance ruling deciding on the independent artist's request. If the Minister were also involved in the procedure on appeal this would be illogical. The Ministry therefore argued that the applicant's proposal should be dismissed.

Reviewing all the above provisions of the Constitution and the law, the Constitutional Court found that the LIARCAE, on the basis of which the Rules were issued, did not explicitly state that appeals were not permitted against first-instance rulings. The Court therefore considered that the Minister of Culture had, by the disputed Article 10.4 of the Rules, overstepped his competence as laid down by law.

Having established that the disputed provision of Article 10.4 of the Rules was not in accordance with Article 18.2 of the Constitution, because the right to appeal can be exceptionally excluded only by law, the Court also found that it was not in conformity with Article 5 of the Constitution, under which, “In the Republic of Croatia laws shall conform with the Constitution, other rules and regulations shall conform with the Constitution and law; everyone shall abide by the Constitution and law and respect the legal order of the Republic of Croatia.”

The Court’s position when reviewing regulations, which as a rule are issued for the purpose of the implementation of laws, is that they should be in accordance with the law on the basis of which they were issued, and with the Constitution as well. In proceedings to review the constitutionality and legality of such a regulation it is therefore examined whether the regulation was issued by an authorised entity, whether the relevant legal basis existed for issuing the regulation and whether the regulation corresponds by its content to the framework defined by law.

The above conclusion of the Court was also based on the provisions of Article 7 of the LIARCAE (according to which the Rules “are issued by the Minister of Culture on the proposal of the majority of existing artistic associations, including the association of independent artists”); Article 17 of the LIARCAE (“Ministers and Directors of the State Administrative Organisations issue rules, orders and instructions for the implementation of laws and other regulations in cases where they are explicitly authorised to do so and within the limits of this authorisation”) and Article 18 of the PASL (“Rules work out in detail particular provisions of a law to enable their implementation”), as well as Article 11.1 of the Law on General Administrative Procedure, prescribing the right of a party to appeal against the ruling made at first instance and also stipulating that appeals on individual administrative issues may only be excluded by law, and only if the protection of the relevant constitutional rights and of legality is guaranteed to a party by some other means.

Languages:

Croatian, English (translation by the Court).

Cyprus
Supreme Court

Important decisions

Identification: CYP-2002-3-003

a) Cyprus / **b)** Supreme Court / **c)** / **d)** 31.01.2003 / **e)** 1004/2001 / **f)** Papasavvas v. Republic of Cyprus / **g)** *Cyprus Law Reports* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

2.1.2.3 **Sources of Constitutional Law** – Categories – Unwritten rules – Natural law.
4.6.9 **Institutions** – Executive bodies – The civil service.
5.3.13.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope.

Keywords of the alphabetical index:

Civil servant, disciplinary offence, proceedings, guarantees / Civil Service Commission, competences.

Headnotes:

The rules of natural justice which, under Article 12 of the Constitution, are applicable to offences in general, should be adhered to in all cases of disciplinary sanctions in the domain of public law. According to the case-law of the Supreme Court, no sanction can be imposed on a person for the commission of a criminal or disciplinary offence other than by means of criminal or disciplinary proceedings that are in conformity with the provisions of Article 12 of the Constitution.

Summary:

Under Section 53.1.b of the Public Service Law 1990 (Law 1 of 1990) the Public Service Commission is vested with competence to decide on the retirement of a permanent, pensionable public servant if the public servant, having attained the age of fifty-five years, is required to retire.

Under Article 12.5 of the Constitution a person charged with an offence has the following minimum rights:

a. to be informed promptly and in a language which he understands and in detail of the nature and grounds of the charge preferred against him;
b. to have adequate time and facilities for the preparation of his defence;
c. to defend himself in person or through a lawyer of his own choosing or, if he has no sufficient means to pay for legal assistance, to be given free legal assistance when the interests of justice so require;
d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The appellant was a Prosecutor in the Office of the Attorney-General of the Republic. The latter invoked the provisions of Section 53.1.b of Law 1 of 1990 and requested that the Public Service Commission compulsorily retire the appellant. He attributed to the appellant, *inter alia*, disobedience to his instructions, lack of co-operation, neglect of duty and misconduct.

The Public Service Commission held that under Section 53.1.b of the Law the Attorney-General of the Republic was entitled to request the compulsory retirement of the appellant. It indicated that it was not treating the case as a disciplinary one because no disciplinary complaint had been lodged against the appellant. After hearing the appellant the Public Service Commission decided to retire him compulsorily because he could not be maintained in a position in the Public Service.

The appellant challenged the legality of his compulsory retirement by means of an appeal seeking the quashing of the Public Service Commission's decision. The appeal was heard by the Full Bench of the Supreme Court. The Court found that the acts and activities of the appellant constituted disciplinary offences under Section 73 of Law 1 of 1990. Disciplinary offences are tried in the manner provided by the Disciplinary Code (see Sections 81, 82 and 83 of Law 1 of 1990). The Disciplinary Code guarantees, with respect to all public servants subject to disciplinary proceedings, all the rights provided by the above Article 12.5 of the Constitution. Under the case-law of the Supreme Court an officer facing a disciplinary charge has the

same rights as a person charged with a criminal offence. A sanction for the commission of a disciplinary offence can only be imposed on a public servant through disciplinary proceedings.

Section 53.1.b could not have as an object the granting of power to the Public Service Commission to examine a disciplinary offence by a public servant, and to impose sanctions for disciplinary acts, independently of the Disciplinary Code of Law 1 of 1990. Section 53.1.b is not a substitute for disciplinary proceedings. The right to invoke Section 53.1.b exists only in cases not connected with disciplinary offences. An examination of the acts and omissions attributed to the appellant could only take place within the framework of disciplinary proceedings. The appeal was allowed and the decision of the Public Service Commission was quashed.

Languages:

Greek.

Czech Republic
Constitutional Court

Statistical data

1 September 2002 – 31 December 2002

- Decisions by the plenary Court: 6
- Decisions by chambers: 34
- Number of other decisions by the plenary Court: 6
- Number of other decisions by chambers: 839
- Number of other procedural decisions: 100
  Total: 985

Important decisions

Identification: CZE-2002-3-010

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 30.07.2002 / **e)** I. US 131/02 / **f)** Concept of lawful detention / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other Institutions – Courts.
3.17 **General Principles** – Weighing of interests.
5.3.5.1.3 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.
5.3.13.21 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Presumption of innocence.

Keywords of the alphabetical index:

Detention order, extension / Detention, provisional, legal grounds / Criminal law / Witness.

Headnotes:

The concept of lawful detention encompasses the definition of constitutionally acceptable grounds for the restriction of the personal freedom of an accused, with the aim of preventing the undermining of or interfering with the purpose of the criminal proceedings.

The Constitutional Court's decision-making cannot be influenced by the fact that a complainant was released from detention. It is necessary to begin with the principle that an infringement that can be proven in the complainant's legal sphere is always a relevant infringement of the fundamental rights of the complainant.

Unlike the legal regulation prior to 1 January 2002, the wording of the Criminal Code currently in force does not make preventive detention on the ground of collusion conditional on the fear of the testimony being affected of witnesses who have not yet testified before the court.

The ordinary courts that decide on detention "must justify, in a way which can be reviewed, the reasons why the interest in the clarification of the crime outweighs the interest in the individual's freedom".

In cases of "irrefutable grounds for detention", it is unacceptable to cite the commission of similar crimes in the past. The previous crimes were committed under a totalitarian regime and were clearly politically motivated. This does not lead to the conclusion that a reasonable threat exists of the complainant's committing a similar crime again, in spite of the social and political changes that have taken place since 1989.

Summary:

The complainant was released from detention on the basis of a District Court decision. The state prosecutor appealed that decision. The Regional Court annulled the decision and rejected the application for release from detention. The complainant lodged a constitutional complaint against the decision of the Regional Court and complained of infringement of his fundamental rights.

The constitutional complaint was justified.

The task of the Constitutional Court is to ensure the protection of constitutionality. The Constitutional Court is not a part of the ordinary court system. Therefore, it does not focus on reviewing the evidence presented before the courts mentioned above, as long as those courts did not violate the complainant's constitutionally guaranteed fundamental rights or freedoms. In its settled case-law, the Constitutional Court has repeatedly dealt with the question of the constitutionality of decisions on detention.

Detention constitutes a necessary restriction of personal freedom, which is governed by the principle of presumption of innocence. The purpose of that restriction is to aid the legal organs responsible for criminal proceedings in the realisation and facilitation of the proceedings (III. US 271/96, Collection 7, [CZE-1997-1-001]). A decision on detention or the extension of detention is an appreciable infringement of the right to personal freedom, thereby making a restrictive interpretation necessary.

The Regional Court found that there were collusive and irrefutable grounds for detention. In the meantime, the Regional Court has released the complainant from detention. The impugned decision was the infringement in question of the complainant's fundamental rights. Therefore, the Constitutional Court had to review whether the infringement was in accordance with the Constitution. The Regional Court considered the collusive grounds for detention in terms of the complainant's trying to influence the persons who could have given evidence against him, and that danger existed until the close of the witness testimony during the main trial. The Regional Court had made references to the investigator's official record.

The Criminal Code in force defines collusive grounds for detention as the fear that the accused will influence the other defendants or the witnesses who have not yet testified, or otherwise hinder the clarification of the material facts for prosecution. At the time of the Regional Court's decision, the witnesses in question had already testified. The Regional Court erred when it ordered the complainant to be held in detention "until the time of testimony during the main trial". It breached one of the primary principles of criminal law: "*criminalia sunt restringenda"*. A danger of collusion, as found by the Regional Court, cannot be deduced from the witnesses' testimony. It does not follow from the witnesses' testimony that they were influenced. The witness whose identity was concealed testified in favour of the complainant. Therefore, it is necessary to take into account the particular facts of the situation, and the complainant's activity relating to his work in the secret service.

The Regional Court did not adequately support its finding of a danger of collusion. At the time of the Regional Court's decision, the witnesses in question had already testified. The content of the investigator's records does not provide evidence in support of collusive grounds for detention.

As to the irrefutable grounds for detention, the Constitutional Court found that the impugned Regional Court decision was inadequately justified and was, therefore, unconvincing.

As the Regional Court correctly stated subsequently, when assessing the grounds for collusion, it is necessary to take into account the nature of the complainant's crimes. The substantive part of the alleged crimes was committed in connection with the complainant's employment. Since his employment in Czech Security Information service (BIS) has been terminated, it has been practically impossible for the complainant to continue committing crimes similar to those of which he was accused. Therefore, it is unacceptable to cite the commission of similar crimes in the past. In its decision, the Regional Court violated the complainant's rights as guaranteed by the Charter. Therefore, the Constitutional Court quashed the impugned decision. Therefore, the review of the other alleged infringements of the law is not necessary.

Cross-references:

- Decision of 06.03.1997 (III. US 271/96), *Collection of Judgments, Rulings and Resolution* no. 7, *Bulletin* 1997/1 [CZE-1997-1-001];
- IV. US 246/98, *Collection of Judgments, Rulings and Resolution* no. 11.

Languages:

Czech.

Identification: CZE-2002-3-011

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 02.10.2002 / **e)** Pl. US 5/02 / **f)** Repeated voting / **g)** *Sbírka zákonu* (Official Gazette), no. 476/2002 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.3 **General Principles** – Democracy.
3.9 **General Principles** – Rule of law.
3.18 **General Principles** – General interest.
3.22 **General Principles** – Prohibition of arbitrariness.
4.5.4.1 **Institutions** – Legislative bodies – Organisation – Rules of procedure.
4.5.6 **Institutions** – Legislative bodies – Law-making procedure.

Keywords of the alphabetical index:

Parliament, voting procedure.

Headnotes:

Repeated voting, both on motions to amend and on resolutions declaring approval of a law as a whole, is limited by two conditions: the objections raised immediately by a Deputy that must be connected with flaws in the actual voting (the voting procedure, the determination of the results), rather than the merits of a proposed draft, and a subsequent affirmative vote by the Chamber of Deputies.

A Chamber of Deputies' resolution declaring the approval of a draft-law must be seen to be the decision containing the final verdict concluding the legislative process in the Chamber of Deputies. The legal requirement that the Chairman of the Chamber of Deputies send the law without delay to the Senate has no connection in terms of time or subject-matter with the decision-making process of the Chamber of Deputies. Uncontested voting resulting in a resolution declaring the Chamber of Deputies' approval of the law as a whole, constitutes a time and subject-matter limit beyond which revocation of and subsequent new dealing with the matter are inadmissible. Neither numerous proposed amendments nor attempts to "correct mistakes" may justify a breach of the constitutionally guaranteed procedures in the legislative process.

Only a flawless procedure may lead to a legal and constitutionally affirmed decision; therefore, it is necessary to pay close attention to the procedural flawlessness of the legislative process and to protect it.

Summary:

A group of senators lodged a complaint with the Constitutional Court to have the Commercial Code amendment struck down for being unconstitutionally passed.

The Chamber of Deputies expressed its opinion that both the law and the procedure leading to its approval were in accordance with the constitutional order.

It is the Senate's opinion that the Parliament may change its will, as expressed during legislative proceedings, only by an amendment to the law. In the government's opinion, repeated voting was not impermissible, and the revocation of a decision could be tolerated.

The impugned law was passed by Resolution no. 1828 on 31 October 2001, then revoked on 15 November 2001, and finally approved by Resolution no. 1859 on 15 November 2001. In this new wording, it was put before the Senate and subsequently submitted to the President to be signed. After signature by the President, the law was published in the Collection of Decisions.

There are two points of view in Parliament. One point of view states that revocation is possible; the other states that the law is unalterable.

Therefore the Constitutional Court had to decide on:

a. whether it is possible to derive, from the current legal order, a time or a subject-limit, beyond which a decision passed by the Chamber cannot be amended; or, if after the revocation of an approved procedure, it is possible to proceed in the legislative process, to deal again with the previously passed law, and to adopt its amended version;

b. if there is such a limit, what is its constitutional significance, and what results would follow from its breach.

The procedure of the legislative process is regulated by the Rules of Procedure. These Rules permit repeated voting and list the reasons for such voting. Every Deputy reserves the right to object in the course of voting or to the results during the voting or immediately after. If the plenary Chamber of Deputies accepts an objection raised under the above procedure, a vote can be repeated.

As to a passed draft-law, the Chamber of Deputies' power is extinguished by the acceptance of a resolution declaring approval of the law.

The phase of the legislative process in which the resolution is submitted to the plenary Chamber of Deputies is the sole conclusion of the decision-making process. A Deputy may vote either for or against, or can abstain from voting. Time and opportunity for each Deputy to put forth suggestions is provided during the period prior to the vote.

The decision-making process governing legislative activity differs to a certain extent from the decision-making process governing other public service organs. However, the main decision-making principles are identical in both cases. In light of the impact on society as a whole, the results following from legislative acts are more important than the results of individual flawed decisions of other organs of the public service. Although the content of the Rules of Procedure is not constitutionally defined, there is no doubt that the basic principles of dealing with and contact between legislative bodies (and within the government) cannot deviate from the constitutional framework.

In a parliamentary democracy, political decisions are derived from the will of the majority expressed through free voting. The conditions that guarantee the constitutional legitimacy and lawfulness of a decision relate to the matter in which it is debated and subsequently decided. Those conditions are also influenced by the present. They may lose their relevance expressed by number of votes in the passing of time.

Therefore, the protection of previous decisions is necessary from the point of view of the stability of legal acts, but it is also one of the constitutional guarantees excluding arbitrariness from decision-making. The fact that the Chairman of the Chamber of Deputies has not yet submitted an approved draft-law to the Senate is not sufficient reason to reopen the decision-making process on the draft-law, and to review again the merits in a new decision. The moment at which the decision-making process is irrefutably concluded at a given point in the legislative process is of such importance, not only for lawfulness but also for continuity, that one cannot constitutionally go beyond the set limit.

During the legislative process, the requirements of stability, persuasiveness and the necessary legal acts are in the foreground. These requirements can only be met by respecting the rules that the Chamber of Deputies has prescribed for its own activity.

To go beyond the boundaries of accepted decision irreversibility is a breach of the constitutional legislative process.

Therefore, the impugned act was not passed in a constitutionally prescribed manner.

The conclusion itself rendered the review of the constitutionality of individual provisions of the impugned law unnecessary.

There is no doubt that the amendments to the Commercial Code bring about many desirable changes. Nevertheless, that fact cannot outweigh the fundamental principle of constitutionality, i.e. that the laws must be passed in a constitutionally prescribed manner. Therefore, the Constitutional Court allowed the complaint in part.

Languages:

Czech.

Identification: CZE-2002-3-012

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 30.10.2002 / **e)** Pl. US 39/01 / **f)** Sugar Quota / **g)** *Sbírka zákonu* (Official Gazette), no. 499/2002 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
3.19 **General Principles** – Margin of appreciation.
3.25 **General Principles** – Market economy.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
5.2 **Fundamental Rights** – Equality.
5.3.36.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Economy, state regulation / Production, restriction / European Union, regulation, agriculture, quotas.

Headnotes:

Although the Charter of Human Rights defines the right to own property and the right to free enterprise as rights of different categories, they are closely related. The right to free enterprise was, at one time, seen as a right derived from the right to property. Business and other economic activity represent primarily activity aimed at the creation of property values needed for securing the necessities of life. The daily result of this activity is property that is protected by the right to property. Moreover, the right to property was, at one time, a prerequisite for the commencement and continuation of business. Property also represents a method of personal and social self-realisation. Even if it is not to be understood as an end unto itself, the right to property enables other fundamental rights to be exercised.

The chosen method of calculating individual production quotas is in contradiction with the requirement for an objective manner of calculation and equality. It constitutes a constitutionally inadmissible unequal constraint on production equipment property, and an unjustifiable differentiation between individual companies that should have the same access to free enterprise.

Summary:

A group of deputies lodged a complaint with the Constitutional Court asking to have Government Decree no. 114/2001 on Setting Quotas annulled.

The majority of the opinions submitted to the Constitutional Court found that the regulation of agriculture is permitted when the limits set by the Charter are preserved. In the Ombudsman's opinion, the Fund cannot set quotas. The Constitutional Court has already dealt with the matter of production quotas. In the present case, it follows, in particular, Judgment no. 410/2001 Coll. According to the current case-law of constitutional and supreme courts in European Union member states, the restriction of production on the grounds of price stabilisation in the market at a certain amount is comparable with the national property standard when quotas are imposed fairly for all current producers.

The Constitutional Court has recognised a one-year reference period, together with commonly set partial amendments, to be adequate. The impugned decree uses a three-year period as its basis. The current situation is nevertheless influenced by an unconstitutional legal arrangement.

The method of calculating individual production quotas lowers undesirable impacts by taking into account that some sugar factories are not in year-round operation and only the three highest seasons of production or only the seasons in which the factories actually produced. This does not eliminate inequality, as some producers could increase production.

The impugned regulation does not take into account a situation where a sugar factory was previously run by a person other than the one who runs it now. The production of a factory that has been taken over is not taken into account, even though sales or mergers of companies are not excluded.

The production quota system follows the production restriction that is disturbed by the state subsidy policy.

The restriction of the amount of sugar production has a long tradition in the EU. Regulation no. 1260/2001 concerns the common organisation of markets in the sugar sector, the aim of which is to reduce fiscal demands and to restrict overproduction. It also includes the reduction of sugar quota production.

This regulation determines the national quotas for individual states. Sugar produced is divided into categories for the purpose of production quotas.

Sugar categories A and B may be produced, although they are subject to a levy. Sugar category C may be produced, but it may not be launched into the EU market. Its only legal use is export. Failure to export is sanctioned by levies. The Czech Republic uses a uniform model of sanctions in the amount of 115 percent of the minimum price for sugar overproduction. The result of taxation on sugar overproduction is, therefore, comparable with the measures in the Czech Republic today.

The sugar quota system introduced in the Czech Republic is not incomparable with that of the EU. There is pressure from the EU to decrease sugar production, which explains the introduction and application of the Czech sugar production quota. In Judgment no. 410/2001 Coll., the Constitutional Court struck down another subordinate delegation, in which the reserve amount was set by the Minister of Finance. Presently, the Fund is to set the reserve amount. The competence to set the minimum price belongs to the government, which can introduce the minimum price by its own order. The effort by the Czech government to transfer the competence to another organ is only the result of its unwillingness to respect the recommendation in the Act on State Agriculture Intervention Fund, which suggests the adoption of quota system regulation “regularly” for a one-year period.

The assessment of the Fund's competence is not unequivocal. The Fund uses the production quota system for the division of quotas and thus executes measures and introduces market orders in order to stabilise the market in agriculture and food products. This provision seems to be unconstitutional, in particular, because of the unjustifiable differentiation between different producers.

The qualitative features of sugar are determined in a manner which is in conformity with the Constitution. The Act on State Agriculture Intervention Fund does not exclude the Administrative Code's application by restricting its use only to decision-making on subsidies. The Constitutional Court has already stated that in case of unclear interpretation, the administrative and court organs are to select such an interpretation so as to secure greater respect for fundamental rights and freedoms, which include the right to fair administrative proceedings and fair process.

When drawing up the government decree, the government ignored the legal recommendation to issue the decree for one year. It is not important whether the production quota system may be introduced by repeated decrees of government or with the approval of the legislature. The Constitutional Court allowed the complaint in part.

Supplementary information:

According to the dissenting opinions, price regulation is also possible in a system of property rights and a market economy. The impugned price regulation also includes a more intensive sanction system, and in this way it also constitutes a more intensive interference with property rights. The Czech legislature does not accept the requirement of subsidiarity and, therefore, the principle of proportionality was breached. The obligation of approximation to European law rests on the principle of approximation and gradual harmonisation, not on the requirement to create stricter regulations. Moreover, the legislature left the choice of commodities up to the executive organs.

When interpreting the principles of proportionality and a rule of law-based state, the Constitutional Court cannot ignore the European dimension of those principles, if its case-law is to fulfil an integrative function.

Cross-references:

- Decision of 16.10.2001 (Pl. ÚS 5/2001), published in *Collection of Laws* 410/2001, *Collection of Judgments* no. 24, *Bulletin* 2001/3 [CZE-2001-3-015].

Languages:

Czech.

Identification: CZE-2002-3-013

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 20.11.2002 / **e)** Pl. US 8/02 / **f)** Implementing a subordinate legal regulation / **g)** *Sbírka zákonu* (Official Gazette), no. 528/2002 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
5.2 **Fundamental Rights** – Equality.
5.3.36.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Government, exceeding of powers / Apartment, rent, determination, limits / Interference, state, necessity / Apartment, owner, differentiation.

Headnotes:

The unconstitutionality of implementing a subordinate legal regulation cannot be, in and of itself, a reason to strike down the empowering provision of the law. The content of a price decision is determined by grading goods clearly defined in a list of goods, whose price is then set in a prescribed manner. Its task is not to regulate behaviour by any means other than those that are legally prescribed in relation to the Commercial Code. The Price Act regulates the behaviour of the entities mentioned in the law only by requiring them to arrange to have the price of the particular goods officially set by way of a price decision on the basis of the five methods of price regulation prescribed in the law.

If the state decides to regulate rents, it cannot arbitrarily ignore fundamental questions such as that of possible disputes. The legislature must create the requisite mechanisms, from the point of view of both lessors and lessees.

Summary:

The Constitutional Court received an application seeking the striking down of the provisions of the Price Act and the annulment of the Ministry of Finance's assessment which replaced Assessment no. 01/2002, setting the maximum rent for flats. In the opinion of the Ministry of Finance, price assessment is not an unjustified act that interferes with matters reserved for legal regulation. The Ministry of Finance requested that the Constitutional Court provide instructions on the proper procedure. As those instructions were not included in Judgment 231/2000 Coll., the Ministry continued on the basis of the regulation.

The complaint was found admissible and justified.

The Constitutional Court has recognised price regulation to be a constitutional form of state policy implementation (Pl. US 24/99, Pl. US 3/2000 and Pl. US 5/01). The question of the method used for price regulation is reserved for the legislature.

The powers of the Ministry of Finance over price regulation arise from the Price Act. The Ministry can implement price regulation either by means of a price decision or a legal ruling. The legal form of Ministry legal rulings is not expressly prescribed.

The impugned assessment (no. 01/2002) was annulled, and proceedings relating to that part were discontinued.

The Ministry issued Assessment no. 06/2002, which replaced the previous Assessment no. 01/2002. The Constitutional Court considers this an attempt to prevent the implementation of the constitutional case-law.

In the present case, the Ministry breached both the Price Act and constitutional principles. For the third time, the Ministry of Finance applied the same rent regulation, whose content had already been declared unconstitutional by the Constitutional Court. The Ministry ignored the Constitutional Court's decision, and thereby circumvented the production of legal regulations.

An intentional replacement of the missing legal regulation led the Ministry of Finance to place the price regulation outside the framework of its legal empowerment, beyond the scope of its powers over price regulation, and its ability to act on matters resulting from setting the level of rent in rent agreements. A price decision for that kind of regulation has not been made.

Price regulation arises from a lessee's relationship to a flat based on administrative acts allocating the flat. In 1992 a change in terminology led to a dual system, which cannot be compared to legal regulation in the European Union. Rental relation-ships in Europe are temporary as a rule. European law does not regulate the same concepts that are regulated under Czech law. Rent regulation in Europe is derived from the housing market prices. These include the land and property prices, and market prices for reconstruction, administration and services, as well as a reasonable profit. The biggest breach of equality between the principles of tenant protection and property protection lies in the fact that subsidies in the form of lower prices provided to tenants from the whole community have been

transferred from some owners. They pay extra money for operation, services, and repairs from their own resources. Thus the state has transferred the costs of the "social policy" to them.

The state is entitled to adopt laws regulating the use of property in accordance with the general interest. A state measure should strike a "just balance" between the general interest and the fundamental rights of the individual. Inequality itself does not always amount to an unconstitutional situation (infringements may be justified by another significant interest).

Lease relationships arose from the state administrative acts. Shortly after 1989, it was possible to anticipate a situation like this one. The Constitutional Court recognised such a transformation, as constitutionally affirmed in the Judgment Pl. US 37/93, in reference to the need to create sufficient legal certainty for the hitherto rights of usage. That reason loses strength over time.

Rental property cannot be permanently removed from the ordinary legal regime and made subject to another one. The state must find a way to resolve this situation; the state of discrimination is deepened by its failure to do so. There is no visible effort to resolve this problem, as is proven by the impugned assessment preserving the status quo on the basis of the annulled decree.

If the state considers it necessary to regulate rent prices, it must correct the procedure so that the lessor may prove, regarding his or her case and his or her flat, that the situation is such that the rental does not fulfil the function of a business activity, but that of a social state.

The assessment did not include a determination of which costs were to be covered by rent (the recoverability of invested capital, location, attractiveness of the flat and reasonable profit). The European Court of Human Rights has granted states a wide scope for consideration, both from the point of view of the seriousness of the problem and that of the selection of regulation measures. A policy relating to flats may pursue different aims in various states. The situation in our country and that in Western Europe can be hardly compared. Nevertheless, it does not alter the obligation to provide protection to a specific group of property owners so that all owners of the same kind are guaranteed that their right to property is regulated by the law, and has the same content and the same protection.

Rent regulation does not mean expropriation. It may concern the content of the right to property. Property may only be restricted on the basis of law, in the public interest, and with compensation. The prohibition of discrimination is valid alongside that restriction. The rule in this sphere sets the rent on the basis of agreement. Regulation is an exception that should be restricted to the necessary period of time. The payment in question is in contradiction with the constitutional order and Czech international obligations and laws, both in terms of content and legal form. Therefore, the Constitutional Court has annulled the impugned decree.

Supplementary information:

The dissenting opinions mentioned that an amendment to the application was allowed during the hearing. The parties to the proceedings then asked for adjournment of the hearing, which was not granted. Thus, the parties to the proceedings had no opportunity to address their opinions to all of the submissions and the principle of equality of the parties to the proceedings might have been breached.

Cross-references:

- Pl. US 3/2000, *Collection of Laws* no. 410/2001, *Collection of Judgments* no. 18;
- Pl. US 37/93, *Collection of Laws* no. 86/1994;
- Decision of 23.05.2000 (Pl. US 24/99), *Bulletin* 2000/2 [CZE-2000-2-011];
- Decision of 16.10.2001 (Pl. US 5/01), *Bulletin* 2001/3 [CZE-2001-3-015].

Languages:

Czech.

Identification: CZE-2002-3-014

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 27.11.2002 / **e)** Pl. US 6/02 / **f)** / **g)** *Sbírka zákonu* (Official Gazette), no. 4/2003 / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.6.1 **Constitutional Justice** – Effects – Scope.
2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
3.7 **General Principles** – Relations between the State and bodies of a religious or ideological nature.
3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
3.22 **General Principles** – Prohibition of arbitrariness.
4.5.2 **Institutions** – Legislative bodies – Powers.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of worship.
5.3.36 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Religion, religious activity, freedom / Church, self-administration / Church, property / Church, registration.

Headnotes:

The Czech Republic is based on the principle of a secular state and it may not be bound either by an exclusive ideology or by a particular religion. The state must tolerate religious pluralism. The state must be separate from particular religious denominations. The churches and religious societies administer their matters independent of the state organs.

In compliance with the principle of the autonomy of churches and religious societies, the state cannot intervene in their internal matters. Those measures are not subject to judicial review. The state shall restrict its interference and influence only to the cases where it is necessary and in accordance with the public interest. Moreover, it is necessary to take into account that churches and religious societies are often historical institutions that have continuously existed under various forms of government and different regimes. Therefore, the state should deal with them especially carefully, consider any possible restrictive encroachment and restrict them only to cases where they are really justified.

The restriction on churches and religious societies to dispose freely of their legally gained revenues only in the sphere of religious belief is an arbitrary infringement by the state of their private matters and, moreover, that encroachment is clearly not legitimised by any public interest.

Freedom of religion is guaranteed by both domestic and international law. In case of doubt, the Constitutional Court prefers the provision that guarantees the higher standard of protection of human rights.

Summary:

A group of senators applied to the Constitutional Court to have the Act on the Freedom of Religious Conviction and the Position of Churches and Religious Societies struck down.

The request to strike down the Act as a whole was not well founded. Mere comparison with the previous regulation was not a reason for striking it down. According to settled case-law, a previous Act, repealed by an unconstitutional Act, does not come back into force on the striking down of the impugned act (Pl. US 21/01, 25).

The Court dealt only with the request to strike down individual provisions of the Act. The substance of the provisions is the principle that churches and religious societies legally exist at the moment of registration by the responsible ministry. The ministry is entitled to annul a registration. A registered church or religious society may ask the ministry to register it as a legal person. The Act regulates in detail the elements of such registration, sets up the Registry of Legal Persons and regulates the annulment and extinguishing of that legal entity.

The registration is an individual administrative act with constitutive effects representing the state's acceptance as to the formation of a particular society. The legal existence of some churches arises from canon law and the state cannot legally regulate those institutions.

The relations between the Catholic Church and individual states are regulated by the international agreements on the organisation of Church institutions within the State. That the Catholic Church is a legal person is indisputable: the domestic legal order may neither interfere with nor question it.

The Constitutional Court prefers the principle of interpreting legal provisions in a constitutionally acceptable way instead of striking them down. Therefore, no doubts may be raised as to the existence of the general legal personality of churches and religious societies and the right to their independent existence upon their acceptance by the state. The registration sets out the conditions under which it takes effect and the legally relevant activity of churches and religious societies on the territory of the Czech Republic.

If the state is entitled to set out the conditions under which registration takes effect and the legally relevant activity of churches and religious societies on the territory of the Czech Republic, it is also entitled to set out conditions for the annulment of registration where the conditions are not fulfilled.

This provision is not in contradiction with the Charter and, therefore, the request to strike it down was not granted.

As to the registration of a church as a legal person, a highly disputable question arises as to whether the establishment of religious and other intra-church institutions may be understood restrictively, in the sense that this constitutionally protected right relates only to intra-church institutions that have no independent legal personality, or, on the contrary, whether it relates to institutions with their own legal personality.

According to the draft agreement between the Czech Republic and the Holy See on the regulation of mutual relations, the Church is entitled to grant a church legal personality. It covers their activity not only in the sphere of religious belief but also in other spheres that are an inseparable and indispensable part of every active church and religious society.

If the impugned provision restricts the right of churches and religious societies only “to the purpose of organisation, confession and spread of the religious belief”, it is an obvious contradiction with the aims and purposes of churches and religious societies.

For a restriction of fundamental rights, three basic conditions must be fulfilled: it must be provided for on the basis of law, it must have a legitimate aim and it must be necessary in a democratic society. The state interventions in granting churches legal personality cannot be characterised as either pursing a legitimate aim or as a measure necessary in a democratic society.

There is no clear difference between the records and registration as regulated in the impugned Act. The Act lays down clear conditions for registering an application. When those conditions are not fulfilled, no record is kept. The Ministry may also annul the records of a church’s legal personality in cases that are listed.

The importance of churches and religious societies cannot be compared to that of ordinary associations. If an ordinary association may create a legal person without state interference, there is no justification for a legal restriction on a church’s ability to do so.

The freedom of conscience and religious conviction cannot be restricted. The exercise of the right of conscience and religious conviction can only be restricted for reasons provided for by law.

The Constitutional Court did not accept the arguments made against the records and, therefore, rejected the request. This interpretation is possible. The existence of records does not make the legal creation and annulment of a church’s legal personality conditional on the constitutive legal act of the state organ: the records have only a declarative nature, serve the function of information and protect third persons.

The manner prescribed by law to grant or to annul the registration of a registered church and religious society for exercising the special rights set out in the law (the right to teach religion, establish a church school, etc.) forms the substance of the provision enabling the enforcement of those special rights.

The core of freedom of religion lies in the guarantee of everyone's possibility of expressing his or her religion without state interference. At the same time, the state, distinctly separate from church and regional societies, cannot be obliged to assist actively in the activity of individual churches and religious societies (II. US 227/97).

There are examples where the state grants entitled churches and religious societies “the above standard” entitlement for a particular purpose; these are cases of the active and positive approach of the state. The state is basically entitled to set out the conditions under which persons are granted those entitlements. The Constitutional Court only reviewed whether some conditions stipulated by the law did not contain elements of arbitrariness and discrimination. The Ministry can annul its entitlement if a public report is not published. The principle of proportionality was not respected. Therefore, the Constitutional Court struck down that provision. If the church or religious society breaches only the information obligation, the sanction that follows relates to the sphere of religious activity.

The Act contains a non-exhaustive list relating to church revenue and objects of its business; this cannot be considered unconstitutional. The business and other church activity that earns money may only be an additional profitable activity and the profit earned may be used “only for the achievement of church activity and religious society aims”. The churches and religious societies are private law corporations that can do all things that are not expressly prohibited by the law. The exercise of those rights may be limited only in necessary cases set out in the Charter.

However, in the present case the Act states that churches and religious societies may use the profit made from business and other activity that earns money only for the accomplishment of its aims.

The impugned Act makes it impossible for the churches and religious societies to use the profit in any way other than the legally prescribed way; this is in contradiction with the Charter. Therefore, the impugned provision was annulled.

Cross-references:

- Constitutional Court Judgment no. II. ÚS 227/97, *Collection of Judgments* no. 10;
- Constitutional Court Judgment no. Pl. US 21/01, *Collection of Judgments* no. 25.

Languages:

Czech.

Denmark
Supreme Court

Important decisions

Identification: DEN-2002-3-001

a) Denmark / **b)** Supreme Court / **c)** / **d)** 21.05.2002 / **e)** II 222/2001 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen* 2002, 1789; CODICES (Danish).

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.
3.19 **General Principles** – Margin of appreciation.
5.2.2.3 **Fundamental Rights** – Equality – Criteria of distinction – National or ethnic origin.
5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship.
5.3.36.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Licence, granting, requirements / Transport, commercial.

Headnotes:

A requirement of citizenship as a condition for receiving a licence for the commercial transportation of persons (taxi driving) was not contrary to the European Convention on Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination or the International Covenant on Civil and Political Rights.

Summary:

In 1997 an amendment of the act regulating taxi driving was passed, which included a citizenship requirement as a condition for receiving a licence for the commercial transporting of passengers. This requirement was revoked in 1999. In June 1998 the Copenhagen Taxi Board advertised some vacant taxi licences. The plaintiff, who was a Pakistani citizen, and who at that time already held six taxi licences, was among the persons who were not granted a new

licence. The plaintiff did not receive his seventh licence until June 1999. The plaintiff instituted legal proceedings against the Ministry of Transportation claiming that the application of the citizenship requirement in the act regulating taxi driving in relation to him was contrary to Article 14 ECHR read in conjunction with Article 1 Protocol 1 ECHR, as well as the International Convention on the Elimination of All Forms of Racial Discrimination, Article 26 of the International Covenant on Civil and Political Rights and Article 2.2 of the International Covenant on Economic, Social and Cultural Rights read in conjunction with Article 6 of that Covenant. Furthermore the plaintiff claimed before the High Court for Western Denmark that the provision on citizenship was contrary to Section 74 of the Constitution governing the free choice of occupation.

The High Court found that the requirement of citizenship as a condition for undertaking the commercial transportation of passengers gave rise to different treatment of persons legally residing in Denmark without having Danish citizenship. The grounds given by the legislator were not sufficient to justify such different treatment. Furthermore, the High Court found that the applicant's six taxi licences were covered by the concept of property in Article 1 Protocol 1 ECHR. It was apparent from the act regulating taxi driving that the plaintiff would no longer be able to exercise his commercial activity after 1 January 2005 if he was not able to obtain Danish citizenship. The High Court found that the application of the citizenship requirement in relation to the plaintiff was contrary to Article 1 Protocol 1 ECHR as well as Article 14 ECHR read in conjunction with Article 1 Protocol 1 ECHR. Furthermore the High Court concluded that the plaintiff would have obtained one more taxi licence in 1998 and that it was only due to the requirement of citizenship that he had not obtained this licence until 22 June 1999. In this respect the High Court found that the plaintiff had suffered an economic loss for which the defendant was liable for damages.

Before the Supreme Court the applicant only claimed that the application of the provision on citizenship was contrary to Article 14 ECHR read in conjunction with Article 1 Protocol 1 ECHR.

The Supreme Court stated that the application of Article 14 ECHR is contingent on the disputed discrimination concerning the enjoyment of the rights and freedoms recognised in the European Convention on Human Rights. The Supreme Court found that the plaintiff had no legal claim for being awarded another licence. According to the case law of the European Court of Human Rights the possibility of being granted a public licence to carry out commercial activities is not a right protected under Article 1 Protocol 1 ECHR. Therefore the Supreme Court found that the plaintiff's possibility of being awarded an additional licence in 1998 was not protected by Article 1 Protocol 1 ECHR. Accordingly the Supreme Court found that the application of the citizenship requirement in relation to the plaintiff was not contrary to Article 14 ECHR read in conjunction with Article 1 Protocol 1 ECHR.

Furthermore the Supreme Court found that differential treatment on the grounds of citizenship was not in itself a violation of Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination and that Article 26 of the International Covenant on Civil and Political Rights had to be interpreted in the same manner. The Supreme Court held that the insertion of the requirement for citizenship was motivated by a wish to consider stated legitimate aims and that differential treatment on the ground of national origin was unintentional. Furthermore the Supreme Court found that the Parliament *(Folketinget)* enjoyed a certain margin of appreciation in deciding whether a requirement for citizenship was appropriate and was reasonable in relation to the aims pursued. Thus the application of the citizenship requirement was not contrary to Article 5 or Article 26.

Languages:

Danish.

Estonia
Supreme Court

Important decisions

Identification: EST-2002-3-007

a) Estonia / **b)** Supreme Court / **c)** Supreme Court *en banc* / **d)** 28.10.2002 / **e)** 3-4-1-5-02 / **f)** Petition of Tallinn Administrative Court to review the constitutionality of Section 7.3 of the Principles of Ownership Reform Act / **g)** *Riigi Teataja III* (Official Gazette), 2002, 28, Article 308 / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.
1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
1.6.7 **Constitutional Justice** – Effects – Influence on State organs.
3.12 **General Principles** – Clarity and precision of legal provisions.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
5.3.36.1 **Fundamental Rights** – Civil and political rights – Right to property – Expropriation.
5.3.36.4 **Fundamental Rights** – Civil and political rights – Right to property – Privatisation.

Keywords of the alphabetical index:

Ownership, reform / Property, unlawfully expropriated, return / Person, resettled / International agreement, return of expropriated property.

Headnotes:

In concrete review proceedings the Supreme Court reviews only the constitutionality of the provision relevant for resolving the initial case in the trial court. The provision is relevant if the trial court would have to make a different decision depending on whether the provision was found to be constitutional or unconstitutional. The Supreme Court is entitled to check whether the challenged provision is relevant for deciding the initial case. In so doing, the Supreme Court cannot assess whether the referring court correctly adjudicated the initial case.

The period of more than ten years of lack of certainty as to whether or not the unlawfully expropriated property of persons who resettled according to the treaties concluded with the German state was to be returned violated the general prohibition of arbitrariness and the fundamental right to procedural fairness, and was contrary to the principle of legal certainty. Furthermore, the rights of the present users of the property had been violated, since their right to privatise the property depended on whether the persons who resettled had the right to the return of their property.

Summary:

In 1992 Ms Kalle filed an application with Tallinn City Assets Agency for the return of unlawfully expropriated property, namely, a house and a plot in Tallinn. Before the expropriation the property belonged to the great-grandfather of the applicant. The Tallinn Committee for the return of and compensation for unlawfully expropriated property (hereinafter the Committee) made several decisions with regard to the property in question, eventually dismissing Ms Kalle's application for a declaration that she was entitled to lodge a claim for ownership reform, because according to Section 7.3 of the Principles of Ownership Reform Act ("the Act"), applications for the return of or compensation for unlawfully expropriated property, which had been in the ownership of persons who had left Estonia, which had been expropriated on the basis of agreements entered into with the German state, and which was located in the Republic of Estonia, shall be resolved by an international agreement. The Committee considered it proved that the applicant's great-grandfather had left Estonia in January or February 1941 on the basis of the agreement entered into between the Soviet Union and Germany on 10 January 1941.

Ms Kalle filed a complaint with Tallinn Administrative Court against the decision of the Committee. She also challenged the constitutionality of Section 7.3 of the Act. Tallinn Administrative Court allowed Ms Kalle's complaint, also declaring the disputed provision unconstitutional and initiating constitutional review proceedings with the Supreme Court. The Constitutional Review Chamber of the Supreme Court reviewed the case, and decided to refer the petition to the Supreme Court *en banc* for review.

First, the Supreme Court dealt with a procedural issue. It held that the Court of constitutional review is entitled to check whether the challenged provision is relevant to resolving the initial case. In so doing, the Supreme Court – within the constitutional review procedure – cannot assess whether the referring court correctly adjudicated the initial case. The Supreme Court found that the challenged provision was relevant to resolving the case in question in the Administrative Court.

The Supreme Court noted the legislative history of the disputed provision. First, the 1991 resolution of the Supreme Council concerning the implementation of the Act contained essentially the same provision in a slightly different wording. In 1997 the Parliament *(Riigikogu)* amended the Act and transferred the provision from the implementing regulations to the main text of the Act. In spite of the disputed provision, Estonia never concluded any international agreement referred to in Section 7.3 of the Act. The Minister of Justice informed the Supreme Court that the Federal Republic of Germany had not taken any initiatives to conclude such an agreement, and had also sought to discourage Estonia from raising the issue.

The Supreme Court found that Section 7.3 of the Act required that the state, the government in particular, take measures in order to conclude an agreement concerning the return of property of persons who had resettled elsewhere. If this proved impossible because of the lack of will of the other party, then the regulation must be amended, so as to create clarity for persons having resettled and their successors, as well as for the present users of the unlawfully expropriated property, whose right to privatise the property depended on whether the persons who resettled had the right to the return of their property. Under the regulation as it stood, the property concerned could neither be returned nor privatised in favour of the present users. On the one hand, the individuals entitled to lodge claims for ownership reform had been given the hope that the relevant property would be returned or compensation paid; on the other hand, the current users of the property apparently had an indeterminate prospect of privatising the property in their use. The Supreme Court held that Article 13.2 of the Constitution (enshrining, *inter alia*, the principle of legal certainty) and Article 14 of the Constitution (the prohibition of arbitrariness and the right to procedural fairness), taken together, had been violated, since for a period of more than ten years the state had neither concluded the agreement referred to, nor changed the disputed provision of the Act.

The Supreme Court did not declare Section 7.3 of the Act invalid. The Court considered that if it declared the provision invalid, the property in question would have to be returned or compensation paid in accordance with the general procedure prescribed by the Act. The Court considered this to be a political decision not to be taken by the Court. It was up to the legislator to decide whether and under what conditions the property in question should be returned or compensation paid. Therefore, the Supreme Court declared Section 7.3 of the Act unconstitutional and ordered the legislator to bring the provision into conformity with the principle of certainty of the law.

Supplementary information:

Four justices out of seventeen delivered a dissenting opinion concerning the declaration of unconstitutionality. According to their view, the Supreme Court should have declared Section 7.3 of the Act invalid. The entry into force of the judgment of the Supreme Court should have been postponed for one year, in order to enable the legislator to enact new regulations.

Cross-references:

Decision of the Supreme Court:

- 3-4-1-10-2000 of 22.12.2000, *Bulletin* 2000/3 [EST-2000-3-009].

Decision of the European Court of Human Rights:

- *Sunday Times v. the United Kingdom*, 26.04.1979, *Special Bulletin ECHR* [ECH-1979-S-001].

Languages:

Estonian, English (translation by the Court).

Identification: EST-2002-3-008

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 05.11.2002 / **e)** 3-4-1-8-02 / **f)** Petition of Tallinn Administrative Court to review the constitutionality of Section 28.4 of the Taxation Act (in the wording in force until 11 May 1996, and from 12 May 1996 until 30 June 2002) and of the regulations of the Minister of Finance issued on the basis thereof / **g)** *Riigi Teataja III* (Official Gazette) 2002, 30, Article 326 / **h)** CODICES (Estonian, English).

Keywords of the systematic thesaurus:

4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
4.10.7 **Institutions** – Public finances – Taxation.

Keywords of the alphabetical index:

Tax, interest rate.

Headnotes:

Interest payable on outstanding taxes as an obligation incidental to tax liability constitutes a financial obligation in public law which, pursuant to Article 113 of the Constitution, shall be determined by law (i.e. by an enactment of the parliament *(Riigikogu)*).

The executive power shall not issue *praeter legem* regulations in matters which according to the Constitution shall be regulated by law.

Summary:

The Jõgeva Tax Board issued a precept to Põltsamaa Põllumajand Ltd, ordering the public limited company to pay various sums of money as interest on different taxes (income tax, value added tax, social tax and land tax). The company unsuccessfully challenged the precept with the Tax Board. Subsequently, it filed a complaint with Tallinn Administrative Court. The Court revoked the decision of the Tax Board and the precept of the Jõgeva Tax Board, and declared partly unconstitutional Section 28.4 of the Taxation Act and the relevant regulations of the Minister of Finance issued on the basis of that provision. The Tallinn Administrative Court initiated constitutional review proceedings with the Supreme Court.

Section 28.4 of the Taxation Act provides that the Minister of Finance shall establish the rate of interest on the amount of the tax to be paid by the taxpayer, if the tax has not been paid in due time. The challenged regulations of the Minister of Finance established interest rates ranging from 0.15% per day in 1994 to 0.07% per day since 1998.

The Constitutional Review Chamber of the Supreme Court referred to Article 113 of the Constitution. According to this provision, state taxes, fees, duties, fines and compulsory insurance payments shall be determined by law. The Supreme Court observed that Article 113 of the Constitution does not mention interest or fines for late payment of monies owed. The Court considered, however, that the protected area of the provision is broader than a strict interpretation of the wording might indicate and includes not only the financial obligations listed therein but all financial obligations in public law. The purpose of Article 113 of the Constitution is to make sure that all financial obligations in public law are established solely by enactments passed by the parliament *(Riigikogu)*.

The Supreme Court found that the provision delegating the relevant competence and the regulations of the Minister of Finance were also in conflict with Article 94.2 of the Constitution. The Court held that delegation to the executive of the competence to establish interest rates on outstanding taxes amounted in substance to a delegation of the right to issue *praeter legem* regulations. The executive power cannot, however, by issuing *praeter legem* regulations, regulate areas which, pursuant to the Constitution, must be regulated by an act of parliament.

Since the Taxation Act containing the disputed provision had been replaced by a new Taxation Act providing for the interest rate in the act itself, the Supreme Court could not declare the disputed provisions to be invalid. The Court declared the provisions unconstitutional.

Supplementary information:

The parliament *(Riigikogu)* passed legislation consequent to the decision of the Supreme Court, retroactively stipulating the interest rates on late payments of taxes.

Cross-references:

- III-4/A-2/94 of 12.01.1994, *Bulletin* 1994/1 [EST-1994-1-001];
- 3-4-1-3-96 of 20.12.1996, *Bulletin* 1996/3 [EST-1996-3-003];
- 3-4-1-2-98 of 23.03.1998, *Bulletin* 1998/1 [EST-1998-1-002];
- 3-4-1-10-2000 of 22.12.2000, *Bulletin* 2000/3 [EST-2000-3-009].

Languages:

Estonian, English (translation by the Court).

Identification: EST-2002-3-009

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 02.12.2002 / **e)** 3-4-1-11-02 / **f)** Petition of Tallinn Administrative Court to review the constitutionality of Section 168.1.2 of the Code of Criminal Procedure / **g)** *Riigi Teataja III* (Official Gazette), 2002, 35, Article 376 / **h)** CODICES (Estonian).

Keywords of the systematic thesaurus:

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
5.3.13.21 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Presumption of innocence.

Keywords of the alphabetical index:

Criminal proceedings, termination, grounds.

Headnotes:

A court initiating constitutional review proceedings with the Supreme Court can challenge only a provision or provisions relevant for deciding the case before it. The Supreme Court has the right to check whether the provision applied by the referring court in deciding the original case was relevant for settling the dispute. The Supreme Court shall not express its opinion as to whether the referring court decided the original case in a substantially correct manner.

The presumption of innocence applies to everyone who is treated to be a suspect.

Summary:

A state prosecutor commenced criminal proceedings against Mr Zaitsev on 22 July 1998, based on Section 133 (unlawful eviction) of the Criminal Code. On 12 July 2001 the prosecutor issued an order concerning the termination of the criminal proceedings due to the expiration of the limitation period. On 26 September 2001 the criminal proceedings were resumed at the request of Mr Zaitsev. The order to resume proceedings, issued by a state prosecutor, was annulled by a senior prosecutor because according to Section 5.3 of the Code of Criminal Procedure Mr Zaitsev did not have the right to challenge the termination of the criminal proceedings due to the expiration of the limitation period, since Mr Zaitsev had not been a suspect in the criminal proceedings. Mr Zaitsev unsuccessfully challenged the order of the senior prosecutor with the State Prosecutor's Office. Subsequently, Mr Zaitsev filed a complaint with Tallinn Administrative Court. He requested annulment of the order concerning the termination of the criminal proceeding as far as the grounds of termination were concerned. According to Mr Zaitsev, the criminal proceedings should have been terminated according to Section 168.1.2 of the Code of Criminal Procedure. According to that provision, the criminal proceedings shall be terminated if the guilt of the accused in the commission of the criminal offence is not proven and the collection of additional evidence is impossible. Tallinn Administrative Court declared Section 168.1.2 partly unconstitutional (specifically, the words: “the guilt of the accused in the commission of the criminal offence is not proven” were unconstitutional) due to incompatibility with Article 22.1 of the Constitution. The Administrative Court found that the provision of the Code of Criminal Procedure violated the constitutional presumption of innocence, since the commission of a criminal offence can be proved only by a court. Section 168.1.2 of the Code of Criminal Procedure, however, provides for termination of the criminal proceedings on the said ground by a preliminary investigator or a prosecutor.

The Constitutional Review Chamber of the Supreme Court noted that the court initiating the constitutional review proceedings with the Supreme Court can challenge only provisions relevant to deciding the original case. A provision is relevant if the trial court would have to make a different decision depending on whether the provision was found to be constitutional or unconstitutional. The Supreme Court stated that it has the right to check whether the referring court had applied the provision relevant for resolving the original case when settling the dispute. The right of the Supreme Court to verify this was derived from Section 14.2 of the Constitutional Review Court Procedure Act, according to which the Supreme Court can annul only a relevant provision. The Supreme Court noted, however, that when verifying this, it shall not express its opinion as to whether the referring court had resolved the initial case in a substantially correct manner.

The Supreme Court held that Article 22.1 of the Constitution does not protect only the persons who have been formally declared to be suspects. Article 22.1 protects any person who is treated as a suspect in criminal proceedings. This includes persons against whom criminal proceedings have been commenced, irrespective of whether they have been formally declared to be suspects.

The Supreme Court found that although the prosecutor had terminated the criminal proceedings due to the expiration of the limitation period (Section 5.1.3 of the Code of Criminal Procedure), the Administrative Court initiated the constitutional review case with regard to Section 168.1.2 of the Code of Criminal Procedure. The latter provision concerns termination of criminal proceedings if the guilt of the accused in the commission of the criminal offence is not proven, and the collection of additional evidence is impossible. Therefore, the Supreme Court found the provision challenged by the Administrative Court not to be relevant for settling the original case. The petition of the Administrative Court was dismissed.

Cross-references:

- 3-4-1-10-2000 of 22.12.2000, *Bulletin* 2000/3 [EST-2000-3-009];
- 3-4-1-5-02 of 28.10.2002, *Bulletin* 2002/3 [EST-2002-3-007].

Languages:

Estonian, English (translation by the Court).

Identification: EST-2002-3-010

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 24.12.2002 / **e)** 3-4-1-10-02 / **f)** Petition of Tallinn Administrative Court to review the constitutionality of the last sentence of Section 8.31 of the Wages Act and of Regulation no. 24 of the Minister of Finance, dated 28 January 2002, entitled “The procedure for and conditions of disclosure of information concerning the wages of officials” / **g)** *Riigi Teataja III* (Official Gazette), 2003, 2, Article 16 / **h)** CODICES (Estonian).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.30 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Company, management board, member / Information, obligation to provide / Wage / Economic interest.

Headnotes:

It is for the legislator to decide all issues relevant to the restriction of fundamental rights, and the legislator must not authorise the executive to regulate these matters. The executive may only clarify the restrictions of fundamental rights and liberties provided for by law. It must not impose additional restrictions.

The right to the inviolability of one’s private life also protects persons from the collection, holding and disclosure of information concerning their business or professional activities which enables information concerning a person's property and economic interests to be revealed. The disclosure of information concerning the wages of members of supervisory boards representing private interests or of members of management boards of companies in which the state has a controlling interest violates a person's right to the inviolability of his or her private life. The same applies to the obligation imposed on the said individuals to submit declarations of their economic interests.

Summary:

According to Section 8.3 of the Wages Act, information concerning the wages of employees shall be confidential. Pursuant to Section 8.31 of the same Act, the confidentiality requirement shall not apply to information concerning the wages of officials specified in Section 4 of the Anti-Corruption Act. The Minister of Finance was empowered to establish the procedure for and conditions of disclosure of information concerning the wages of these officials. The list of officials laid down by Section 4 of the Anti-Corruption Act included members of the management and supervisory boards of partly publicly owned companies. Information concerning the wages of these persons had to be disclosed, regardless of the share of the company

owned by the state, and regardless of whether the individual member of the supervisory board was a representative of the state. According to Section 14.7 of the Anti-Corruption Act, members of the management or supervisory boards of a partly publicly owned company had to submit declarations of their economic interests (including information concerning their property, proprietary obligations and other circumstances enabling their economic interests and financial situation to be determined) to the minister in charge of the ministry exercising the state's shareholder rights in the company.

In 1995 66% of the shares of Estonian Air Ltd were privatised. The state retained 34% of the shares. In 2002 the Minister of Transport and Communications requested information concerning the wages of the members of the management and supervisory boards of Estonian Air Ltd in order to disclose this information. Declarations of economic interests were also requested. Several members of the management and supervisory boards not representing the state filed a complaint with Tallinn Administrative Court, requesting a declaration that the measures taken by the Minister were unlawful and that the relevant provisions of the Wages Act, Anti-Corruption Act and Regulation of the Minister of Finance were unconstitutional. The Administrative Court declared the provisions concerning the disclosure of information concerning wages unconstitutional, but dismissed the application concerning the requirement to submit the declarations of economic interests. The Court initiated constitutional review proceedings with the Supreme Court.

The Constitutional Review Chamber of the Supreme Court held that Article 26 of the Constitution, which protects the inviolability of private and family life, also protects persons from the collection, holding and disclosure of information concerning their business or professional activities which would enable information concerning a person's property and economic interests to be revealed.

The Supreme Court declared the last sentence of Section 8.31 of the Wages Act, empowering the Minister of Finance to establish the procedure for and conditions of disclosure of information concerning wages, as well as the Regulation issued by the Minister on the basis of this delegation of competence, to be unconstitutional and invalid. According to the Supreme Court, the delegating provision of the Wages Act was too broad, and the Regulation of the Minister of Finance imposed additional restrictions compared with those provided for by the Wages Act.

As to the substance, the Supreme Court held that the disclosure of information concerning the wages of members of supervisory boards who represent private interests (i.e. who are not representatives of the state) and members of management boards of companies in which the state has a controlling interest (i.e. companies in which the state holds stocks or shares representing a sufficient number of votes to preclude the adoption of resolutions concerning amendments to the articles of association or increases in or the reduction of stock capital or share capital, or concerning the dissolution, merger, division or transformation of a company at the general meeting of the company), and the requirement that these persons submit a declaration of economic interests, infringed their right to the inviolability of their private life.

The Court observed that the aim of requiring the disclosure of information concerning wages and the submission of declarations of economic interests – which was to guarantee the transparency of the use of state property and to prevent corruption – could be considered a legitimate aim of protecting public order and preventing criminal offences under Article 26 of the Constitution. The Court found, however, that a fair balance between the rights of individuals and the public interest had not been achieved. The Court considered the disclosure of information concerning wages to be a serious restriction on the right to inviolability of one's private life. Furthermore, the Court observed that the state as a shareholder also had other means of obtaining information about the economic activities of partly publicly owned companies, including information concerning the sums of money paid to members of the supervisory and management boards of such companies. There was no reason to disclose this information to the general public.

The information to be given in declarations of economic interests included information about an official's property, proprietary obligations and other circumstances which allowed the official's economic interests and financial situation to be determined. Information concerning income from abroad and property in joint ownership, as well as information about the official's spouse, parents and children also had to be declared. The Supreme Court found that such a serious interference with the right to inviolability of private life of the individuals concerned, and also of their family members, was not justified. There was no evidence that the submission of such declarations would promote the prevention of corruption or its exposure. The Supreme Court found the restriction to be disproportionate.

Therefore, the Supreme Court declared the relevant provisions of the Wages Act and Anti-Corruption Act unconstitutional and invalid.

Cross-references:

Decisions of the Supreme Court:

- III-4/A-2/94 of 12.01.1994, *Bulletin* 1994/1 [EST-1994-1-001];
- 3-4-1-1-99 of 17.03.1999, *Bulletin* 1999/1 [EST-1999-1-001];
- 3-4-1-1-01 of 08.02.2001, *Bulletin* 2001/1 [EST-2001-1-001];
- 3-4-1-2-01 of 05.03.2001, *Bulletin* 2001/1 [EST-2001-1-003].

Decisions of the European Court of Human Rights:

- *Niemietz v. Germany*, 16.12.1992, *Special Bulletin ECHR* [ECH-1992-S-007];
- *Rotaru v. Romania*, 04.05.2000.

Languages:

Estonian, English (translation by the Court).

Finland
Supreme Administrative Court

There was no relevant constitutional case-law during the reference period 1 September 2002 – 31 December 2002.

France
Constitutional Council

Important decisions

Identification: FRA-2002-3-007

a) France / **b)** Constitutional Council / **c)** / **d)** 26.09.2002 / **e)** / **f)** Decisions concerning the campaign accounts of the 16 candidates in the presidential election of 21 April and 5 May 2002 (16 decisions) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 12.10.2002, 16865 to 16882 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

4.9.8.1 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material – Financing.
4.9.8.2 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material – Campaign expenses.

Keywords of the alphabetical index:

Election, presidential, candidature, sponsorship / Election, electoral expenses, reimbursement / Election, campaign, accounts, approval, rejection.

Headnotes:

Participation in an election campaign by municipal employees, while on duty, breaches Article L. 52-8, which bans assistance by legal persons other than those of a political nature. A deliberate breach of those provisions constitutes a ground for rejecting campaign accounts and disqualifying a candidate from reimbursement of campaign expenses by the state.

The following constitute grounds for adjusting accounts, resulting in a reduction in the amount of the reimbursement a candidate may expect from the state: erroneous inclusion of personal items of expenditure in electoral expenses (excessive clothing expenses or travel or entertainment costs having no connection to the election); inclusion of the full cost of a durable good (e.g. a photocopier or a vehicle) whereas only wear and tear associated with its use, i.e. depreciation, should be taken into account.

Summary:

Candidates in presidential elections, each of whom must obtain at least 500 “supporting signatures”, are placed on a list drawn up by the Constitutional Council after counting the sponsorship forms received from approximately 40 000 duly authorised elected representatives. Those candidates must file campaign accounts, which are checked by the Constitutional Council after the election to ensure they are in order. These accounts must be submitted not more than two months after the election. Accounts should be kept by a financial representative appointed by the candidate. Candidates must not exceed a limit on expenses, which was set at 14 796 000 euros for the first round of the 2002 presidential election, and 19 764 000 euros for each candidate standing for election in the second round.

The penalty for failure to file accounts, exceeding the limit on expenses or rejection of accounts (by reason of a breach of the rules governing expenses, income or the balancing of accounts, or for omissions in or dishonest accounting) is not ineligibility to stand for election or cancellation of the election results, but disentitlement to reimbursement of all or part of campaign expenses by the state.

On 26 September 2002 the Constitutional Council accordingly gave its decisions concerning the accounts of each of the sixteen candidates in the presidential election. It rejected only one set of accounts (on the ground that a local authority had assisted the candidate's campaign), approved two outright and approved the thirteen others after adjustment.

Supplementary information:

A full file of documentary information on the presidential election of 21 April and 5 May 2002 can be found on the Constitutional Council's web-site at the following address: http://www.conseil-constitutionnel.fr/dossier/presidentielles/2002/index.htm.

Languages:

French.

Identification: FRA-2002-3-008

a) France / **b)** Constitutional Council / **c)** / **d)** 12.12.2002 / **e)** 2002-463 DC / **f)** Social Security Financing Act for 2003 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 24.12.2002, 21500 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

2.3.1 **Sources of Constitutional Law** – Techniques of review – Concept of manifest error in assessing evidence or exercising discretion.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
4.10.1 **Institutions** – Public finances – Principles.
4.10.7 **Institutions** – Public finances – Taxation.
5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
5.4.19 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

Keywords of the alphabetical index:

Social security, Financing Act, honesty / Health insurance, expenditure, forecasts and objectives.

Headnotes:

There was no manifest error of assessment in either the revenue forecasts or the sickness insurance expenditure objectives set out in the Social Security Financing Act for 2003.

Parliament does not infringe the principle of equality where it introduces a difference in treatment linked to a public-interest objective that it sets itself. This applies, for instance, to a duty levied on high-alcohol beer, where the aim is to ensure the protection of public health, as guaranteed under the eleventh paragraph of the Preamble to the Constitution, adopted on 27 October 1946. It is likewise in the case where a standard “responsibility rate” is fixed for medication, with a view to preserving the financial balance of the social security system, which ranks as a constitutional objective.

Summary:

More than sixty members of the National Assembly referred the Social Security Financing Act for 2003 to the Constitutional Council, alleging that the Act was dishonest (a complaint admissible before the Constitutional Council). It was argued that the revenue forecasts were based on inflated economic growth targets and that the sickness insurance expenditure objectives minimised growth in health expenses.

In view, *inter alia*, of the government's undertaking to introduce a bill of amendment if a significant discrepancy, in relation to the objectives set, came to light in the following spring, the Constitutional Council rejected the complaint.

Regarding complaints that the principle of equality was infringed, firstly, by a duty levied on high-alcohol beer and, secondly, through the introduction of a standard rate for reimbursement of medication, the Constitutional Council held that both measures had the aim of serving a public-interest objective and that the impugned differences in treatment were directly, tangibly and reasonably related to that objective.

Cross-references:

- Decision 2002-464 DC [FRA-2002-3-009].

Languages:

French.

Identification: FRA-2002-3-009

a) France / **b)** Constitutional Council / **c)** / **d)** 27.12.2002 / **e)** 2002-464 DC / **f)** Finance Act for 2003 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 31.12.2002, 22103 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

2.3.1 **Sources of Constitutional Law** – Techniques of review – Concept of manifest error in assessing evidence or exercising discretion.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
4.5.6.5 **Institutions** – Legislative bodies – Law-making procedure – Relations between houses.
4.10.1 **Institutions** – Public finances – Principles.
4.10.2 **Institutions** – Public finances – Budget.
4.10.7 **Institutions** – Public finances – Taxation.
5.2.2.1 **Fundamental Rights** – Equality – Criteria of distinction – Gender.

Keywords of the alphabetical index:

Budget, Act, balance, honesty / Tax, concessions, granting.

Headnotes:

The Budget Act cannot be deemed dishonest on the basis of either revenue forecasts for 2003, regard being had to the uncertainties inherent in such projections and the uncertain economic outlook for 2003, or ceilings on given categories of expenditure, which do not make it mandatory for each minister to spend the full amount of appropriations voted. Nonetheless, it is for the government to inform Parliament of any budgetary management measure and to introduce a bill amending the Budget Act, should the main factors affecting the budget's balance vary significantly from the forecasts.

Although Article 39 of the Constitution provides that draft budgets shall first be brought before the National Assembly, this does not mean that members of the Senate, who, like any member of parliament, are entitled to table amendments (Article 44 of the Constitution), cannot propose financial measures by way of amendments.

The principle of equality does not prevent Parliament from introducing, on public-interest grounds, incentives in the form of tax concessions. This applies to the tax reduction for employment of domestic staff, which has the dual impact of alleviating unemployment and combating illegal employment.

On the other hand, the principle of equality is infringed by a provision introducing a levy for removal from the public highway of waste resulting from the distribution of advertising leaflets or periodicals, since it provides for too many exceptions, that provision creates a difference in treatment having no direct link with parliament's objective of protecting the environment.

Summary:

The State Authorities Act *(loi organique)* of 1 August 2001 relating to Budget Acts, which completely revised the Government Order *(ordonnance)* of 1959, brought the following provision into force from January 2002: “Budget Acts shall set out in an honest manner all of the state's revenues and expenses. Their honesty shall be appraised in the light of the information available and the forecasts that can reasonably be based thereon”. It was in the light of such factors that the Constitutional Council considered allegations that a Budget Act was dishonest. Its review was necessarily limited in scope.

Certain provisions of the same State Authorities Act increased the government's obligation to inform parliament of both budgetary management measures and other measures, of any kind, which had the aim or effect of making appropriations unavailable.

A number of complaints related to the Senate's role in budgetary procedure, since the Constitution gave the National Assembly precedence regarding consideration of Budget Acts. These concerned the right of amendment in the Senate. Completely new financial provisions could not be introduced through a government amendment tabled in the Senate. However, individual members of the Senate could avail themselves in the normal way of their right to table amendments.

Lastly, the Constitutional Council was asked to consider, from the standpoint of equality in matters of taxation, certain measures entailing tax incentives. It reviewed those measures on the basis of their consistency with the public-interest objectives pursued.

Cross-references:

- Decision 2002-463 DC [FRA-2002-3-008].

Languages:

French.

Georgia
Constitutional Court

Important decisions

Identification: GEO-2002-3-003

a) Georgia / **b)** Constitutional Court / **c)** First Chamber / **d)** 18.04.2002 / **e)** 1/1/126, 129, 158 / **f)** Citizens of Georgia v. Parliament of Georgia / **g)** *Adamiani da Konstitutsia* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

3.11 **General Principles** – Vested and/or acquired rights.
5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.

Keywords of the alphabetical index:

Social guarantee / Electricity, supply, free / Veteran, armed forces / Police, officer, former.

Headnotes:

Every state has to make its best efforts to secure the social rights of its population. The state is obliged to protect the social rights of its citizens even when a certain service (e.g. electricity supply) is managed by private companies.

Summary:

The subject of the petition was the constitutionality of the Law on Changes and Amendments to Certain Legislative Acts of 24 December 1999 ("the Law").

The petitioners were veterans of the armed forces and former police officers. In accordance with the Law of 17 October 1995 on War Veterans and Veterans of the Armed Forces and the Law of 27 July 1993 on the Police, they enjoyed a number of social privileges. The above-mentioned laws established the state policy towards these veterans, providing for the allotment of funds from the state budget to secure the social rights of these persons. A number of amendments were made to the Law, which were unfavourable to the petitioners. Specifically, their right to free use of electricity was abolished. The petitioners asserted that they could not afford to pay for the electricity they consumed.

Therefore, in their opinion, the above-mentioned amendments violated their social rights and consequently Article 39 of the Constitution. Finally, they reduced their petition and requested to recognise as unconstitutional only the provisions of the disputed acts that were related to the electric power supply.

The representative of the respondent stated that the disputed provisions were adopted because of the need to reduce the expenditure of the state budget. This was an imperative and substantiated request of the executive power. Merely declaring the relevant legislative provisions invalid would not of itself suffice to restore the privileges existing previously. However, in general the respondent supported the idea of restoring the privileges.

The Court considered that the State had made an important decision when it introduced certain privileges for the veterans and former police officers. However, under the Law of 24 December 1999 their privileges were restricted and therefore their constitutional rights were violated. The Court indicated that although provisions regulating the social security guaranteed to the petitioners are not directly laid down in the Constitution, they are implied in its principles. Furthermore, according to Article 22 of the Universal Declaration of Human Rights, "Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality". According to Article 25.1 of the Declaration, "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control".

Considering the above-mentioned provisions, the Court considered that the amendments made to the Laws regulating privileges with respect to the supply of electric energy were not in compliance with Article 39 of the Constitution and the standards of international law. Every state has to make its best efforts to secure the social rights of its population. The State is obliged to protect the social rights of its citizens even when a given service (e.g. electricity supply) is managed by private companies.

Furthermore, according to Article 2 of the above-mentioned Law, “It is inadmissible to abolish or diminish the privileges, rights and assistance that were previously in force”. However, the above-mentioned amendments did diminish the rights of the veterans.

Considering all of the above, the Court allowed the petition and declared unconstitutional the disputed provisions of the Law on Changes and Amendments to Certain Legislative Acts of 24 December 1999, in that they breached Article 39 of the Constitution.

Languages:

Georgian, English (translation by the Court).

Identification: GEO-2002-3-004

a) Georgia / **b)** Constitutional Court / **c)** First Chamber / **d)** 30.12.2002 / **e)** 1/3/136 / **f)** Shalva Natelashvili v. the Parliament of Georgia, the President of Georgia and the Georgian National Energy Regulatory Commission / **g)** *Adamiani da Konstitutsia* (Official Gazette) / **h)**.

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
3.25 **General Principles** – Market economy.
4.10.8.1 **Institutions** – Public finances – State assets – Privatisation.
5.4 **Fundamental Rights** – Economic, social and cultural rights.

Keywords of the alphabetical index:

Consumer, protection / Electricity, privatisation / Tariff, calculation.

Headnotes:

The tariff policy should take into account the interests of all participants in the private sector. A fair tariff is the most essential condition for a normal and stable functioning of the private sector in the relevant field. In so far as a private sector in electric energy entails definite customers, it is inadmissible to set tariffs at a level that will exclude the customer from the sector. The disputed tariff puts the participants in transactions in the private sector in an obviously unequal position, and fails to meet the requirements of an equitable private sector.

Furthermore, using the number of rooms as a basis for the tariff does not serve the customers’ interests. Space (the number of rooms) cannot be considered to be a means of measuring the amount of energy consumed. It is quite possible that much more energy is consumed in a relatively small space; indeed, according to existing practice, the better part of energy is consumed for similar purposes in both one- and several-room flats.

Summary:

The petitioner (the leader of the opposition Labour party, petitioning in his individual capacity) considered that Resolution no. 12 of the National Energy Regulation Commission (GNERC) of 15 October 2002 was incompatible with Articles 30.2 and 39 of the Constitution, as it established extremely high rates of payment for electricity consumption. Due to the existing social conditions, it was impossible for people to pay these rates. The petitioner argued that the Commission had exceeded its authority and by adopting this Resolution had disregarded Georgian legislation and existing social conditions. The protection of consumers from monopolistic rates constituted one of the main principles of the Commission. In so far as the monopoly-holding company AES Telasi had not concluded a contract with consumers that determined the rights and obligations of the parties to the contract, consumers were unable to protect themselves from monopolistic rates. In 1997 the electricity rate was 4.5 tetri per kilowatt hour. By GNERC Resolution no. 4 of 19 August 1998 the rate was increased to 6.0 tetri. By Resolution no. 1 of 21 May 1999 it was increased to 8.3 tetri. With Resolution no. 8 of 31 August 2000 it reached 9 tetri. Resolution no. 12 of 14 November 2001 established a new rate of 12.4 tetri. The petitioner was concerned that further rate increases were expected, which was not denied by the general manager of AES Telasi.

Furthermore, the petitioner argued that the Rules of Payment of Electricity Charges According to Fixed Rates, approved by GNERC Resolution no. 15 of 31 December 2001, were also incompatible with Articles 30.2 and 39 of the Constitution. The petitioner considered that the population did not have to pay old debts. The fixed rate calculated according to the number of rooms put consumers in an extremely

serious position as on many occasions they did not have electricity. Furthermore, payment of electricity charges according to the number of rooms did not meet the consumers' interests. It was possible for more electricity to be consumed in a small space than in a large one. It was also possible that three or more people lived in a one-room apartment and one person lived in a three-room apartment. In this case more electricity would be consumed in the one room apartment than in the three-room apartment.

In his constitutional petition the petitioner also asserted that as a result of the illegal privatisation of electric power objects, namely 35-110 kilowatt power lines, his constitutional rights and the constitutional rights of the Georgian population had been violated. The petitioner noted that Article 3.1.i of the Constitution provided that the state was exclusively responsible for controlling and managing the unified Georgian system of energy. The violation of this constitutional norm, i.e. the privatisation of the energy system automatically resulted in a violation of the rights and freedoms provided for by Articles 30.2 and 39 of the Constitution. Therefore, the petitioner sought the recognition of the following provisions as unconstitutional:

1. Article 4.d of the Law of 13 December 1998 on the Privatisation of the State Property;
2. Decree no. 403 of the President of Georgia of 5 July 1998 on the Strategy of Privatisation of the Georgian Power System Companies;
3. Decree no. 58 of the President of Georgia of 14 February 1999 on the Georgian Electric Power Distribution Companies and the Rehabilitation-Development Action Program for Generators; and
4. Decree no. 568 of the President of Georgia on the Privatisation of Shares of the Joint-Stock Company AES Telasi owned by the State.

The Constitutional Court recalled that under Article 30.2 of the Constitution, the state is obliged to promote the development of free enterprise and competition, monopolistic activity is prohibited except in circumstances provided for by law, and the rights of consumers are protected by law. According to Article 39 of the Constitution, “The Constitution does not deny other universally recognised rights, freedoms and guarantees of the individual and citizen, which are not specifically stated but are the natural outcome of the principles contained within the Constitution”.

The Court found that the tariff set by the National Energy Regulatory Commission of Georgia (NERCG) did not meet the requirements of social public order. Its main purpose is to avoid the disregard of the fundamental principles of the private sector, which would put the customer in an extremely difficult situation. Considering the economic situation, the better part of the population cannot even afford to pay a lower tariff, much less the tariff in effect. In such a situation, the tariff currently in effect does not promote entrepreneurial activities (the private sector) or protection of the customers’ rights; on the contrary, it hinders them.

It was also noted that AES Telasi had not concluded service agreements with the customers at the time the judgment was delivered. It is inadmissible for a participant in a transaction in the private sector to have obligations without knowing the obligations of the other. Furthermore, the Court considered the method and principles used for setting tariffs inadequate; they should have optimally combined the interests of the entrepreneur and the customer.

With regard to the last request of the petitioner the Court pointed out two circumstances:

1. Pursuant to Article 89.1.f of the Constitution and Articles 19.1.e and 39.1 of the Organic Law of Georgia on the Constitutional Court of Georgia, when the constitutional petition is submitted by an individual citizen, the Constitutional Court is authorised to consider the conformity of the normative act only with the provisions laid down in the Chapter 2 of the Constitution. Since Article 3 falls within the first chapter of the Constitution, the Court could not consider the constitutionality of these disputed acts.

2. Moreover, the Court noted that Article 4 of the Law on the Privatisation of State Property provided the list of objects the privatisation of which was impermissible. According to Article 4.d of this Law, the privatisation of a 35-110 kilowatt power line was permissible. The power line was not an object of strategic importance. Instead, it was part of the distribution system of power companies, and as far as the relevant company was privatised, the power line was correspondingly privatised as well.

The first chamber of the Court partly allowed the constitutional petition and recognised as unconstitutional GNERC Resolution no. 12 of 15 October 2002 and the Rules of Payment of Electricity Charges According to Fixed Rates approved by GNERC Resolution no. 15 of 31 December 2001.

The judgment (which came into force from the moment of its public delivery at the sitting of the Court) requested the GNERC to fix new rates for electricity consumption before 1 March 2003.

The amounts paid for electricity consumption according to the current rates from the day of promulgation of this judgment till the adoption of the new rates would be recalculated based on the new rates.

Languages:

Georgian, English (translation by the Court).

Germany
Federal Constitutional Court

Summaries of important decisions of the reference period 1 September 2002 – 31 December 2002 will be published in the next edition, *Bulletin* 2003/1.

Hungary
Constitutional Court

Statistical data
1 September 2002 – 31 December 2002

- Decisions by the plenary Court published in the Official Gazette: 21
- Decisions by chambers published in the Official Gazette: 21
- Number of other decisions by the plenary Court: 38
- Number of other decisions by chambers: 19
- Number of other (procedural) orders: 28

Total number of decisions: 127

Important decisions

Identification: HUN-2002-3-004

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 04.09.2002 / **e)** 37/2002 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2002/123 / **h)**.

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
3.20 **General Principles** – Reasonableness.
3.22 **General Principles** – Prohibition of arbitrariness.
5.1.1.4.1 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Minors.
5.2.2.11 **Fundamental Rights** – Equality – Criteria of distinction – Sexual orientation.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.15 **Fundamental Rights** – Civil and political rights – Rights of victims of crime.
5.3.30 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Sexual orientation / Homosexual, offence, punishment / Child, protection.

Headnotes:

It is necessary that a criminal provision for differentiation between non-fundamental rights not be unjustified, that is, not be arbitrary, and not violate inalienable human dignity. Heterosexual and homosexual orientation equally belong to the essence of human dignity and, therefore, exceptional justification is required for them to be separated from one another and for the unequal treatment of the dignity of persons in question.

The duty of the state to protect the interest of children arising from Article 67.1 of the Constitution is not a strong enough constitutional justification where, in relation to criminal provisions protecting children's healthy sexual development from the influence of adults, protected age is determined differently on the basis of whether sexual activity takes place between persons of the same or the opposite sex.

Summary:

In the course of a petition for ex post facto norm review and review proceedings initiated by a court, the Constitutional Court struck down the sodomy laws in the Hungarian Criminal Code (HCC) which were aimed at sexual activity between members of the same sex (the offences of engaging in an unnatural sexual act with a person with consent of that person and engaging in an unnatural sexual act with a person without the consent of that person). By the terms of the Criminal Code, a person over 18 years of age engages in an unnatural sexual act where he or she has sexual contact with a 14-to-18 year old person of same sex with his or her consent. However, it is not a crime for persons of 14-18 years of age to engage in sexual activity with each another, be they members of the same or opposite sex.

A sexual act is any act of gross indecency, with the exception of sexual intercourse, aimed at causing sexual arousal or gratification [HCC 210/A. § (2)].

In dealing with the offence of engaging in a sexual act with a person without the consent of that person, the Hungarian Criminal Code uses the same considerations for the commission of the crime and its punishment, but separate legal provisions. The name of the offence is a “crime against pudency” (Article 198 of HCC) where the perpetrator and the victim are of the opposite sex, and it is called “engaging in an unnatural sexual act with a person without the consent of that person” (Article 200 of HCC) where the perpetrator and the victim are of the same sex. The legislature differentiates between the two offences in that a crime against pudency is

punishable only on the basis of private prosecution, whereas engaging in an unnatural sexual act without the consent of the other person is punishable independent of the plaintiff's wishes (Article 209 of HCC).

After a detailed analysis and comparison of legal history, the Constitutional Court examined the relevant decisions of European legal fora and it declared the provisions in question to be unconstitutional. According to the Constitutional Court, Article 199 of HCC is contrary to Article 70/A.1 of the Constitution on the ground that it is unjustifiable on the basis of objective facts, thereby making an arbitrary distinction based on sexual orientation of persons over 18 years of age who have engaged in sexual activity with persons from 14-to-18 years of age with their consent.

1. In the question of the constitutionality of Article 199 of HCC, the Constitutional Court did not base its decision on the so-called necessity test, but rather on the rationality test applied in the case of constitutional review of Article 203.3 under which “unnatural” sexual intercourse between siblings of the same sex was unlawful (*Bulletin* 1999/3 [HUN-1999-3-005]).

According to the Constitutional Court, in the case of Article 199 of HCC a comparable group is formed by those persons over the age of 18 who engage in a sexual act with younger persons who are over 14 years of age with their consent. Under Article 199 of HCC, distinction within this group is made, in a particular case, exclusively on the basis of the sexual orientation of the man or woman over the age of 18.

The legislature identifies the legal purpose of the offence in Article 199 of HCC as the promotion of the healthy sexual development of the young. On the basis of Article 67.1 of the Constitution, the state has a constitutional duty of protection towards all members of this age group to ensure their adequate physical, psychological and moral development, and their healthy sexual development also falls within that protection. One of the means that can be used to meet that legal responsibility of protection is criminal punishment. Under Article 199 of HCC, in the 14-to-18 year old age group, the mere sexual orientation of a young boy or girl in a particular case may form the basis of the state's interference by way of criminal law into his or her sexual activity with an adult person.

Heterosexual and homosexual orientations equally belong to the essence of human dignity and, therefore, exceptional justification is required for them to be separated from one another and for the unequal treatment of the dignity of the persons in question. Such justification is, for example, the differentiation of homosexual orientation in the case of the right to marry (*Bulletin* 1995/1 [HUN-1995-1-002]).

The possible differences in heterosexual and homosexual development are undoubtedly strengthened by a social environment showing a lack of understanding or rejection of a relationship. Differences can be pointed out in the personal development of teenage boys and girls, too. Historically these differences led to – among others – different treatment in criminal law of the sexual relationship between men and women in most European countries.

According to the Constitutional Court, these differences do not, however, constitute a reasonable and objective justification for the state to define protected age differently.

2. It was also because of a violation of Article 70/A.1 of the Constitution that the Constitutional Court found Article 200 of HCC unconstitutional. There is no reasonable justification for the legislature to treat the crime against pudency and that of engaging in an unnatural sexual act without the consent of the other person as different offences exclusively on the basis of the sexual orientation of the perpetrators, just as there is no reasonable justification for the different rule of making the possibility of punishing the offence subject to private prosecution.

As to the punishment and commission of the offence, the expressions “engaging in an unnatural sexual act without the consent of the other person” defined in Article 200.1 and “crime against pudency” defined in Article 198.1 of HCC are perfectly similar. In addition to the similar qualifying conditions and punishments, the differentiation of the criminal provisions between the two offences is based exclusively on the sexual orientation of the perpetrator. The Constitutional Court has seen no reasonable and objectively justifiable ground for such differentiation.

The Constitutional Court found another legal differentiation leading to discrimination, namely, that of the perpetrator of a crime against pudency being punishable only upon the victim's private prosecution, whereas the perpetrator (of the crime of engaging in an unnatural sexual act without the consent of the other person) is punishable regardless of the victim's wishes.

Making the punishment of forced sexual acts subject to private prosecution serves to protect the victim's privacy. It is the competence of the legislative power to decide whether a perpetrator's punishment at all costs or the protection of a victim's privacy is the more significant interest.

The legislative power decides on the basis of a weighing of the importance of public interests (the state's duty to punish crimes) and private interests (respect for the victim's private sphere). The victims of crimes against pudency and engaging in an unnatural sexual act without the consent of the other person form a homogeneous group. From the point of view of the victim, it is mere coincidence whether he or she falls victim to a heterosexual or homosexual perpetrator; from the point of view of the protection of his or her private sphere, the sexual preference of the perpetrator makes no difference. Within that homogeneous group of victims of sexual crimes, differentiation between victims is made arbitrarily, and, in that respect, unconstitutionally.

Moreover, the differences in the likelihood of punishment based upon private prosecution between the cases of crimes against pudency and engaging in an unnatural sexual act without the consent of the other person are also discriminatory from the point of view of the perpetrators. It is not justifiable to make a distinction between similarly punishable perpetrators of heterosexual and homosexual violence, which would deem it acceptable in the former case to consider the victim's wishes and deem it unacceptable in the latter case.

Supplementary information:

In reference to the striking down of the provision on engaging in an unnatural sexual act with a person with the consent of that person, Justice Németh stated the following in his concurring opinion: the parties taking part in the proceedings have not shown sufficient justification for a declaration of the constitutionality of the differentiation. Justice Kiss in another concurring opinion found the lack of objective grounds insufficient for the staking down of the provision, and emphasised that the state had to have an active role in the shaping of children's sexual orientation. In a separate opinion, Justice Strausz questioned the striking down of the provision, stating that state protection was justified, as “the pursuit of a sexual life different from the standard and biologically normal sexual orientation requires a serious decision, commitment, even the undertaking of social disadvantages”. Justice Vasadi found neither the provision on the offense of engaging in an unnatural sexual act with a person with consent of that person nor that on engaging in an unnatural sexual act with a person without the consent of that person to be unconstitutional. In her opinion, the fact that the making of the decision as to whether there was an objective reason for the differentiation between homosexual and heterosexual perpetrators did not fall within the duty of the Constitutional Court but rather within that of social and natural sciences, was ground for upholding the former provision. The different treatment in criminal law of the crime against pudency and that of engaging in an unnatural sexual act without the consent of the other person is explained by the fact that the latter is directed not only against sexual freedom, but also against sexual self-definition. The so-called “majority view” may, in turn, be the basis for judging a particular crime more strictly.

Cross-references:

- Decision no. 14/1995 of 13.03.1995, *Bulletin* 1995/1 [HUN-1995-1-002];
- Decision no. 20/1999 of 25.06.1999, *Bulletin* 1999/3 [HUN-1999-3-005].

Languages:

Hungarian.

Identification: HUN-2002-3-005

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 07.10.2002 / **e)** 569/B/1999 / **f)** / **g)** *Alkotmánybíróság Határozatai* (Official Digest), 2002/10 / **h)**.

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.
5.3.26 **Fundamental Rights** – Civil and political rights – Freedom of association.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of assembly.
5.4.11 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Prisoner, right of association / Detention, fundamental rights, limited action.

Headnotes:

As a result of striking a balance between the state's duty to punish the perpetrators of crimes and the freedom of association, the Court stated that according to the Constitution, detained persons may exercise their right to freedom of association as long as this does not upset or directly endanger the purpose of the execution of penalties. When making that decision, the legislature has to consider the purpose of the conviction, and by what degrees the convict's sentence is to be served, and also, whether or not within that degree the convicts' exercise of the freedom of association endangers the order of the penal institution. The legislature did not exclude the possibility of forming associations in general (not even within a penal institution), and as a result whether or not restriction of the freedom of association is necessary and proportionate in any particular case can only be decided with knowledge of all circumstances.

Summary:

In a petition presented to the Constitutional Court, the petitioner sought a declaration of unconstitutionality regarding Article 36.5.f of the Legislative decree on the enforcement/execution of penalties (Legislative decree), stating that that provision – read in conjunction with Article 36.6.b of the Legislative decree – makes it impossible for persons detained in any penal institution to enjoy their right to freedom of association as set out in Article 63 of the Constitution, as well as their right to form or join organisations (trade unions) in order to protect their economic or social interests as set out in Article 70/C of the Constitution.

According to Article 36.5.f of the Legislative decree, the rights of convicted citizens (prisoners) are amended as follows: their freedom of association, right to education, and the duty of national defence are restricted as a result of detention.

On the basis of Article 36.6 of the Legislative decree, during the time of detention the prisoner's freedom of assembly is suspended.

The Constitutional Court has placed freedom of association among the rights of expression. Freedom of association means that everyone has the right to found an association with a cultural, corporate, political or any other purpose, or to take part in the activity of any such group of persons. This freedom also includes the right to found associations, the right to join them and also not to join them. Freedom of association is a basic right, which, like any other basic right, is not unlimited.

Persons detained in a penal institution are in a special situation. They are also entitled to basic rights; however, because of the detention and its legal purpose, legal provisions limit the convicts' right to enjoy their basic rights. In Decision no. 13/2001 (*Bulletin* 2001/2 [HUN-2001-2-005]) the Constitutional Court has dealt with the limitation on the exercise of certain basic rights resulting from detention in a penal institution. According to this decision there are certain constitutional basic rights that cannot be affected by the detention of convicts, such as, for example, the right to life and human dignity. As a result of the nature of detention, the full assertion of the right to personal freedom, free movement and free choice of residence are excluded. Liberty of opinion is, however, listed among basic rights that still exist during detention, but its exercise and manifestation is defined by the fact of execution of the penalty and its circumstances.

The constitutionality of limiting the exercise of basic rights has been considered by the Constitutional Court on the basis of the so-called necessity test. In the present case the Constitutional Court had to strike a balance between the state's power to deal successfully with criminal matters and the freedom of association of prisoners. Concerning the fundamental rights of prisoners, the Constitutional Court finds that it is important that detention may be used to justify only that restriction on the exercise of basic rights having an interest closely related to the execution of the penalty itself. A legal provision relating to constitutional rights of convicts that hinders a convict in his or her exercise of any basic right as a result of detention can only be considered to be constitutional if it serves legitimate penal purposes. In the instant case, the Constitutional Court stated that for the sake of the effective enforcement of the state's criminal laws and for the maintenance of order in the execution of penalties, the restriction of the exercise of freedom of association may be necessary in certain cases.

It is the state's constitutional duty to call the perpetrators of crimes to account. Part of this duty is to enforce penalties in the case of persons sentenced by the court to be held in detention. In executing a penalty the state can only restrict the exercise of the freedom of association to the extent that it is done for the sake of serving the legal purpose of the penalty. The purpose of detention is to promote the resocialisation of the convict by enforcing a legal sanction, and to help a convict avoid committing another crime in the future. Belonging to an association can play an important role in the convicts' keeping in contact with the outside world; after their detention it can help them to reintegrate into society; and, belonging to a smaller community can also promote the preservation of personality and self-esteem.

According to Article 36.5.f of the Legislative decree, freedom of association is limited. This legal norm provides that the proportionality of a legal restriction is not subject to review because the issue of whether the restriction of a convict's freedom of association is proportionate to the aim pursued in a particular case is decided by legal practice. The Legislative decree does not deal with the extent to which the convicts' freedom of association is restricted, which associations may still be formed and which associations prisoners may join.

In general, it can be stated that a restriction of the right of association is not a proportionate one where the convicts are forbidden to form associations that are reconcilable with the purpose of the penalty and do not endanger order and security. It is especially important in a case where the convicts wish to form a corporate association for the protection of their interests as safeguarded by the Legislative decree.

The convicts' exercise of freedom of association is, of course, restricted in the sense that they cannot take part in the everyday life of associations outside the penal institution. This restriction arises from the fact that during the time of detention the convicts' right to free movement and the free choice of residence is "suspended". As a result of the purpose served by the execution of the penalty, the detained person may not leave the penal institution at any time. However, this restriction does not mean that the convicts cannot be members of an association outside the penal institution, or cannot take part in the association's activity at all. The convicts may keep their membership of an association obtained before the time of detention, or may become members of a new association where this is reconcilable with the execution of penalties. The convicts' membership with an association outside the penal institution is restricted only to the extent that they cannot take part in the association's activity in person, or they may do so only when they may leave the penal institution according to the general rules of the execution of penalties. During that leave the convicts may even form an association, as in this case when their participation in a meeting founding an association did not meet with any difficulty.

The exercise of the freedom of association is possible not only in the case of associations outside the penal institution, but also inside the penal institution where the convicts wish to form associations, for example corporate associations. Article 70/C.1 of the Constitution provides for a special type of freedom of association, that is, associations for the safeguarding of social and economic interests and the right to form and join them. Since the basic right guaranteed by Article 70/C of the Constitution is the expression of the general freedom of association in relation to associations safeguarding interests (trade unions), in the interpretation of that constitutional provision, statements concerning the essence of the freedom of association are normative: the right to form corporate associations, that is, the exercise of this right – together with the freedom of association – is restricted by the fact that a convict is held in detention. In reference to this right it may therefore be said that the convicts' exercise of the right to form associations is restricted only to the extent that is justified by the purpose of the execution of the penalty; and that this right may be restricted only to the extent that is necessary and unavoidable for the maintenance of the order in the penal institution.

Cross-references:

- Decision no. 13/2001 of 14.05.2001, *Bulletin* 2001/2 [HUN-2001-2-005].

Languages:

Hungarian.

Identification: HUN-2002-3-006

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 03.12.2002 / **e)** 65/2002 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2002/149 / **h)**.

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
5.3.30.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.

Keywords of the alphabetical index:

Data, processing, control, right / Data, medical / Sexual habit.

Headnotes:

In accordance with Act LXIII of 1992 on the protection of personal data and the publication of public data,

data concerning sexual habits constitute sensitive data. This means that the purposes of the processing of that data must be clearly outlined and defined, and the processing of such of data must be unavoidably necessary.

Summary:

The second sentence of Article 3.a of the Act XLVII of 1997 on the processing and protection of medical data (the Act) classifies in certain cases data concerning sexual habits as medical data. Article 4.1 of the Act enables medical staff to use this data for the sake of:

a. the preservation of health,
b. effective medical treatment,
c. keeping track of medical conditions, and
d. in the interest of public health and the country's epidemiological situation.

The processing of such data is not compulsory according to Article 12.1 of the Act; however, Article 13 makes it compulsory in certain cases.

The petitioner argued that the basic right to privacy and the protection of personal data set out in Article 59.1 of the Constitution were violated by the second sentence of Article 3.a of the Act.

The Constitutional Court found – after briefly reiterating its leading decisions in the field of data protection – that data concerning sexual habits constituted sensitive data, according to Act LXIII of 1992 on the protection of personal data and the publication of public data. That, in the opinion of the Constitutional Court, meant that the purposes of the processing of that data had to be clearly outlined and defined, and the processing of such data had to be unavoidably necessary.

Noting the purposes stated above of Article 4.1 of the Act, the Constitutional Court stated that the processing of data to serve the purposes (the medical treatment of the person in question) stated in a. to c. was not appropriate, as the effectiveness of medical treatment could be better served by the knowledge of data concerning the medical condition of the person in question than by the knowledge of data concerning his or her sexual habits. The public health and epidemiological interest stated in point d. of Article 4.1 may in theory justify the processing of sensitive data concerning sexual habits; however, the purpose of the processing of data has to be unambiguously and clearly outlined. The Constitutional Court stated that, in its opinion, not even those public interests met the requirements. Furthermore, under the Act, the processing of data concerning sexual habits for the purposes stated above is not only possible in relation to patients with sexual illnesses, but also in general.

According to the majority opinion of the Constitutional Court, the second sentence of the impugned Article 3.a of the Act provided for a definition that was broader than necessary for the processing of data concerning sexual habits. The processing of such data without a clearly defined purpose constitutes an unnecessary limitation of the basic right to the protection of personal data, and it is, therefore, unconstitutional. For this reason, the Constitutional Court struck down the sentence in question.

Supplementary information:

In a concurring opinion, Chief Justice Németh stated that in the majority decision the purposes constituting the unconstitutionality and listed in (a-d) of Article 4.1 of the Act are unambiguous, precise and the processing of data is adequately tied to a purpose. That being so, it should not have formed the basis for a declaration of unconstitutionality; however, the expression "sexual habits" in the second sentence of Article 3.1.a is ambiguous, can be interpreted in various ways, and, therefore, the resulting disproportion violates the right to the protection of privacy set out in Article 59 of the Constitution.

In a dissenting opinion, Justice Harmathy stated that he did not agree with the finding of unconstitutionality in the majority decision. In his opinion, the second sentence of Article 3.a of the Act providing that in certain cases the data concerning sexual habits constituted medical data was not, in itself, directly and constitutionally related to Article 59.1 of the Constitution protecting privacy. However, Article 13.a of the Act was relevant from the point of view of the violation of privacy, which provides for the cases where the medical data of a patient – and with it and under Article 3.a of the Act his or her privacy concerning his or her sexual habits – had to be handled. In Harmathy's opinion, among the cases listed in Article 13 in the cases of f. concerning petty offences and administrative authority procedures, the obligation as to the processing of private information concerning sexual habits as medical data constituted an unconstitutional restriction of the fundamental right to privacy. For that reason, the Constitutional Court should have extended its examination to this provision and, in that respect, it should have made a declaration of unconstitutionality. Furthermore, Justice Harmathy drew attention to the difference between the protection of privacy and the protection of personal data set out in Article 59.1 of the Constitution, and cited the European Convention on Human Rights and several judgments of the European Court of Human Rights in support.

In a dissenting opinion, Justice Vasadi stated that she did not agree with the finding of unconstitutionality. In her opinion the information concerning sexual habits is sensitive data according to the Act, and in this way is entitled to protection similar to that of any other sensitive data. The purposes of the processing of data are clearly defined and legally valid in the Act. The revealing of such information is voluntary, and the petition did not challenge Article 13 by also showing cases where the revealing of such information was compulsory, and not even the majority decision found it justified to extend the scope of constitutional review to cover it (see the dissenting opinion of J Harmathy). In that respect, the petition against the second sentence of Article 3.a of the Act should have been rejected.

Cross-references:

- Decision no. 29/1994 of 20.05.1994, *Bulletin* 1994/2 [HUN-1994-2-011].

Languages:

Hungarian.

Israel
High Court of Justice

Important decisions

Identification: ISR-2002-3-004

a) Israel / **b)** High Court of Justice / **c)** Panel / **d)** 18.12.2002 / **e)** H.C. 5591/02 / **f)** Yassin and others v. Commander of Kziot Military Camp – Kziot Detention Facility / **g)** not yet published / **h)**.

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
4.18 **Institutions** – State of emergency and emergency powers.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.5.1.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Arrest.
5.3.13.21 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Presumption of innocence.

Keywords of the alphabetical index:

Detention, administrative, conditions / Terrorism, military operation.

Headnotes:

According to international law and Israeli domestic law, persons held in administrative detention – even during a massive military operation against terror facilities and infrastructures – are entitled to at least a minimum standard of detention conditions. That minimum standard is derived from the concept of human dignity and the presumption of innocence.

Summary:

The Supreme Court ruled on a petition presented against the conditions of detention of those persons detained in the area of Judea and Samaria during the Operation “Protective Wall” and were held in the Kziot Camp in Israeli territory.

As a result of great terrorist activity in both that area and in Israel, the government decided to initiate a large-scale military operation against the Palestinian terrorist infrastructure in Judea and Samaria. Many arrests were made within the framework of this operation. The arrested persons were initially brought to temporary detention facilities. After their initial screening, some of the detainees were moved to the Ofer Camp, a detention facility in that area. As a result of overcrowding in that camp, it was decided to move some of the detainees to the detention facility at Kziot in the South of Israel. Most of those held there are administrative detainees.

A petition against the detention conditions in the Kziot Camp was presented to the Court. The petitioners claimed that the conditions of detention were unsuitable and did not satisfy the minimum standards set by Israeli and international law. The respondents (the head of the facility and the Minister of Defence) argued that, though the conditions in the facility were not comfortable, they were reasonable with respect to the reality in Israel. During the first days of the operation of the facility, which had been opened urgently and without warning, there had been deficiencies. However, with time, the facility underwent many improvements. The conditions, as they were at the time the petition was before the Court, did not substantially differ from conditions under which soldiers lived who carried out detention operations and security functions, or the facilities in which many IDF solders lived. Those standards were in accordance with the minimum standards set by both Israeli and international law.

The Court held that it should be recognised that the persons concerned are administrative detainees, who have not been brought to trial or convicted. They should enjoy the presumption of innocence. The Court emphasised that although administrative detention denies the detainees their liberty, it does not strip them of their humanity. The balance between an individual's rights on the one hand and national security on the other, as well as the fundamental idea of human dignity, the principles of the State of Israel as a Jewish and democratic state, and the requirements of international law, all require that detainees be treated humanely and in recognition of their human dignity. These minimum requirements, which must be met during detention, emerge from both Israeli Law (Basic Law: Human Dignity and Liberty, as well as other statutes and Supreme Court decisions) and the directives of international law, to which Israel is subject.

Against this background, the Court held that, on the basis of the affidavits filed with it, it appeared that the opening of the detention facility in Kziot had been done hastily and without preparation. Moreover, at first, detention conditions did not meet minimum standards. The Court noted that this deviation was unjustified. Operation “Protective Wall” was planned in advance. It should have been obvious that one of the consequences of the operation would be a large number of detainees. It was therefore necessary to prepare in advance detention facilities that would satisfy minimum standards. However, the Court added, the detention conditions were eventually improved, such that the conditions provided there now satisfy the required minimum standards and, in some cases, exceed them.

For the reasons stated above, the petition was dismissed.

Languages:

Hebrew.

Identification: ISR-2002-3-005

a) Israel / **b)** High Court of Justice / **c)** Panel / **d)** 30.12.2002 / **e)** H.C. 7622/02 / **f)** Zonenstein v. The Chief Military Advocate / **g)** not yet published / **h)**.

Keywords of the systematic thesaurus:

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.
4.6.2 **Institutions** – Executive bodies – Powers.
4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
5.2.2.9 **Fundamental Rights** – Equality – Criteria of distinction – Political opinions or affiliation.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
5.3.25 **Fundamental Rights** – Civil and political rights – National service.

Keywords of the alphabetical index:

Conscientious objection, selective, recognition / Military service, dismissal.

Headnotes:

Conscientious objection is a part of every person's right to dignity. Conscientious objection should be recognised even in cases where the objection concerns a specific military operation ("Selective Objection"). The right to object should be balanced against other rights. However, in the current situation in Israel, there is no cause to intervene in the Minister of Security's discretion and decision not to dismiss "selective Objectors" from military service .

Summary:

The Supreme Court dismissed the petition of eight reserve soldiers, which was presented against a decision of the Chief Military Advocate upholding their convictions under disciplinary jurisdiction for refusing to serve in the occupied territories.

The petitioners' main claim before the Supreme Court was that they enjoyed the basic right of freedom of conscience, which encompassed the right of "selective conscientious objection". They claimed the nature of military service in the occupied territories compelled them to engage in operations, which went directly against their consciences. The respondent claimed that the conscientious argument was actually a disguise for an ideological-political stance. The respondent further claimed that selective conscientious objection did not fall under the protected freedom of conscience. It should not have been recognised under the circumstances in Israel at the time, as it would have resulted, with probable certainty, in substantial harm to the security of the state. In addition, the respondent claimed, the army was not required to consider selective conscientious objections, since they were the subject of an ideological-political conflict.

The Court held that the Minister of Defence certainly had the primary authority to exempt a person from active or reserve military duty for conscientious reasons. That authority, which also exists in many other countries, is based on the balance between two competing considerations. The first is the freedom of conscience every person enjoys. It stems from the Declaration of Independence, the democratic character of the state, Basic Law: Human Dignity and Liberty and the recognition of the values of humanism and tolerance. The second consideration is the injustice in exempting part of the population from a general duty imposed on all, especially since this duty entails risking one's life and as the exemption might jeopardise national security, result in unjust administrative effects and discrimination.

How should selective conscientious objection, the objection to carry arms and fight in a particular war or military activity, as opposed to "complete" conscientious objection, the objection to participate in war in any form, be treated? The Court ruled that there is no reason to intervene in the Minister of Defence's decision not to grant exemptions from active or reserve duty due to selective objection. The Court held that in using his discretion while making decisions regarding exemptions based on selective objection, the Minister balances different considerations. Both the selective objector and the "complete" objector are motivated by real conscientious reasons and are, in that sense, similar. However, there are several distinct characteristics of selective conscientious objection – unlike "complete" conscientious objection – which tip the balance against the recognition of selective conscientious objection. In this respect, the Court noted that the weight of the considerations against the recognition of conscientious objection is much heavier in selective conscientious objection than in "complete" conscientious objection. The Court added that the seriousness of an exemption from a general duty is apparent. The phenomenon of selective conscientious objection is by its nature wider than that of "complete" objection, and it raises in all its intensity the sensation of discrimination between "one blood to another". Moreover, the Court was of the opinion that in a society as pluralistic as Israel, the recognition of selective conscientious objection might loosen the links that hold us together as a people and turn the people's army into an army of peoples, made up of different units, each having its own spheres in which it can act conscientiously, and others in which it cannot. The Court noted that in a polarised society this consideration carries considerable weight. Furthermore, the ability to distinguish between those who claim conscientious objection in good faith and those who oppose the government's or parliament's policy is more difficult in selective objection. This is because there is a fine line between opposing a certain state policy and a conscientious objection to carry out that policy. Sometimes that line is extremely difficult to draw. Moreover, the ability to run an administrative system that would operate in a non-discriminatory and biased manner is extremely complicated with selective conscientious objection.

On the basis of those considerations, the Court held that due to the different character of selective conscientious objection, it requires a balance to be struck that is different from that of complete conscientious objection. Within that balance there is no reason for intervening with the Minister of Defence's use of his discretion. This would be true even if the Court were to adopt the balance of probability ("near certainty") of significant harm to

public interest test, which has not been decided. Not granting exemptions for selective conscientious objections during this time of division in Israel is a balance that a reasonable Minister of Defence who acts proportionately was entitled to strike.

The Court also noted that at this time when Israeli society is polarised and split, and has groups and individuals with strong conscientious beliefs, it is difficult to determine the legitimate bounds of conscientious objection. The line between selective conscientious objection and a public policy perception is fine. Moreover, the considerations of state security and the integrity of Israeli society must be considered against the arguments of conscience and belief. The State of Israel has been engaged in fighting throughout its existence, conducted according to the perception of national security by the different governments. The questions raised by the fight against terrorism are at the crux of an intense political debate. Were this debate to be conducted within the army, it might result in serious and substantial harm. Therefore, taking into account the wide discretion given to the Minister of Defence set out in the Basic Law: The Army, there is no cause for intervening in the Minister's decision that gives overwhelming weight to security needs in the face of real concern for the expected harm to military mechanisms, were selective conscientious objection to be recognised.

Languages:

Hebrew.

Italy
Constitutional Court

Important decisions

Identification: ITA-2002-3-004

a) Italy / **b)** Constitutional Court / **c)** / **d)** 24.10.2002 / **e)** 455/2002 / **f)** / **g)** *Gazzetta Ufficiale*, *Prima Serie Speciale* (Official Gazette), 20.11.2002 / **h)** CODICES (Italian).

Keywords of the systematic thesaurus:

1.3.4.2 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between State authorities.
3.4 **General Principles** – Separation of powers.
4.4.1.3 **Institutions** – Head of State – Powers – Relations with judicial bodies.
4.4.4.1.1.1 **Institutions** – Head of State – Status – Liability – Legal liability – Immunity.

Keywords of the alphabetical index:

Head of State, declarations, liability / President, declaration, spontaneous.

Headnotes:

The dispute between the former national President and the judicial authorities over the President's actions to uphold the presidential prerogatives in respect of declarations which he made while in office and on which successive rulings were made at the expiry thereof, has a constitutional character in that it raises the issue of determining the respective functions, set forth in the Constitution, of the national President and of the judiciary.

The Court of Cassation, as a State power, has the capacity to hear the proceedings brought in order to rule on this dispute.

Summary:

The former President of the Republic, Mr Francesco Cossiga, brought before the Constitutional Court a dispute over the distribution of powers between State authorities, requesting the setting aside two Court of

Cassation judgments delivered in two civil actions originating in claims for damages brought against him by Senators Flamigni and Onorato. The claimants asserted that certain declarations by Mr Cossiga while in presidential office had been insulting and defamatory to them, and had brought judicial proceedings before the Rome District Court, which found against Mr Cossiga. The judgments were subsequently reviewed on appeal and set aside by the Court of Cassation, with referral back to the courts below.

In the two relevant decisions, the Court of Cassation made the following statements regarding the characteristics of the office and status of the President of the Republic in the Italian institutional system:

a. the President of the Republic, aside from the functions set out in Article 87 of the Constitution, has a power of "spontaneous declaration" *(esternazione)*, that is to make statements related to his office;
b. the freedom from liability (whether criminal, civil or administrative) enjoyed by the President of the Republic for acts carried out in the discharge of his office (apart from acts of high treason and attack on the Constitution) prescribed in Article 90 of the Constitution, can only be relied on where an operative link exists between the alleged offence and the President's powers: spontaneous declaration is thus authorised and does not carry any criminal, civil or administrative liability if strictly associated with the presidential functions (it is consequently an immunity *ratione materiae*, not *ratione personae*);
c. it is for the ordinary court to determine the existence of the "operative link", subject to the right of the President of the Republic, where he considers himself to have been wrongfully accused, to bring the dispute with the judiciary before the Constitutional Court.

Mr Cossiga considered to have the necessary capacity, as a "State power", to bring before the Constitutional Court a dispute on the basis of Article 134 of the Constitution since, though no longer President of the Republic, he had been tried while in office for acts committed during the time he had been office. As he further pointed out, former Presidents are appointed life Senators and therefore retain a position of prime importance from an institutional standpoint. Regarding the subject-matter of the dispute, Mr Cossiga considered that there was matter for litigation: the judiciary had exceeded its powers by prosecuting him for his "spontaneous declarations" which, being strictly associated with his official functions, could not carry any liability and must be covered by the immunity granted to the Head of State by Article 90 of the Constitution.

The applicant argued that the President of the Republic must be able to "express spontaneously" his point of view wherever he considered this vital to the performance of his functions, first and foremost that of ensuring fulfilment of the constitutional principles, without incurring legal prosecution for doing so. It is moreover increasingly difficult today, since "spontaneous declarations" are usually in oral form, to distinguish between statements made personally and declarations pertaining to one's office. In the case of the President of the Republic, any attempt to distinguish between the public and the private sphere is futile, as the President is vested with that office permanently and not at set dates and times.

In the instant case, the statements made by Mr Cossiga about Senators Flamigni and Onorato were not of a private nature but constituted reactions by the holder of the Republic's highest office to the attacks made upon the Republic in areas of great institutional importance, such as Italy's position in the system of international relations at the time of the Gulf War and Mr Cossiga's links with freemasonry. In these instances, the guarantee set out in Article 90 of the Constitution ought to cover the President's statements, as does Article 68 of the Constitution for parliamentarians in the exercise of their mandate.

In the applicant's contention, presidential immunity shields the holder of this office from any court proceedings that might interfere with the office-bearer's freedom of action or subjugate him to another State power such as the judicial authority. Liability in ordinary law, which continues to apply (and is of a lesser degree, having regard to the difficulty of singling out from the President's acts as a whole those completely unconnected with his office) may be put forward after expiry of the term of office.

The Constitutional Court was thus called upon to rule on the admissibility of the case, determining the presence of the subjective and objective conditions that must be fulfilled for admissibility. The Court held that in the instant case both types of condition were met and concluded that as the question of the admissibility of such a case had arisen for the first time, it was desirable to allow the proceedings on the merits of the case to take their course so that the question of admissibility could be re-discussed once the *inter partes* proceedings have begun.

Languages:

Italian.

Kazakhstan
Constitutional Council

Supplementary information on the activity of the Constitutional Council Kazakh to be added to the information published in the *Bulletin* 2002/2

The Constitutional Council examined Article 26 of the Law "On rehabilitation of victims of mass political repressions". According to the applicant, the above-mentioned provision did not allow compensation to victims, who were rehabilitated after the Law came into force. The Constitutional Council by its decision ordered the Supreme Court of the Republic to adopt an interpretation of the Law.

Upon the request of a group of members of parliament, the Constitutional Council gave an official interpretation of the constitutional provisions on deputies' immunity.

The Constitutional Council also examined for compatibility with the Constitution the international agreement, to be ratified by the parliament, entitled "On co-operation between the Government of the Republic of Kazakhstan and the Government of the Federal Republic of Germany as regards the support of the Kazakh citizens of German origin".

In 2002 the legislation on the Constitutional Council and its composition remained unchanged.

Latvia
Constitutional Court

Statistical data
1 October 2002 – 31 December 2002

Number of judgments: 6

Important decisions

Identification: LAT-2002-3-007

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 21.10.2002 / **e)** 2002-05-010306 / **f)** On the Compliance of Articles 4.3 and 10.5 of the Law "On Excise Tax" as well as the Compliance of Item 24 (in the Part on Customs Tariffs to be Applied to Vehicles) of the Cabinet of Ministers 10 October 2000, Regulations no. 349 "The Process of Implementation of the Customs Procedure – Temporary Admission" with Articles 89, 91 and 105 of the Republic of Latvia Constitution *(Satversme)*; with the Second Part of Article 2 of the Istanbul Convention of 26 June 1990 "On Temporary Admission" as well as Articles 7 and 9 (the Second Part) of Appendix C to the Convention and with Standards 30 and 34 of Appendix F to the 18 May 1973 Kyoto International Convention on the Simplification and Harmonising of Customs Procedures / **g)** *Latvijas Vestnesis* (Official Gazette), 153, 23.10.2002 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

4.10.7 **Institutions** – Public finances – Taxation.
5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Importation, temporary, custom rate / Importation, foreigner, resident.

Headnotes:

In accordance with the Istanbul Convention, Latvia may freely determine whether to grant residents of Latvia relief from import duties for the temporary use of a car belonging to a foreign person. The Istanbul

Convention does not require Latvia to grant relief from customs duties to residents temporarily importing goods into the territory in which they reside.

In accordance with the relevant Cabinet of Ministers Regulations, where a foreign person brings into Latvian territory his own, hired or rented car for his private and non-commercial use for six months, he or she need not pay customs duties, whereas where a Latvian resident brings into Latvian territory his own, hired or rented car for his private and non-commercial use for six months, he or she must pay customs duties.

Summary:

The State Human Rights Bureau challenged the compliance of provisions of the Law on Excise Tax and the provisions of the Cabinet of Ministers Regulations with Articles 89, 91 and 105 of the Constitution *(Satversme)*, with the Istanbul Convention On Temporary Admission providing that temporary admission be granted full conditional relief from import duties and taxes, and with the standards of the Kyoto International Convention on the Simplification and Harmonising of Customs Procedures providing that relief be granted to a means of transport for private use where it is owned by non-residents or hired by them and where it enters the territory together with, before or after the travellers.

In preliminary proceedings the applicant requested that Court dismiss the claim in part as to the compliance of the challenged norms with the Constitution.

Upon examination of the facts it was found that as set down in the Law On Excise Tax, taxpayers are any natural or legal persons or groups of natural or legal persons importing automobiles or motorcycles for a period of time, and that taxpayers had to pay excise tax on automobiles and motorcycles that were imported temporarily. The relevant Cabinet of Ministers Regulations provided that a Latvian natural person importing a vehicle belonging to a foreign person for a period of time for private use and non-commercial purposes may be granted partial relief from the payment of customs duties.

It was also found that the Kyoto Convention referred to travellers – non-residents, i.e. to persons, who entered a state in which they do not reside for a temporary stay. The Convention did not refer to travellers – residents, who were returning, i.e. – to persons, who after a temporary stay in a foreign country, return to the territory of the state in which they live permanently. Moreover, the Kyoto Convention is to be applied in cases where a non-resident, i.e. a person, who comes to a country in which he or she does not reside permanently and uses the means of transport for private purposes.

Furthermore, it was found that the field of regulation of the Cabinet of Ministers Regulations differed from that of both the Istanbul Convention and the Kyoto Convention. The Cabinet of Ministers Regulations concern any person of Latvia (in the interpretation of the Istanbul and Kyoto Conventions – a resident of Latvia), that temporarily imports for private use any means of transport belonging to a foreign person, whereas the norms of the Istanbul and Kyoto Conventions concern only those cases where the means of transport is temporarily brought into Latvia by a non-resident, a foreign person or legal entity.

The relief, set out in the second part of Article 2 of the Istanbul Convention, namely, full relief from payment of customs for temporary admission of any means of transport for private use, are to be applied where the following criteria, enumerated in Article 5.b of the Annex C, are met:

1. the means of transport is brought in by a foreign person;
2. it belongs to a foreign person; and
3. the means of transport is registered in a territory other than that of temporary admission.

The Court held that the impugned norms of the Law On Excise Tax and of the Cabinet of Ministers Regulations complied with the provisions of the Istanbul and Kyoto Conventions.

Languages:

Latvian, English (translation by the Court).

Identification: LAT-2002-3-008

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 22.10.2002 / **e)** 2002-04-03 / **f)** On the Compliance of Items 59.1.6, 66 and 68 of the “Rules on the Internal Order of Investigation Prisons” with Articles 89, 95 and 111 of the Constitution *(Satversme)* / **g)** *Latvijas Vestnesis* (Official Gazette), 154, 24.10.2002 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.
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.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.4.19 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

Keywords of the alphabetical index:

Prison, investigation prison / Detention, conditions / Prison, solitary confinement cell / Council of Europe, Recommendation R (87) 3.

Headnotes:

The Rules on the Internal Order of Investigation Prisons provide that imprisoned and convicted persons who have grossly or systematically violated the prison regime may be placed in a punishment or disciplinary cell for a period of up to 15 days. The Rules also provide that the detainee may take with him or her only things for personal hygiene, as well as any notes and documents concerning the criminal case. However, things for personal hygiene do not include such things as glasses, vitamins and fresh clothing, or paper, pens and books.

The Court considered that the conditions under which a prisoner was held in a solitary confinement cell and the fact that the prisoner could not bring an appeal against the punishment violated that person's constitutionally guaranteed rights.

Summary:

The applicants in the constitutional claim, two detainees, challenged the compliance of provisions of The Rules on the Internal Order of Investigation Prisons with Articles 89, 95 and 111 of the Constitution (duty of the State to recognise and protect fundamental human rights, prohibition of cruel or degrading treatment, protection of human health respectively), as well as with Article 3 ECHR, and with Item 37 of the Regulations on European Penitentiaries (Council of Europe Recommendation no. R (87) 3).

In accordance with the prison regime set up by the Rules on the Internal Order of Investigation Prisons, which were confirmed by the Chief of the Department of the Places of Confinement on 9 May 2001, prisoners may be placed in punishment or disciplinary cells. Usually the maximum term for the placement into the punishment cell – 15 days – is used.

The Court noted that violation of fundamental rights was not found as to the type of the punishment – "placement into a solitary confinement cell (the punishment cell)", but rather as to the conditions under which a prisoner was held in the cell, and as to whether or not the punishment was well grounded. At issue was also the fact that the prisoner placed into the punishment cell could not bring an appeal against the punishment. Moreover, the Court had to examine whether the restrictions to fundamental rights, as set out in the Rules, were in accordance with the law, were justified with the legitimate aim and were proportionate.

The Court stated that fundamental rights may be subject to restrictions in circumstances provided for by law in order to protect the rights of other people, the democratic structure of the state and public safety, welfare and morals. But the restrictions incorporated into the impugned norms were not determined by law or on the basis of the law. The impugned Rules have been passed on the basis of the Minister of Justice's Transitional Provisions of Order; therefore, they were not determined by law.

The Court held that the impugned items of the Rules on the Internal Order of Investigation Prisons did not comply with Articles 64, 89 and 111 of the Constitution. The impugned items were declared null and void as of the day of the publishing of the decision.

Languages:

Latvian, English (translation by the Court).

Identification: LAT-2002-3-009

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 26.11.2002 / **e)** 2002-09-01 / **f)** On the conformity of Article 19.2 (the fourth part) of the Law on the Constitutional Court with Articles 91 and 92 of the Republic of Latvia Constitution *(Satversme)* / **g)** *Latvijas Vestnesis* (Official Gazette), 173, 27.11.2002 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

1.2.2.1 **Constitutional Justice** – Types of claim – Claim by a private body or individual – Natural person.
1.3.2.3 **Constitutional Justice** – Jurisdiction – Type of review – Abstract review.
1.4.3.1 **Constitutional Justice** – Procedure – Time limits for instituting proceedings – Ordinary time limit.
3.10 **General Principles** – Certainty of the law.
5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Constitutional Court, individual complaint, admissibility / Abstract review, time limit.

Headnotes:

The purpose of a time limit for introducing a constitutional complaint is to maintain reasonable legal clarity and ensure that cases are reviewed in reasonable time. Limitations of this kind have also been internationally acknowledged as means of guaranteeing legal certainty and stability in a state. Moreover, the time-limit for introducing that claim as set out in the impugned norm does not bar a person from protecting his or her rights and lawful interests in the Constitutional Court; it only determines conditions that should be fulfilled in order to protect one's rights.

A natural person, unlike a legal person, has the right to make an application to the Constitutional Court only when his or her fundamental rights have been violated. Therefore, the different approach to the issue of a time limit for bringing a constitutional claim as set out in the Law on the Constitutional Court Law cannot be considered to be discriminatory.

Summary:

The applicant challenged the compliance of the Article 19.2 of the Law on the Constitutional Court with Articles 91 and 92 of the Constitution on the ground that the impugned norm created inequality before the law and before the courts. The applicant argued that a limitation period of six months for bringing a constitutional claim did not comply with the principle of proportionality and did not guarantee legal stability. Besides, the restriction did not apply to any other public bodies or officials entitled to make an application to the Constitutional Court.

Initially, the Law on the Constitutional Court provided that persons were not entitled to bring applications to the Constitutional Court. The Parliament amended that Law with a new Article 19.2 on Constitutional Claims (applications). That amendment entitled also natural persons to make an application to the Court where their fundamental rights, as laid down by the Constitution, have been violated by the application of a normative act that does not comply with a legal norm of paramount legal force. The Amendment to the Law concerning the right of a person to bring a constitutional claim came into force on 1 July 2001.

In order to be able to exercise that right, a person has to fulfil four conditions. First, the person must submit a claim only after exhausting the ordinary legal remedies, where such remedies exist. Second, the decision of the last institution must not have taken effect before 1 January 2001. Third, the claim must be brought no later than six months from the day the decision of the last institution came into effect. Fourth, the right to bring a constitutional claim may only be exercised from 1 July 2001 onwards. According to the applicant, the rules set out in Article 19.2 of the Law formed the basis of a Constitutional Court decision which was unfavourable to the applicant.

Upon examination of the facts, it was found that the introduction of a time limit for bringing a constitutional claim follows from the nature of the constitutional claim itself and also exists in other states, as well as being provided for by international documents on human rights, for example, in Article 35 ECHR. The purpose of the term is to maintain reasonable legal clarity and ensure that cases are reviewed in reasonable time. Limitations of this kind have also been internationally acknowledged as means of guaranteeing legal certainty and stability in a state. Moreover, the time limit for introducing the claim as set out in the impugned norm does not bar a person from protecting his or her rights and lawful interests in the Constitutional Court; it only determines conditions that should be fulfilled in order to protect one's rights.

Moreover, regarding the right to fair trial (Article 92 of the Constitution), it was held that the right is not absolute. Even though a person must not be deprived of the right in essence, that right may be restricted. Any restrictions must be determined by law or based on the law, must be justified with a legitimate aim and be proportionate with that aim. It was found that those conditions were fulfilled with respect to Article 19.2 of the Law.

Regarding the statement that the impugned norm discriminates against the applicant when compared to other legal subjects, that may exercise the above-mentioned right without any time limit, it was found that the principle of equality (Article 91 of the Constitution) was not applicable in the particular case. The subjects who have no set time limit in which to make applications are entitled to make

applications for abstract control, and the model of abstract control does not provide for a fixed period of time for bringing the application. The constitutional claim is, in turn, the means of protection for a particular person.

The Court found that the fourth part of Article 19.2 of the Law on the Constitutional Court complied with Articles 91 and 92 of the Constitution.

Languages:

Latvian, English (translation by the Court).

Liechtenstein
State Council

Statistical data
1 January 2002 – 31 December 2002

Number of decisions: 97

There was no relevant constitutional case-law during the reference period 1 September 2002 – 31 December 2002.

Lithuania
Constitutional Court

Statistical data
1 September 2002 – 31 December 2002

Number of decisions: 3

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

The main content of the cases was the following:
- on the right to private life: 2
- on the right to social security: 1

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

Important decisions

Identification: LTU-2002-3-014

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 19.09.2002 / **e)** 34/2000-28/01 / **f)** On the inviolability of telecommunications and on the right to property / **g)** *Valstybės Žinios* (Official Gazette), 93-4000, 25.09.2002 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.30.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.
5.3.33.2 **Fundamental Rights** – Civil and political rights – Inviolability of communications – Telephonic communications.
5.3.36.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Telecommunications, duty to provide / Information, obligation to provide.

Headnotes:

In accordance with the Constitution, a procedure for collecting information about the private life of an individual must be established by law. The law must provide that such information may be collected only upon a reasoned court decision.

A statutory provision laying down an on-going duty for non-state owned entities to use their property to fulfil state functions which should be financed by state funds is contrary to the Constitution in so far as it violates the constitutionally guaranteed inviolability and protection of ownership.

That a law or another legislative act is in conflict with the Constitution does not necessarily mean that it is contrary to Article 1 of the Constitution which provides that the State of Lithuania shall be democratic. It is for the Constitutional Court to assess, in each case, whether or not the statutory provision found to be in conflict with the Constitution also violates Article 1 of the Constitution.

Summary:

On 3 October 2000 the petitioner – a group of members of Parliament (*Seimas)* – applied to the Constitutional Court asking it to determine whether Article 1.2 of the Law amending Article 27 of the Law on Telecommunications complied with Article 22 of the Constitution, and whether Articles 1.2 and 2.1 of that law complied with Article 23 of the Constitution. On 8 May 2001 another petitioner – a group members of Parliament – applied to the Constitutional Court asking it determine whether the provisions listed below complied with the principles of an open, just, civil society and the rule of law entrenched in the Preamble and Articles 1, 22 and 23 of the Constitution: the provision in Article 1 of the Law amending Article 27 of the Law on Telecommunications which reads “telecommunications operators must [...] under the procedure set up by the Government, supply information free of charge as determined by the Government to entities of operational activities, inquiring and investigating bodies for the prevention, investigation and solving of crimes relating to subjects of operational activities, other subscribers and their telecommunications which are necessary for investigation”; the provision in Article 48 of the Code of Criminal Procedure (CCP) which reads “carrying out the preparatory investigations, the investigator shall independently adopt all decisions regarding the investigations and carrying out of investigative acts, except for where the law provides that the authorisation of the prosecutor is necessary”; the provision of Article 75 of the CCP which states “the interrogator, investigator, prosecutor [...] shall have

the right, in the cases for which he or she is responsible, [...] to demand that enterprises, establishments, organisations and citizens furnish items and documents which might be important in the case and to demand that audits be carried out. These requirements must be carried out by all citizens, enterprises, establishments and organisations"; and, the provision of Paragraph 3.4 of the Law on Operational Activities which reads "that, under the procedure set up by the Government, the entities of operational activities are entitled to use the information which enterprises, establishments and organisations possess".

The petitioners expressed doubts that some controversial norms were in keeping with the requirement of the Constitution that information concerning the private life of an individual may be collected only upon a reasoned court decision, and submitted that some norms in question violated Article 23 of the Constitution, the principles of an open, just, civil society and the rule of law, as well as Article 1 of the Constitution.

The Constitutional Court emphasised that the legislature had the duty to establish by law a procedure for collecting information about an individual's private life, the law must provide that such information may be collected upon a reasoned court decision only, and that a statutory provision may not be enacted creating an on-going duty for non-state owned entities to use their property to fulfil the state functions which ought to be financed by state funds.

The Constitutional Court recalled that under the Constitution, restriction of constitutional rights and freedoms of the individual was permitted where the following conditions are met: this is done by law; the restrictions are necessary in a democratic society in to protect the rights and freedoms of other persons and the values entrenched in the Constitution as well as constitutionally important objectives; the restrictions do not deny the nature and essence of the rights and freedoms; and, the constitutional principle of proportionality is followed.

It was also noted that according to Article 22.3 and 22.4 of the Constitution, "Information concerning the private life of an individual may be collected only upon a reasoned court decision and in accordance with the law. The law and the Court shall protect individuals from arbitrary or unlawful interference in their private or family life and from encroachment upon their honour and dignity".

The Constitutional Court ruled that Article 27.2 of the Law on Telecommunications (wording of 11 July 2000) as well as Article 57.4 of the same Law (wording of 5 July 2002) conflicted with Article 22 of the Constitution and the constitutional principle of the rule of law to the extent that the articles of that Law imposed a duty on telecommunications operators and providers of telecommunications services to trace telecommunications events and their participants more than would have been required to ensure the economic activity of the telecommunications operators, thereby interfering with an individual's private life, and also to the extent that they granted the Government powers both to determine the scope of information to be furnished about a person's private life and the procedure as to how such information is to be furnished.

The Court also noted that the inviolability and protection of ownership entrenched in Article 23 of the Constitution meant that the owner had the right to possess, use and dispose of the property that belonged to him, and the right to demand that other persons not violate his rights, while the state had a duty to defend and safeguard ownership from unlawful encroachment.

Therefore, Article 27.2 of the Law on Telecommunications (wording of 11 July 2000) as well as Article 57.4 of that Law (wording of 5 July 2002) to the extent that a duty is imposed on telecommunications operators and providers of telecommunications services that are non-state owned to ensure and constantly maintain at their own expense, the technical ability required to monitor the content of information transmitted via telecommunications networks, but not required for the economic activity of the telecommunications operators, conflict with Article 23 of the Constitution and the constitutional principle of the rule of law. Article 2.1 of the Law amending Article 27 of the Law on Telecommunications conflicts to the extent mentioned above with Article 23 of the Constitution and the constitutional principle of the rule of law.

Article 7.3.4 of the Law on Operational Activities (wording of 22 May 1997) and Article 7.3.6 of that Law (wording of 20 June 2002) to the extent that they provide that information about a person's private life be collected under the procedure laid down by the Government or the institutions empowered by the Government, both conflict with the constitutional principle of the rule of law. The former article also conflicts with Article 22 of the Constitution.

Article 48.1 of the CCP (wording of 26 June 1961) to the extent that it grants powers to an investigator to adopt decisions regarding investigative acts interfering with a person's private life without a reasoned court decision conflicts with Article 22 of the Constitution and the constitutional principle of the rule of law.

The provision “the interrogator, investigator, prosecutor [...] shall have the right, in the cases for which he or she is responsible, [...] to demand that enterprises, establishments, organisations and citizens furnish items and documents which might be important in a case and to demand that audits be carried out and that “those requirements must be carried out by all citizens, enterprises, establishments and organisations” of Article 75 of the CCP (wording of 29 January 1975) complies with the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2002-3-015

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 23.10.2002 / **e)** 36/2000 / **f)** On the Law on the Provision of Information to the Public / **g)** *Valstybės Žinios* (Official Gazette), 104-4675, 31.10.2002 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.16 **General Principles** – Proportionality.
5.2 **Fundamental Rights** – Equality.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.
5.3.30 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Information, right to seek, obtain and disseminate / Informant, identity, disclosure / Public person, media information.

Headnotes:

When establishing by law the guarantees of freedom of the media, the legislature must heed the imperative of an open, just and harmonious civil society entrenched in the Constitution, as well as the constitutional principle of the rule of law, and must not violate the rights and freedoms of others.

By laying down the right of a producer and an imparter, an owner of the producer and/or imparter of public information and of a journalist, not to disclose a source of information even in cases where, in a democratic state upon a decision of a court, disclosure of the source is necessary because of vitally important or other interests of society which are of the utmost importance, or to ensure that the constitutional rights and freedoms of other persons are protected, and that justice be administered, Article 8 of the Law on the Provision of Information to the Public violates Articles 25.3, 25.4 and 29 of the Constitution, and is contrary to the principle of the rule of law, since non-disclosure of the source might cause much graver effects than its disclosure.

The media may inform the public about the private life of persons involved in social and political activities without their consent in so far as the personal characteristics, behaviour and particular circumstances of that person’s private life may be of importance to public affairs. A person involved in social and political activities cannot but anticipate greater attention being paid to him by the public and the media.

Summary:

The petitioner – a group of members of the Parliament of Lithuania *(Seimas)* – applied to the Constitutional Court requesting that it determine whether Article 8 of the Law on the Provision of Information to the Public (the Law) complied with Article 29.1 of the Constitution and whether Article 14.3 of that law complied with Article 22 of the Constitution.

The petitioner emphasised that Article 8 of the Law consolidated the right of a producer and an imparter, an owner of the producer and/or imparter of public information and a journalist to keep, without reservations, secret the source of information and not disclose it. The petitioner doubted whether the norm laying down such an absolute right complied with Article 29.1 of the Constitution, since similar rights in other laws are restricted by the reservation that the data, information or other facts must be disclosed where the court, prosecutor's office and other state institutions of law and order demand so in connection with existing criminal or civil cases under their jurisdiction or powers, and in other cases provided for by law. In the opinion of the petitioner, Article 8 of the Law placed the producer, imparter and other entities named therein in a privileged position; they were granted more rights than other natural and legal persons.

The petitioner argued that Article 14.3 of the Law gave very vague reasons for which the principle of the inviolability of an individual's private life, entrenched in Article 22 of the Constitution, may be disregarded when publishing information about a person's private life; those reasons were subject to various interpretations.

The Constitutional Court recalled that the constitutional freedom to seek, obtain and impart information and ideas unhindered was one of the fundamentals of an open, just, and harmonious civil society and law-governed state. That freedom is an important pre-condition for the implementation of various rights and freedoms of the person which are entrenched in the Constitution, since most constitutional rights and freedoms of a person can only be adequately implemented if that person has the right to seek, obtain and impart information unhindered. The Constitution guarantees and safeguards the interest of the public to be informed.

Freedom of the media stems from Article 25 of the Constitution and the other provisions of the Constitution consolidating and guaranteeing an individual's freedom to seek, obtain and impart information. Under the Constitution, the legislature has a duty to establish by law the guarantees of the freedom of the media.

The Constitutional Court held that Article 8 of the Law on the Provision of Information to the Public conflicted with Article 25.3 and 25.4 of the Constitution and the constitutional principle of the rule of law in so far as Article 8 laid down that the producer and imparter, the owner of the producer and/or imparter of public information and the journalist had the right to keep secret and not disclose the source even in cases where in a democratic state, upon a decision of the court, disclosure of the source is necessary because of vitally important or other interests of society which are of utmost importance, to ensure that the constitutional rights and freedoms of persons be protected, and that justice be administered.

Article 22 of the Constitution consolidates the inviolability of the private life of an individual. The right of an individual to privacy encompasses the inviolability of private, family and home life, of honour and reputation, physical and psychological inviolability of persons, secrecy of personal facts and prohibition to publicise any confidential information obtained, etc.

The right to the inviolability of private life is not absolute. Under the Constitution, constitutional rights and freedoms of the individual may be restricted where the following conditions are met: this is done by law; the restrictions are necessary in a democratic society in an attempt to protect the rights and freedoms of other persons and the values entrenched in the Constitution as well as constitutionally important objectives; the restrictions do not deny the nature and essence of the rights and freedoms; and, the constitutional principle of proportionality is followed.

The Constitutional Court emphasised that the personal characteristics, behaviour and particular circumstances of the private life of persons participating in social and political activities may be of importance to public affairs. The interest of the public to know more about those persons than about others is constitutionally grounded. The said interest would not be ensured if in every particular case, publishing the information of public importance about the private life of a person participating in social and political activities required the consent of that person. The Court ruled that Article 14.3 of the Law on the Provision of Information to the Public complied with the Constitution.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2002-3-016

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 25.11.2002 / **e)** 41/2000 / **f)** On pensions / **g)** *Valstybės Žinios* (Official Gazette), 113-5057, 27.11.2002 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.
5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.
5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.
5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.
5.4.16 **Fundamental Rights** – Economic, social and cultural rights – Right to a pension.

Keywords of the alphabetical index:

Diplomat, spouse, pension / Pension, principle of solidarity / Pension, reduction.

Headnotes:

Social security measures express the idea of public solidarity and help a person protect himself or herself from social risks. However, in a civil society the principle of solidarity does not deny personal responsibility for one's own destiny, and therefore the legal regulation of social assistance must be such so as to create preconditions and incentives for every member of society to take care of his own welfare and not rely solely on social assistance guaranteed by the state.

The person meeting the conditions established by law to receive an old age pension and has been granted and paid that pension, has the right to continued payment of that amount, i.e. the right to ownership. Under Article 23 of the Constitution, that right must be protected and safeguarded.

A statutory provision under which a person cannot freely choose an occupation or business because if upon doing so, he or she would not continue to be paid the old age pension already granted and paid, or part thereof, must be considered as a restriction of the right to choose freely an occupation or business.

Summary:

The petitioner – the Higher Administrative Court – applied to the Constitutional Court requesting that the Court determine whether Article 69.2 of the Law on the Diplomatic Service, Article 4.1.9 (wording of 16 March 2000) of the Law on State Social Insurance and Article 2.1.5 (wording of 16 December 1999) of the Law on State Social Insurance Pensions to the extent that they set up an obligatory state social pension insurance for spouses of diplomats to cover the period which they spent abroad in order to reside with the diplomat who was serving at a Lithuanian diplomatic mission or consular institution, were in compliance with Article 52 of the Constitution.

According to the petitioner, Article 23.2 (wording of 21 December 1994) of the Law on State Social Insurance Pensions provided that pensioners who are under 65 years of age and met the requirement of the obligatory state social pensions insurance period and had an insured income which did not exceed 1.5 minimum monthly salaries were to be paid full state social insurance old age pension. If their insured income exceeded 1.5 minimum monthly salaries, they were to be paid only the basic part of the state social insurance old age pension. The petitioner noted that it meant that the pensioners referred to in the law had the right to choose whether:

1. to refuse the insured income and receive the full old age pension (the basic pension and the complementary part);
2. to work and to receive the insured income for work or in other manner, which is greater than 1.5 minimum monthly salaries, while refusing the complementary part of the old age pension; or,
3. to work and receive the insured income which does not exceed 1.5 minimum monthly salaries, as well as the full old age pension. In cases of the latter, a right is acquired to recalculation of the old age pension in the future.

In the petitioner’s opinion, a diplomat’s spouse receiving an old age pension and residing abroad with the diplomat serving at a Lithuanian diplomatic mission or consular institution did not have a choice. Article 69.2 of the Law on the Diplomatic Service provides that a diplomat’s spouse shall be insured by the state social pensions insurance on an obligatory basis to cover the period which the diplomat's spouse spent abroad in order to reside with the diplomat working at a Lithuanian diplomatic mission or consular institution. Contributions for such persons are paid from the State Budget, while their amount is calculated on the basis of 0.5 of the amount of the diplomat's official salary. The law provides for one exception only, i.e. the aforementioned requirement is not applied upon the diplomat's spouse becoming employed. No exceptions are provided for pensioners or their individual categories. The petitioner noted that analogous provisions providing for obligatory state social insurance pensions insurance of a diplomat’s spouse are entrenched in Article 4.1.9 (wording of 16 March 2000) of the Law on State Social Insurance and Article 2.1.5 (wording of 16 December 1999) of the Law on State Social Insurance Pensions. Upon obligatory insurance of a diplomat’s spouse, where the income from which the contributions are calculated exceeds 1.5 minimum monthly salaries, the complementary part of the old age pension is not paid. The wishes of the diplomat’s spouse are not taken into consideration.

Article 52 of the Constitution provides: “The State shall guarantee the right of citizens to old age and disability pension, as well as to social assistance in the event of unemployment, sickness, widowhood, loss of an income earner, and other cases provided by law.”

Social assistance is entrenched in the Constitution in various ways. The pensions and social assistance indicated in Article 52 are one form of social security. The state, as the organisation of the whole society, has an obligation to take are of its members in the event of old age, disability, unemployment, sickness, widowhood, loss of an income earner and other cases provided for by the Constitution and laws.

The principle of solidarity is closely related with the constitutional principle of the rule of law. The latter is a universal principle upon which the entire Lithuanian legal system and the Constitution itself are based. The content of the principle of the rule of law is revealed in various provisions of the Constitution and is to be construed inseparably from the striving for an open, just, and harmonious civil society, which is proclaimed in the Preamble to the Constitution. Along with other requirements, the principle of the rule of law, which is entrenched in the Constitution, also implies that one must ensure human rights and freedoms, that all institutions implementing state authority and other state institutions must act on the basis of law and in compliance with law, that the Constitution has supreme legal power and that all legal acts must conform with the Constitution. Inseparable elements of the principle of the rule of law are protection of legitimate expectations, legal certainty and legal security. In a case where protection of legitimate expectations, legal certainty and legal security are not ensured, the confidence of the person in the state and law would not be ensured.

The Constitutional Court emphasised that, following the constitutional principle of the rule of law, if a person had been granted and paid an old age pension, then that pension must be continued to be paid, i.e. its payment cannot be stopped or its amount cannot be reduced. Under the Constitution, a statutory provision cannot be enacted under which a person granted and paid an old age pension would be restricted, because of this, in his free choice of an occupation or a business.

The Constitutional Court ruled that all impugned norms were in accordance with the Constitution.

The Constitutional Court *ex officio* found that Article 23.2 (wording of 21 December 1994) of the Law on State Social Insurance Pensions, Article 23 (wording of 21 December 2000) of the same Law and Article 23 (wording of 8 May 2001) of the same Law were in compliance with the Constitution and ruled that all those norms conflicted with Article 23 of the Constitution, the provision of Article 48.1 of the Constitution stating that every person may freely choose an occupation or business, Article 52 of the Constitution, and the constitutional principle of the rule of law.

Languages:

Lithuanian, English (translation by the Court).

Moldova
Constitutional Court

Important decisions

Identification: MDA-2002-3-003

a) Moldova / **b)** Constitutional Court / **c)** / **d)** 19.09.2002 / **e)** 34 / **f)** Review of constitutionality of certain provisions of Law no. 544-XIII of 20 July 1995 on the Status of Judges / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

4.5.2 **Institutions** – Legislative bodies – Powers.
4.7.4.1.6 **Institutions** – Judicial bodies – Organisation – Members – Status.
4.10.7 **Institutions** – Public finances – Taxation.
5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.

Keywords of the alphabetical index:

Judge, independence, remuneration / Judge, pension / Judge, monthly life allowance / Taxation.

Headnotes:

The right of a judge who has resigned to receive a monthly life allowance is a legal right, and the taxation and non-taxation of this income fall within the legislator's competence. Taxes are expressly and unilaterally established by the authorised state bodies and are conceived as an act of authority, as an obligation, which derives from the very concept of the state fiscal policy. For the tax payer, taxation represents a restrictive measure imposed by law on his or her source of income.

Thus, enactments governing the taxation of judges' monthly life allowance do not violate a judge's right to social assistance and protection and do not contravene the principle of the independence of the judiciary.

Summary:

The case was referred to the Constitutional Court by the Supreme Court of Justice pursuant to a complaint alleging that the provisions of Article 26.6 of Law no. 544-XIII on the Status of Judges as amended by Law no. 1592-XIII of 27 February 1998 and Article III.3 of the Final and Transitional Provisions of Law no. 544-XIII run counter to the norms enshrined in Articles 16.2, 47.1, 116.1 and 121.2 of the Constitution. The complainant held that the provisions of Article 26.6 of Law no. 544-XIII, according to which the monthly life allowance is subject to taxation, put judges who had resigned and who are paid a monthly life allowance on an unequal footing vis-à-vis the judges who are paid a tax-free pension.

In the complaint it was also emphasised that when calculating the monthly life allowance or the pension of judges who retired prior to 26 October 1995, by virtue of Article III.3 of the Final and Transitional Provisions of Law no. 544-XIII, account was taken not of the average wage of the judge filling the post, but only of the ordinary wage attached to the office held by the judge, the extra payment for the judge's qualifications (where applicable) and the length of service of the judge, which put judges who retired before the entry into force of the law in question on an unequal footing vis-à-vis those who retired after the entry into force of the law.

During the plenary session of the Constitutional Court, the representative of the complainant sought to modify the subject of the complaint, soliciting the constitutional review only of certain provisions of Article 26.6 of Law no. 544-XIII, and the withdrawal of proceedings for the constitutional review of Article III.3 of the Final and Transitional Provisions of Law no. 544-XIII.

According to Article 26.6 of Law no. 544-XIII in its initial wording, a judge who has resigned shall be entitled to a monthly life allowance of between 80 and 100 percent of the average wage paid for the office that was held by the judge, taking into account the length of service in the office of judge. This allowance shall reflect wage indexation and is not subject to taxation.

The Court recalled that the Constitution expressly provides that all citizens are equal before the law and public authorities, regardless of their race, nationality, ethnic origin, language, religion, sex, opinion, political allegiance, property or social origin (Article 16.2 of the Constitution).

Pursuant to Articles 116 and 121 of the Constitution, judges are independent, impartial and irremovable under the law. The salary and other rights of judges are established by law.

Pursuant to Article III.3 of the Final and Transitional Provisions of Law no. 544-XIII, judges who have retired from office, regardless of the date of their retirement, fall within the ambit of Articles 26 and 32 of the Law. Each retired judge is paid a monthly life allowance from the state budget, taking into account the ordinary wage attached to the office held by the judge, the extra payment for the judge's qualifications (where applicable) and the length of service of the judge.

From the above-mentioned provisions it appears that for judges having resigned or retired after the entry into force of the Law on the Status of Judges (26 October 1995), the calculation of the monthly life allowance or the pension takes into account the wage attached to the judge's office and all extra payments foreseen by Article 28.1 of Law no. 544-XIII on the Status of Judges, while for judges who retired prior to 26 October 1995, the calculation of their pension or monthly life allowance, according to Article III.3 of the Final and Transitional Provisions of the Law on the Status of Judges, in its initial wording, takes into account only the ordinary wage attached to the office held by the judge, the extra payment for the judge's qualifications (where applicable) and the length of service of the judge. Thus, these provisions contravened Articles 16.2, 47.1 and 116.1 of the Constitution, which meant that the case had to be referred to the Constitutional Court.

On 6 June 2002 the Parliament adopted Law no. 1099-XV, by which it amended Law no. 544-XIII, including certain provisions of Article III.3 of the Final and Transitional Provisions of the Law, which were challenged in the present complaint. Article III was supplemented with a new paragraph 4, which provides that the individuals mentioned in paragraph 3 are paid a monthly life allowance or pension from the state budget, taking into account the average wage of judges serving in the respective office and the extra payments provided for by Article 28.1 of the Law.

Thus, with the adoption of Law no. 1099-XV and the amendment of Article III.3 of the Final and Transitional Provisions of Law no. 544-XIII, the claim of unconstitutionality of the provision at issue had been settled. On this ground the Constitutional Court, pursuant to the provisions of Article 60.d of the Code of Constitutional Jurisdiction, ruled that the proceedings should be suspended in this part.

Exercising its power of constitutional jurisdiction, the Court found that the provisions of Article 26.6 of Law no. 544-XIII of 20 July 1995 on the Status of Judges as amended by Law no. 429-XV of 27 July 2001 were in conformity with the Constitution, and ceased the proceedings for the review of constitutionality over certain provisions of Article III.3 of the Final and Transitional Provisions of Law no. 544-XIII of 20 July 1995 on the Status of Judges.

Dissenting opinion

Justice Mircea Iuga delivered a partly dissenting opinion in the present case. He found that, according to Law no. 1592-XIII of 27 February 1998 on the amendment and supplementing of certain legislative acts, the phrase “not liable to taxation” had been excluded from Article 26.6 of Law no. 544-XIII on the Status of Judges.

The Constitutional Court judgment of 19 September 2002 found the provisions of Article 26.6 of Law no. 544-XIII in the above wording to be in conformity with the Constitution.

Justice Iuga considered the Court's judgment to be unfounded in this part.

Languages:

Romanian, Russian.

Identification: MDA-2002-3-004

a) Moldova / **b)** Constitutional Court / **c)** / **d)** 21.11.2002 / **e)** 46 / **f)** Review of the constitutionality of certain provisions of Law no. 793-XIV of 10 February 2000 on Administrative Justice along with the amendments and supplements introduced by Law no. 726-XV of 7 December 2001 and Law no. 833-XV of 7 February 2002 / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

4.6.9 **Institutions** – Executive bodies – The civil service.
4.7.9 **Institutions** – Judicial bodies – Administrative courts.

5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.13.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to a hearing.

Keywords of the alphabetical index:

Public authority, abuse of power / Measure, administrative, judicial review / Administrative act, nature / Ruling, final, appeal.

Headnotes:

Administrative law as a body of law is aimed at the protection of fundamental rights and freedoms against abuses of power committed by central and local public authorities and their representatives.

Regulations providing that administrative measures of an individual nature, adopted by parliament, the head of the state or the government and related to the election, appointment and dismissal from the civil service of certain categories of state officials cannot be subject to constitutional review on notification by the subjects empowered with this right, do not violate the right of access to justice, guaranteed by Article 20 of the Constitution, inasmuch as these regulations derive from the necessity to carry out certain exclusively political actions, which do not involve questions of labour law.

Denying the parties in legal proceedings the right to lodge a last appeal for the annulment of final and binding rulings issued by the courts is in conformity with Article 20 of the Constitution, as such actions constitute extraordinary avenues of appeal, this right being assigned to the Prosecutor General or his deputies, who can lodge such an appeal with the Supreme Court only at the request of the parties.

Enactments governing the application of disciplinary sanctions to members of the military and their dismissal from office represent administrative acts similar to the administrative acts adopted by the other public administrative services, have a civil nature and may be submitted for consideration by the administrative courts.

Summary:

Law no. 793-XIV on Administrative Justice regulates the protection of fundamental rights and freedoms against abuses of power committed by organs of the central and local public authorities and their representatives.

A group of members of Parliament and an Ombudsman questioned the constitutionality of certain amendments introduced in this law.

The Court recalled that the Constitution expressly provides that all citizens are equal before the law and public authorities, regardless of their race, nationality, ethnic origin, language, religion, sex, opinion, political allegiance, property or social origin (Article 16.2 of the Constitution).

Article 20 of the Constitution provides that any individual person has the right to obtain effective protection from the competent courts of law for actions infringing on his or her legitimate rights, freedoms and interests.

The Court found that the Constitution was not breached by the regulations according to which state officials acting as spokespersons for a particular political or public interest are deprived of the right to challenge in the administrative courts the administrative acts adopted by parliament, the head of state or the government related to their election, appointment and dismissal from the civil service.

Nor was the Constitution breached by regulations that excluded from judicial review laws and decrees of a normative nature issued by the President of the Republic, government enactments and decisions of a normative nature and international treaties to which the Republic of Moldova is party, all of which are subject to constitutional review, as Article 135.1.a. of the Constitution stipulates that the exercise of constitutional review over government decisions and enactments falls within the competence of the Constitutional Court.

As to regulations providing that the parties in legal proceedings are deprived of the right to appeal for the annulment of final and binding decisions of the courts, these were found to be in conformity with the Constitution, as the examination of such decisions falls within the powers of the Supreme Court of Justice.

The Court found the regulations excluding “unilateral” administrative measures from constitutional review by way of exception, and allowing the review only of administrative measures “having a normative nature, issued by a public authority”, to be in conformity with the Constitution, on the grounds that any individual having seen any of his or her legally acknowledged rights infringed by a public authority can seek the annulment of the act in question by the administrative courts, the acknowledgment of the contested right and the reparation of damages.

The Court ruled that the following provisions were unconstitutional:

- Regulations under which enactments concerning the application of disciplinary sanctions to members of the military and their dismissal from office, together with enactments of a military nature, cannot be appealed against in the administrative courts.

  The Court found that the administrative courts are competent to verify the legality of the administrative measures issued by the military authorities, where these acts do not constitute enactments of a military nature.

- Regulations that bar from judicial review administrative measures issued by a public authority as a legal entity and related to the management and use of the assets it owns, including assets that are jointly owned, as pursuant to Article 127 of the Constitution, both the state and administrative-territorial units have the right to possess public property, with regard to assets that by their nature are of public interest and use. Thus, administrative measures issued by public authorities concerning the management of public property can be contested in the administrative courts.

  Simultaneously, the Court found that the state can in no way impose constraints on the exercise of the right to possess such property, taking into account the type of property involved.

Dissenting opinion

One judge delivered a partly dissenting opinion, asserting that the act of excluding unilateral administrative acts from judicial review by way of exception, and the acknowledgment of this right only for administrative acts of a normative nature, constituted an unconstitutional regulation, restricting the free access to justice provided for by Article 20 of the Constitution.

Languages:

Romanian, Russian.

Netherlands
Supreme Court

There was no relevant constitutional case-law during the reference period 1 September 2002 – 31 December 2002.

Norway
Supreme Court

Statistical data

The number of decisions of the Supreme Court in the year 2002 was 155 cases (66 civil cases and 89 criminal cases).

The Appeals Selection Committee delivered decisions on 764 civil cases and 824 criminal cases, of those 81 civil cases and 99 criminal cases were passed on to the Supreme Court.

Important decisions

Identification: NOR-2002-3-004

a) Norway / **b)** Supreme Court / **c)** / **d)** 11.10.2002 / **e)** 2001/1588 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 2002, 1216 / **h)** CODICES (Norwegian).

Keywords of the systematic thesaurus:

2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
5.3.14 **Fundamental Rights** – Civil and political rights – *Ne bis in idem*.

Keywords of the alphabetical index:

Driving licence, confiscation, qualification / Sanction, imposition by different authorities / Punishment, definition.

Headnotes:

An administrative decision concerning the confiscation of a driving licence following a criminal conviction for breach of the Road Traffic Act Section 22.2 was deemed to be punishment within the terms of Article 4.1 Protocol 7 ECHR. The conviction did not, however, bar a subsequent administrative confiscation order.

Summary:

A. was convicted by the Court of Summary Jurisdiction and sentenced to 21 days' imprisonment and a fine of NOK 20,000 for breach of Section 22.2 of the Road Traffic Act. This provision provides that it is an offence to have consumed alcohol within six hours before driving a motor vehicle in circumstances where the driver believes or ought to believe that the driving might lead to a police investigation. The sentence was suspended with a probation period of 2 years.

The judgement was served on A. personally in court the same day. He accepted the conviction, which became enforceable against him immediately. Before the prosecution's time-limit for appeal had expired, the police warned A. that there was a possibility that an administrative order would be made to confiscate his driving licence for a period of two years. Two months after the judgement became final, the police issued an order for the confiscation of the licence for a period of 12 months, pursuant to Section 33.2 of the Road Traffic Act. A. brought an appeal against the order to the Ministry of Justice, which allowed the appeal in part and reduced the confiscation period to 8 months.

A. subsequently filed a civil action against the State, represented by the Ministry of Justice, and claimed that the order was unlawful and in breach of the *ne bis in idem* principle in Article 4.1 Protocol 7 ECHR. The District Court found in favour of the State, but the Court of Appeal found the order to be unlawful.

The case before the Supreme Court raised two main questions. Firstly, whether the confiscation of the driving licence was deemed to be "punishment" in the terms of the *ne bis in idem* principle in Article 4.1 Protocol 7 ECHR. This question had to be resolved on the basis of consideration of all of the circumstances, taking as a starting point the criteria to be applied when determining whether a measure is a "penalty" in Article 7 ECHR, as laid down in the case of *Welch v. United Kingdom* (European Court of Human Rights, case 17440/90). The main criterion for defining a measure as a "penalty" in this connection is whether it is imposed following conviction for a "criminal offence". The other criteria are the nature and purpose of the measure, its characterisation under national law, the procedures involved in the making and implementation of the measure and the severity of the measure.

The Supreme Court found that the confiscation of the driving licence in the present case must be deemed to be "punishment" within the terms of Article 4.1 Protocol 7 ECHR. The Court placed emphasis, *inter alia*, on the fact that the measure in question was infringing, that it was directly related to a criminal

conviction, and that the Norwegian system of mandatory confiscation of a driving licence for the consumption of alcohol subsequent to the event must be said to have a distinct penal motive. The Court left unanswered the question whether the situation would be different for the confiscation of a driving licence following a conviction for drunk-driving pursuant to Section 22.1 of the Road Traffic Act, or for confiscation following breaches of other provisions of the Act.

The second question in the case before the Supreme Court was whether A. had been "tried again in criminal proceedings" within the terms of the Convention. The issue here was whether the enforceable criminal conviction barred the administrative confiscation order. The Court stated that its plenary decisions concerning the surtax did not resolve the questions raised in the present case. As opposed to the confiscation of driving licences, the imposition of the surtax pursuant to the Tax Assessment Act takes place in accordance with a dual-track system, whereby both authorities conduct proceedings with separate and independent submission and assessment of evidence. In cases concerning the confiscation of a driving licence following a criminal conviction, however, there is only one set of proceedings where the law attaches two measures to the same act, and where the confiscation takes place subsequent to and fully based on the conviction. In resolving this question, the Court stated that the appropriate starting point was the wording of Article 4.1 Protocol 7 ECHR, which provides that no one shall be liable to be tried or punished "again" for an offence for which he has already been "finally" acquitted or convicted.

According to the practice of the European Court of Human Rights, the purpose of the provision is to prevent "the repetition of criminal proceedings that have been concluded by a final decision". The Supreme Court referred in particular to the admissibility decision of 30 May 2000 in *R.T. v. Switzerland* (case 31982/96) and emphasised that the fact that two different public authorities imposed qualitatively different sanctions pursuant to a system of divided competence according to law, did not itself constitute a violation of the Convention. The Court discussed the importance of the statement in the *R.T.* case to the effect that the sanctions were "issued at the same time", and suggested that there were two alternative approaches to the question. Firstly, it could be argued that the system in the Norwegian Road Traffic Act with the obligatory confiscation of a driving licence when a person is found guilty of breach of the provisions of the Act, will never amount to a repetition of criminal proceedings, and that Article 4.1 Protocol 7 ECHR will therefore never be applicable. In that event, any protection that a convicted person has against confiscation after criminal proceedings are completed must be sought in Article 6.1 ECHR.

The other approach was related to the fact that the decision is made by two different authorities. The system could therefore be conceived as two sets of proceedings and thus in breach of Article 4.1 Protocol 7 ECHR, unless the sanctions are imposed "at the same time", cf. the *R.T.* case. The Court stated that the requirement of "at the same time" must in that event be more clearly substantiated in light of the purpose of Article 4.1 Protocol 7 ECHR, which is to protect the offender's legitimate interest in wishing to put the case behind him. This required a concrete assessment, where a relevant factor is that the confiscation of the driving licence in alcohol-related driving offences is well known among motorists.

The Supreme Court concluded that the two approaches would hardly lead to different results, and that the decisive issue was whether the different sanctions were imposed reasonably close to each other in time, without unnecessary delay. Irrespective of which approach was applied, the Court found in favour of the State. The Court noted that A. had been forewarned of the possibility that a confiscation order would be made, even before the prosecution's time-limit for appeal had expired, but stated that the result would have been the same even if the warning had been given after the time-limit had expired.

Cross-references:

- Decisions nos. 2001/1527 of 03.05.2002, *Bulletin* 2002/2 [NOR-2002-2-003] and 2000/770 of 03.05.2002, *Bulletin* 2002/2 [NOR-2002-2-001];
- *Welch v. United Kingdom*, Vol. 307-A, Series A of the Publications of the Court; *Bulletin* 1995/1 [ECH-1995-1-002];
- *R.T. v. Switzerland*, 30.05.2000, not published.

Languages:

Norwegian.

Identification: NOR-2002-3-005

a) Norway / **b)** Supreme Court / **c)** / **d)** 23.10.2002 / **e)** 2001/987 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 2002, 1271 / **h)** CODICES (Norwegian).

Keywords of the systematic thesaurus:

2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
5.3.14 **Fundamental Rights** – Civil and political rights – *Ne bis in idem*.
5.3.36.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Confiscation, property, preventive measure / Punishment, definition.

Headnotes:

The confiscation of property used in connection with the perpetration of a criminal offence, was deemed to be a “criminal charge” in the terms of Article 6 ECHR, but not “punishment” within the terms of Article 4.1 Protocol 7 ECHR.

Summary:

During the period of 20-22 August 1998, Greenpeace carried out environmentalist action against a Norwegian registered drilling rig off the coast of Norway. The purpose of the action was to bring attention to environmental climate issues and to halt further exploration drilling. The first incident took place on 20 August 1998 whilst the rig was at anchor and a security zone was in place. Following that incident, four people were fined, including the captain of the M/V Greenpeace (A) and a “capsule” was seized. The next incident took place on 22 August 1998, while the rig was under tow. As a consequence of this second incident, three people were fined, and six inflatable dinghies were seized. The seizure of the dinghies was upheld by the Court of Summary Jurisdiction on 7 September 1998. A confiscation order relating to the capsule and the dinghies was addressed against A. However, A. did not accept the confiscation order, and the case was referred to the District Court. The District Court acquitted A., and found that the confiscation order was unlawful. On appeal, however, the Court of Appeal upheld the confiscation order. A. lodged an appeal with the Supreme Court, which dismissed that appeal.

The Supreme Court found that the conditions for confiscation in Norwegian law were satisfied. The rubber dinghies could be confiscated on the grounds that they had been used in the perpetration of a criminal offence on 22 August 1998, and that the use of all of the dinghies had been a prerequisite for the incidents to occur and for the media coverage that Greenpeace had wanted.

The Supreme Court also found that the provisions of the UN Convention on the Law of the Sea did not prevent the Norwegian Courts from having jurisdiction, nor was a specific authority in international law necessary in order to confiscate the dinghies. Furthermore, in its capacity as flag state, Norway had criminal jurisdiction over the action against the rig on 22 August 1998, and the confiscation had to be deemed to be a preventive measure to protect the tow against further environmentalist action.

The Supreme Court did not take a stance as to whether the use of the dinghies and the capsule in the incident was protected by Articles 10 and 11 ECHR, since the cumulative conditions for restricting these freedoms in subsection 2 of Articles 10 and 11 were satisfied. The Court found that there was no doubt that the restriction/confiscation was prescribed by law. The purpose of the confiscation of the dinghies and the capsule had been to protect the drilling rig's lawful right to operate on the Continental Shelf, and to prevent risk to the marine environment or to the demonstrators while the rig was under tow. The Court found, therefore, that the interferences were necessary in order to prevent disorder and crime. The Court referred to the fact that the European Court of Human Rights in its admissibility decision in *Drieman and others v. Norway* (Rt 1996, p. 376) expressed the view that States must be allowed a wide margin of appreciation in their assessment of the necessity in taking measures to restrict conduct of this kind.

The question of the application of the *ne bis in idem* principle, was only relevant in relation to the capsule, since A was only criminally convicted for aiding and abetting the criminal offences in which the capsule had been used. The Supreme Court referred to the decision in *Göktan v. France*, where the European Court of Human Rights had stated that the term “punished” in Article 4.1 Protocol 7 ECHR must be interpreted in the same way as the term “punishment/penalty” in Article 7 ECHR. Thereafter, the Court considered whether the confiscation of property that is used in the perpetration of a criminal offence must be deemed to be punishment according to the criteria laid down in *Welch v. United Kingdom* and *Brown v. United Kingdom.* On the basis of an overall assessment, the Court found that this was not the case. In particular, the Court emphasised that

the penal element of the reaction was so limited, whilst the preventive element was so dominant, that it was not natural to define the reaction as punishment.

Cross-references:

European Court of Human Rights:

- *Drieman and others v. Norway*, 04.05.2000, not published;
- *Göktan v. France*, 02.07.2002, not published;
- *Welch v. United Kingdom*, Series A, no. 307-A;
- *Brown v. United Kingdom,* 24.11.1998, not published.

Languages:

Norwegian.

Identification: NOR-2002-3-006

a) Norway / **b)** Supreme Court / **c)** Plenary / **d)** 17.12.2002 / **e)** 2001/1428 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 2002, 1618 / **h)** CODICES (Norwegian).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.17 **General Principles** – Weighing of interests.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Demonstration, neo-Nazi / Expression, grievous, definition / Racism.

Headnotes:

The racism provision in Section 135.a of the Criminal Code must be interpreted in light of the restriction in Article 100 of the Constitution relating to freedom of expression, and a balance must be struck where freedom of expression is given particular weight, see the plenary decision 75B/1997 of 28 November 1997 (*Bulletin* 1997/3 [NOR-1997-3-003]). Section 135.a only prohibits expressions which are of an exceptionally grievous nature.

Summary:

The issue in the case was whether expressions made during a neo-Nazi demonstration in Askim on 19 August 2000 were in breach of Section 135.a of the Penal Code.

A. was a leading member of a neo-Nazi group. When the group was refused the right to demonstrate in Oslo in connection with the commemoration of Rudolf Hess's death on 17 August, it chose to arrange an unlawful demonstration in Askim outside Oslo. The group marched on the town square, where A. held a short speech, during which he made several very offensive and derogatory remarks about immigrants and Jews. He was charged pursuant to Section 135.a of the Penal Code. He was acquitted in the District Court, but convicted on appeal by the Court of Appeal with regard to his remarks concerning Jews. The Supreme Court heard the case in a plenary sitting, and A. was acquitted with some justices dissenting.

The majority of the Supreme Court – 11 justices – held that the expressions that are to be criminalised must be interpreted in the light of what was actually said. The rule of law requires that the courts are prudent not to interpret expressions liberally on the basis of context. In his speech, A. had said that the Jews “suck our country empty of riches and replace them with immoral and non-Norwegian views”. Otherwise the speech paid homage to Adolf Hitler and Rudolf Hess. This must be seen as an ideological adherence to Nazism. The statement that Hess should be applauded “for his courageous attempt to save Germany and Europe from Bolshevism and Judaism during the Second World War”, could not be deemed to be adherence to the persecution of Jews and, thereby, acknowledgement of the Holocaust during the Second World War. The expression “every day, immigrants rob, rape and kill Norwegians”, though incorrect, was intended to express a fact. However, it did not urge people to take action against immigrants, and in any event not to inflict serious physical injury. The remarks were seriously derogatory and mortifying for both groups, and also untrue. Notwithstanding, they were not so exceptionally grievous as to be in breach of Section 135.a of the Criminal Code.

The minority of the Court – 6 justices – had a different opinion of the natural understanding of the remarks regarding Jews. In the opinion of the minority, greater

weight had to be attached to the entire text and the context. Like the Court of Appeal, the minority held that the association to Hitler and Hess must be deemed to be an acknowledgement of and an adherence to the massive brutality to which the Jews were subjected during the Second World War. The expressions were deeply derogatory and therefore criminal.

Cross-references:

- Plenary decision 75B/1997 of 28.11.1997, *Bulletin* 1997/3 [NOR-1997-3-003].

Languages:

Norwegian.

Poland
Constitutional Tribunal

Statistical data
1 September 2002 – 31 December 2002

I. Constitutional review

Decisions:
- Cases decided on their merits: 12
- Cases discontinued: 3

Types of review:
- *Ex post facto* review: 15
- Preliminary review: 0
- Abstract reviews (Article 22 of the Constitutional Tribunal Act): 14
- Court referrals (points of law), Article 25 of the Constitutional Tribunal Act: 1

Challenged normative acts:
- Cases concerning the constitutionality of statutes: 13
- Cases on the legality of other normative acts under the Constitution and statutes: 2

Decisions:
- The statutes in question to be wholly or partly unconstitutional (or subordinate legislation to violate the provisions of superior laws and the Constitution): 4
- Upholding the constitutionality of the provision in question: 11

Precedent decisions: 2

II. Universally binding interpretation of laws

- Resolutions issued under Article 13 of the Constitutional Tribunal Act: 14
- Motions requesting such interpretation rejected: 1

Statistical data

1 January 2002 – 31 December 2002

I. Constitutional review

Decisions:
- Cases decided on their merits: 56
- Cases discontinued: 6

Types of review:
- *Ex post facto* review: 59
- Preliminary review: 3
- Abstract reviews (Article 22 of the Constitutional Tribunal Act): 54
- Court referrals (points of law), Article 25 of the Constitutional Tribunal Act: 8

Challenged normative acts:
- Cases concerning the constitutionality of statutes: 54
- Cases on the legality of other normative acts under the Constitution and statutes: 8

Decisions:
- The statutes in question to be wholly or partly unconstitutional (or subordinate legislation to violate the provisions of superior laws and the Constitution): 19
- Upholding the constitutionality of the provision in question: 43

Precedent decisions: 5

II. Universally binding interpretation of laws

- Resolutions issued under Article 13 of the Constitutional Tribunal Act: 60
- Motions requesting such interpretation rejected: 2

Important decisions

Identification: POL-2002-3-021

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 06.03.2002 / **e)** P 7/00 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2002, no. 23, item 242; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy Seria A* (Official Digest), 2002, Series A, no. 2, item 13 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
3.13 **General Principles** – Legality.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
4.10.7.1 **Institutions** – Public finances – Taxation – Principles.

Keywords of the alphabetical index:

Tax, value added, subjects / Tax, power to impose / Tax, reimbursement.

Headnotes:

The provisions of the Minister of Finance's Ordinance on Excise creating subjects of excise other than those listed in the Act on VAT are contrary to Article 84 of the Constitution which provides that subjects of tax may be provided for only by statute. The unconstitutionality of the provisions does not constitute ground for the reimbursement of the tax paid on the basis of those provisions.

Summary:

The Tribunal examined the case referred to it by the Highest Administrative Court.

The Tribunal noted that the rule that taxes may be introduced only by law is one of the basic rules of democracy. The interpretation of this rule, in accordance with judgments of the Constitutional Tribunal, is that the regulation of tax issues requires the use of the form of a law and only a small number of issues are left which can be regulated by secondary legislation issued on the basis of a law and the delegation provided for therein. Secondary legislation may, therefore, provide for only such issues which are supplementary to the law.

The Tribunal pointed out that the impugned provisions not only introduced new subjects of excise but also gave a different description of a purpose of the tax and set the relevant tax rates. The impugned provisions of the Ordinance were, therefore, not issued in order to enforce the provisions of the Act, but they replaced with its own contents provisions of the Act concerning matters that should have only been provided for in the form of a law.

Supplementary information:

One dissenting opinion has been filed with the judgment (Judge Teresa Debowska-Romanowska).

Cross-references:

- Decision of 16.06.1998 (U 9/97);
- Decision of 01.09.1998 (U 1/98), *Bulletin* 1998/3 [POL-1998-3-015].

Languages:

Polish.

Identification: POL-2002-3-022

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 12.03.2002 / **e)** P 9/01 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2002, no. 26, item 265; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy Seria A* (Official Digest), 2002, Series A, no. 2, item 14 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.12 **General Principles** – Clarity and precision of legal provisions.
3.13 **General Principles** – Legality.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.

Keywords of the alphabetical index:

Ordinance, issue, content / Minister, law-making power / Civil procedure, form, use.

Headnotes:

The provisions of the Code on Civil Procedure granting the Minister of Justice powers to issue an ordinance on forms used in civil proceedings are detailed enough and thus meet the conditions of the grant of powers to issue secondary legislation set out in Article 92.1 of the Constitution.

Summary:

The Tribunal examined the case brought before it in a joint court referral.

The Tribunal noted that according to the provisions of the Constitution, a grant of powers to issue secondary legislation must describe the authority which is being empowered to issue the legislation, the scope of matters to be covered and the guidelines concerning the content of the legislation. There is no doubt that the grant of powers in question properly described the empowered entity (the Minister of Justice) and the scope of matters to be covered in the secondary legislation (on the use of forms). The courts referring the case raised questions as to the minuteness of detail in the content of the secondary legislation. The legislature referred here to other provisions of the Code and ordered that the forms include necessary instructions as to the proper filling out, filing and the results of failure to do so by a party.

According to the Tribunal's previous judgments, the more an act regulates a matter concerning basic issues from the point of view of an entity, the broader the regulation in the act must be and the narrower the scope for any references to secondary legislation. The guidelines, however, must be included in the provision granting the powers to issue an ordinance. It is possible to include the guidelines in other provisions of the act as well, as long as it is possible to reconstruct their content precisely. In the Tribunal's opinion, the guidelines included in the provisions under question and other provisions referred to in the Code are detailed enough and, therefore, meet the conditions set out in the Constitution.

Cross-references:

- Decision of 26.10.1999 (K 12/99), *Bulletin* 1999/3 [POL-1999-3-027].

Languages:

Polish.

Identification: POL-2002-3-023

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 26.03.2002 / **e)** SK 2/01 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2002, no. 37, item 353; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy Seria A* (Official Digest), 2002, Series A, no. 2, item 15 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.36 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Construction, law / Building, lawlessness / Building, permit.

Headnotes:

The provisions of the Law on Construction relating to actions undertaken by authorities where the activities of an investor do not comply with the legal provisions requiring the investor to obtain a building permit or to inform the authorities of his intention to build are in compliance with the conditions for limitations of citizens' rights as set out in Article 31.3 of the Constitution.

Summary:

The Tribunal stated that the provisions in question related to actions undertaken by authorities in a case in which the activities of an investor did not comply with the legal provisions requiring the investor to obtain a building permit or to inform the authorities of his intention to build. In the Tribunal's opinion, the nature of these provisions has been very well described by the Supreme Administrative Court, which has stated that “the provisions are of a restitutive and not a repressive nature (i.e. one which punishes more than has been built in breach of law); its nature is to restore an object to its previous condition”.

The Tribunal stated that the obligation to obtain a building permit arising out of the provisions in question fully complies with the conditions for limitations of citizens' rights set out in the Constitution, which are “necessary in a democratic country for… public order..., environmental protection… [and] rights and freedoms of other persons”.

The Tribunal held that a use of legal means that permit the person who infringed the law to keep the benefits resulting from the infringement was not contrary to the constitutional requirement of proportionality of limitations of rights and freedoms.

Cross-references:

- Decision of 08.11.1994 (P 1/94), *Bulletin* 1994/3 [POL-1994-3-018];
- Decision of 12.01.1999 (P 2/98), *Bulletin* 1999/1 [POL-1999-1-002].

Languages:

Polish.

Identification: POL-2002-3-024

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 08.04.2002 / **e)** SK 18/01 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2002, no. 44, item 423; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy Seria A* (Official Digest), 2002, Series A, no. 2, item 16 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.12 **General Principles** – Clarity and precision of legal provisions.
3.22 **General Principles** – Prohibition of arbitrariness.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.6.4.3 **Institutions** – Executive bodies – Composition – End of office of members.
5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.
5.4.9 **Fundamental Rights** – Economic, social and cultural rights – Right of access to the public service.

Keywords of the alphabetical index:

Local councillor, mandate, termination / Judgment, for offence.

Headnotes:

The provisions of the Act on the electoral law concerning municipal councils, *poviats* and *voivodships*, which provide for the expiry of a mandate of a councillor as a consequence of a binding judgment finding the councillor guilty of having committed an intentional offence, are in compliance with the equal right of all citizens having full political rights to have access to employment in the public service, which is guaranteed by Article 60 of the Constitution.

Summary:

The Tribunal examined the case brought before it by a motion filed in a constitutional claim.

The Tribunal noted that the provisions of the Constitution introducing the rule of access to the public service under the same rules guarantee every citizen having full political rights the right to apply for employment in the public service. However, these provisions do not state that every person who has Polish citizenship and enjoys all his or her political rights shall be accepted into the public service. The legislature has a right to include additional requirements, which are relevant to the nature and kind of services, that have to be met in order for a particular person to be accepted for a specific post in the public service.

At the same time, a criterion for release from a particular post in the public service and a procedure for taking appropriate decisions in that respect must be the subject of precise and detailed regulation set out in the form of a law. Only that method will eliminate the use of discretion in taking such decisions. In the Tribunal's opinion, the method mentioned above relates to the provisions in question. The condition of the expiry of the mandate provided for in those provisions meets the criteria of precision and minuteness of detail. Those provisions, therefore, do not introduce any criteria that would be contrary to the constitutional requirement that all persons holding a particular post in the public service be treated equally.

Cross-references:

- Decision of 14.12.1999 (SK 14/98).

Languages:

Polish.

Identification: POL-2002-3-025

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 10.04.2002 / **e)** K 26/00 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2002, no. 23, item 241; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy Seria A* (Official Digest), 2002, Series A, no. 2, item 18 / **h)** Annotations: *Granat Miroslaw, Przeglad Sejmowy* 2002 nr 4 s. 79-90; Malanowski Andrzej: Droga do Europy czy powrót do PRL. Sluzba panstwu nie koliduje z czlonkostwem w legalnej partii politycznej. Rzeczpospolita 206, 4 IX 2002 s. C3; Macior Wladyslaw: Nie sztuka twierdzic, sztuka uzasadnic. Osoby na okreslonych stanowiskach i pelniace funkcje maja sluzyc panstwu a nie partiom. Rzeczpospolita 195, 22 VIII 2002 s. C3; CODICES (Polish).

Keywords of the systematic thesaurus:

3.3 **General Principles** – Democracy.
4.6.9 **Institutions** – Executive bodies – The civil service.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.26 **Fundamental Rights** – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

Public officer, incompatibility / Political party, membership / Freedom of association, scope.

Headnotes:

In the light of the constitutional description of the purposes and tasks of political parties, the right to become a member of a political party should not be viewed through the right of association but through the right to influence national politics by democratic methods.

Deprivation of a group of persons holding public positions or having the status of officers in the public service of the right to participate in political parties does not represent an infringement of the nature of the freedom of association and the right to influence national politics. It creates a limitation of those rights, but it does not constitute an infringement of their nature and is, as such, not contrary to the constitutional rule of law.

Summary:

The Tribunal examined the case brought before it in a motion filed by the Ombudsman.

The Tribunal recalled that the applicant claimed that the provisions in question deprived certain groups of citizens of their freedom of association. The applicant, therefore, did not claim that there was a limitation of that freedom but that its essence had been infringed. In the Tribunal's opinion, the aim of freedom of association was to achieve the common development of the citizens' political, social and cultural activity. The Tribunal also mentioned that freedom of association did not have an absolute nature.

The nature of freedom of association is that it grants the citizens a possibility of creating formal organisational links whose purposes and tasks are not regulated by the government. An infringement of the nature of that freedom would occur if certain groups of persons would be prohibited from participating in any form of an organisation.

The provisions in the Act on Military Services of Professional Soldiers, the Public Prosecution Act, the Police Act, the Act on the National Protection Office, the Border Guard Act, the National Fire-Brigade Act, the Act on Self-Government Appeal Councils, the Act on the Highest Chamber of Review, the Prison Service Act, the Customs Inspection Act, the Act concerning disclosure of work or services carried out by persons holding public posts for the security service between 1944 and 1990, the Political Parties Act, the Personal Data Protection Act, the Act on the National Memory Institute, the Civil Service Act, the Customs Service Act and the Election Act for the Chambers of Parliament prohibiting public officers and persons holding certain public positions from being members of political parties are in compliance with Article 2 of the Constitution setting out the conditions for limitations of citizens' rights.

Cross-references:

- Decision of 12.02.1991 (K 6/90);
- Decision of 19.05.1998 (U 5/97), *Bulletin* 1998/2 [POL-1998-2-010];
- Decision of 21.10.1998 (K 24/98);
- Decision of 20.12.1999 (K 4/99), *Bulletin* 2000/1 [POL-2000-1-003].

Languages:

Polish.

Identification: POL-2002-3-026

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 15.04.2002 / **e)** K 23/01 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2002, no. 60, item 549; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy Seria A* (Official Digest), 2002, Series A, no. 2, item 19 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.12 **General Principles** – Clarity and precision of legal provisions.
3.13 **General Principles** – Legality.
3.18 **General Principles** – General interest.
4.6.9.3 **Institutions** – Executive bodies – The civil service – Remuneration.
4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Local councillor, remuneration and allowances / Calculation criteria, number of inhabitants.

Headnotes:

The number of inhabitants in a municipality has a significant influence on the scale of tasks to be performed by local councillors in a given territory. The legislature had a justifiable right to adopt the number of inhabitants in a municipality as a basis for determining the remuneration and allowances of councillors. Such a criterion is clear and readable, and is in accordance with the constitutional equality rule.

Summary:

The Tribunal examined the case brought before it in a motion filed by the City Council of a Polish town.

The Tribunal noted that since units of self-government participate in the execution of public authority and perform public tasks with the help of legally created institutions, it is possible to include all aspects of the status of public officers, including their remuneration, in a legislative act.

The Tribunal decided that the holding of a post of councillor is of such a nature as to differentiate the councillor from other inhabitants. In the Tribunal's opinion, there are, however, no grounds to decide in the present case that the social interest justifies a

need for an internal differentiation of the legal situation of the councillors. On the other hand, a difference in number of inhabitants, which is often connected with a different scale of tasks, may justify a differentiation in the amount of remuneration and allowances in certain municipalities.

It was decided that the provisions in the Municipal Self-Government Act concerning councillors' allowances in a municipality and the provisions of a Cabinet Ordinance issued on the basis of that Act providing for the maximum amount of the allowances for persons employed by the unit of self-government, based on the number of inhabitants in the particular unit of self-government, are in accordance with Article 32 of the Constitution.

Cross-references:

- Decision of 03.09.1996 (K 10/96), *Bulletin* 1996/3 [POL-1996-3-013];
- Decision of 24.03.1998 (K 40/97), *Bulletin* 1998/1 [POL-1998-1-006];
- Decision of 31.03.1998 (K 24/97), *Bulletin* 1998/1 [POL-1998-1-007];
- Decision of 07.05.2001 (K 19/00), *Bulletin* 2002/1 [POL-2002-1-001].

Languages:

Polish.

Identification: POL-2002-3-027

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 24.04.2002 / **e)** P 5/01 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2002 no. 78, item 713; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy Seria A* (Official Digest), 2002, Series A, no. 3, item 28 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Accident, work-related, compensation / Disease, occupational.

Headnotes:

The provisions of the Act regarding compensation for work-related accidents and occupational diseases that impose on non-privately owned workshops an obligation to pay out of their own resources compensation for permanent or long-term health damage or death and that, at the same time, release privately owned workshops from such payments do not comply with Article 32 of the Constitution because they introduce unequal treatment of employers and persons entitled to compensation.

Summary:

The Tribunal examined the case brought before it by way of a reference made by a court and an application by the Association of Employers in the Defence and Air Industry.

The Tribunal recalled that the rule of equality has been analysed in many of its judgments. It is understood in such a way that all subjects of law (addressees of legal norms) having the same substantial characteristic (relevant) must be treated equally, according to the same measure and without any differentiation – discriminatory or favourable.

The Tribunal considered whether it is justifiable to impose on non-privately owned workshops (i.e. a workshop with the capital participation of the state or a municipality) an obligation to pay out of their own resources compensation for permanent or long-term health damage or death, while releasing privately owned workshops from such payments. The Tribunal noted that there are no doubts as to the discrepancy of the provisions in question with the Constitution unless any other specific regulations exist introducing a system of indirect imposition of such payments on privately owned workshops e.g. a different system of settlement with ZUS (Workshop Social Security), from which the non-privately owned workshops would be released.

The Tribunal found, that in light of the analysed provisions of the Act, the characteristic created by the quality of the "non-private nature" of a workshop could not amount to a legally relevant differentiation for the obligations of an employer. Such a criterion is not only imprecise, but it is also not justified by any other constitutional value.

Cross-references:

- Decision of 08.06.1999 (SK 12/98).

Languages:

Polish.

Identification: POL-2002-3-028

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 22.05.2002 / **e)** K 6/02 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2002, no. 78, item 715; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy Seria A* (Official Digest), 2002, Series A, no. 3, item 33 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.10 **General Principles** – Certainty of the law.
3.12 **General Principles** – Clarity and precision of legal provisions.
3.17 **General Principles** – Weighing of interests.
4.10.7 **Institutions** – Public finances – Taxation.
5.1.1.4 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons.

Keywords of the alphabetical index:

Tax, calculation / Tax, capital gains tax.

Headnotes:

The Personal Income Tax Act, as amended, does not provide for a method of calculation and collection of tax on the transfer of sums in capital turnovers. It does not set out the obligations of the taxpayers or paymasters, the deadlines or a method of tax calculation in such a way so as to amount to precise and detailed criteria. The lack of such regulations in the Act should be treated as significant flaw in the amended Act, which creates a threat and uncertainty for taxpayers as to the legal consequences of their actions, and is, as such, contrary to the rule of law guaranteed by Article 2 of the Constitution.

Summary:

The Tribunal examined the case brought before it in a motion filed by a group of deputies.

The Tribunal noted that, in accordance with its previous judgments, there is an established view that the legislature has the relative freedom to determine state revenue and expenditure. There is also a fundamental view that the freedom of the legislature to create the substantive content of the tax law is significantly balanced against its obligation to obey the procedural aspects of the rule of law, in particular, the rules of proper legislation.

In the Tribunal's opinion, the requirement that the legislature comply with the rules of proper legislation derives from the constitutional rule of law. This requirement is functionally connected with the rules of legal certainty and security, as well as the citizens' trust in the state and law.

The provisions that amend the Act as to the income tax of natural persons and lump sum income tax on certain profits made by natural persons and that impose income tax on the transfer abroad by natural persons of sums constituting a capital turnover within the meaning of the Foreign Exchange Law are not in accordance with the constitutional rule of law.

Cross-references:

- Decision of 19.06.1992 (U 6/92);
- Decision of 25.04.2001 (K 13/01).

Languages:

Polish.

Identification: POL-2002-3-029

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 03.07.2002 / **e)** SK 31/01 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2002, no. 109, item 966; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy Seria A* (Official Digest), 2002, Series A, no. 4, item 49 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Contempt of court, penalty, appeal.

Headnotes:

The provisions of the old Law on the Structure of the Common Courts laying down that a decision concerning punishment for contempt of court is not subject to appeal, thereby excluding review of that decision by a higher court, are not contrary to the constitutional right to fair and open court proceedings (Article 45 of the Constitution).

Summary:

The Tribunal examined a constitutional claim brought before it.

A court of first instance had fined the Claimant for using wording offensive to the court in a writ. The Claimant argued that the constitutional right to have a case determined by an independent court guaranteed also the right to seek the annulment of all decisions of the first instance court, including those imposing fines on one of the participants.

The Attorney-General argued that the right to have a case examined by an independent court did not include the right to call into question the decisions aimed at preventing behaviour that infringed the court's dignity. The court must have at its disposal measures that allow for an immediate and effective reaction to events violating the status of the court.

The Tribunal noted that contempt of court proceedings are commenced *ex officio* by a court that decides that its dignity has been violated by the actions of a party to the proceedings. A purpose of these proceedings is to reinstate discipline and to inspire respect for a court that delivers decisions in the name of the Republic of Poland. If these proceedings were not available, it would not be possible to protect the courts against the participants in an action behaving in such a way as to infringe the dignity of the court.

Regardless of the above, the Tribunal found, however, that the model of review examined in the case at instance was not to be applied to a situation regulated by the impugned provisions of the law, which dealt exclusively with immediate enforcement and a decision not subject to appeal relating to a penalty for the contempt of court. Since the model of review was unsuitable for the provisions in question, a finding had to be made that the impugned provisions were not contrary to the model.

Cross-references:

- Decision of 08.04.1997 (K 14/96), *Bulletin* 1997/1 [POL-1997-1-008];
- Decision of 09.06.1998 (K 28/97), *Bulletin* 1998/2 [POL-1998-2-013].

Languages:

Polish.

Identification: POL-2002-3-030

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 30.09.2002 / **e)** K 41/01 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2002, no. 171, item 1400; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy Seria A* (Official Digest), 2002, Series A, no. 5, item 61 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

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.

Keywords of the alphabetical index:

Profession, sportsman, definition / Disabled, physically, benefit, right.

Headnotes:

The provisions of the Physical Education Act that define the professional sportsmen that have a right to receive benefits from the public budget and omit to mention handicapped sportsmen who have won medals in the Olympic Games for the Handicapped are in accordance with Article 32 of the Constitution setting out the rule of equal treatment of citizens by the government.

Summary:

The Tribunal examined the case brought before it in a motion filed by the Ombudsman.

The applicant claimed that the impugned provisions discriminated against winners of medals in the Olympic Games for the Handicapped because they granted a right to receive payments from the public budget only to medal winners of the Olympic Games, while disregarding the handicapped Olympic game medal winners.

The Tribunal noted, that the provisions of the Constitution setting out the obligation that citizens be treated equally, gave the legislature – as a rule – a possibility to introduce an imputation of a breach of that obligation. It is not possible to find a provision in the Constitution, which would introduce an obligation of equal treatment in relation to subsidies for sportsmen in general and/or handicapped sportsmen and other sportsmen – in particular.

From the point of view of the three characteristics referred to in the motion i.e.:

1. both the handicapped and the normal sportsman represent Poland;
2. they represent Poland at summer and winter Olympic games; and
3. the effort and hard work required from the handicapped sportsman often exceeds amount of work required by the normal sportsman, and also taking into account the reasons for which the benefits in the impugned provisions are granted, no arbitrariness could be found in the legislature's actions.

Therefore, it should be acknowledged that an imputation of a discrimination against the sportsmen has not been proved by the applicant.

Cross-references:

- Decision of 17.01.2001 (K 5/00);
- Decision of 02.07.2002 (U 7/01).

Languages:

Polish.

Identification: POL-2002-3-031

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 02.10.2002 / **e)** K 48/01 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2002, no. 168, item 1383; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy Seria A* (Official Digest), 2002, Series A, no. 5, item 62 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
5.2 **Fundamental Rights** – Equality.
5.3.36.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Lease, premises, administrative decision / Rent, control by municipality.

Headnotes:

The right to set the amount of rent should be used to enforce the rights of owners. On the other hand, it cannot disregard the rights of occupants. The rules of setting the rates of rent and those on its increase should strike a balance between those two rights.

The provisions in the Act protecting occupants and municipal assets, and the amendments to the Civil Code concerning rent increases are contrary to Article 64 of the Constitution, which guarantees the right of property and protection of other pecuniary rights, to the extent that the above-mentioned provisions protect the interests of the lessees but disregard those of the groups of owners of premises which are related on the basis of leases governed by regulated rents.

Summary:

The Tribunal examined the case brought before it in a motion filed by the Ombudsman.

The Tribunal emphasised that the fact that the legislature allows entry into a rent relationship by the form of an agreement does not amount to full freedom and discretion as to fixing the amount of rent. The regulation found in the impugned provisions amounts to a breach of the property rights of a certain group of owners of the premises i.e. those owners with whom a lease has been concluded on the basis of an administrative decision on the allocation of the premises or other legal title before the introduction of a market economy of premises in the city in question.

The legislature has not only relinquished the review of the regulated rent rates, which has been acknowledged as unconstitutional, but also, through introduction of the restrictive provisions on rent increases, it has frozen their amount at a level that cannot be reconciled with the constitutional guarantees of the right of property.

Cross-references:

- Decision of 02.06.1999 (K 34/98), *Bulletin* 1999/2 [POL-1999-2-019];
- Decision of 12.01.2000 (P 11/98), *Bulletin* 2000/1 [POL-2000-1-005].

Languages:

Polish.

Identification: POL-2002-3-032

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 08.10.2002 / **e)** K 36/00 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2002, no. 176, item 1457; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy Seria A* (Official Digest), 2002, Series A, no. 5, item 63 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.3.5 **Sources of Constitutional Law** – Techniques of review – Logical interpretation.
4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.

Keywords of the alphabetical index:

Police, officer / Firearm, use, conditions.

Headnotes:

The catalogue set out in the Police Act of the circumstances under which the use is permitted of firearms is in compliance with the right to life guaranteed by Article 38 of the Constitution and with the conditions provided for by the European Convention on Human Rights. An imputation that listing the conditions for the use of firearms does not guarantee a policeman the protection of his/her right to life to the degree guaranteed to every person by the provisions of international law is not justified.

Summary:

The Tribunal examined the case brought before it in a motion filed by the National Enforcement Committee of the Independent Trade Union of Policemen.

According to the impugned provisions, a policeman has a right to use a firearm where the measures of direct duress set out in the Police Act are insufficient, or where their use, because of the circumstances of the particular event, is not possible. Firearms may, however, be used only in the situations listed. The applicant claimed that the legislature limited in this way the possibility of the police forces to use firearms, which was not in accordance with the guarantees set out in the Convention for the Protection of Human Rights and Fundamental Freedoms, which in applicant's opinion, “allows every person to deprive another person of his/her life”, where that results from a use of force that was absolutely necessary in the circumstances described in the Convention.

The Tribunal pointed out that the content of the provisions referred to in the Convention showed that it did not refer to “an admissibility” or “a consent” as to deprivation of a person's life. Those provisions did not list situations where deprivation of life does not violate the Convention, since it is justified with particular circumstances. A different interpretation would run contrary to the explicit meaning of those provisions and logic.

Cross-references:

- Decision of 23.03.1999 (K 2/98);
- Decision of 07.03.2000 (K 26/98), *Bulletin* 2000/1 [POL-2000-1-007].

Languages:

Polish.

Portugal
Constitutional Court

Statistical data
1 September 2002 – 31 December 2002

Total: 150 judgments, of which:

- Preventive review: 2 judgments
- Abstract *ex post facto* review: 4 judgments
- Unconstitutionality by omission: 1 judgment
- Appeals: 113 judgments
- Complaints: 28 judgments
- Political parties and coalitions: 2 judgments

Important decisions

Identification: POR-2002-3-006

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 25.09.2002 / **e)** 368/02 / **f)** / **g)** *Diário da República* (Official Gazette), 247 (Series II), 25.10. 2002, 17780-17791 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
3.20 **General Principles** – Reasonableness.
5.3.30.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.
5.3.40 **Fundamental Rights** – Civil and political rights – Right to self fulfilment.
5.4.19 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

Keywords of the alphabetical index:

Medical examination, compulsory / Labour law / Confidentiality, medical / Occupation, hazardous.

Headnotes:

The right to protection of privacy entails a duty to respect confidentiality, in other words a prohibition on obtaining information on the private life of others, including, of course, information relating to health. However, it is not an absolute right prevailing in all cases or in relation to all fields.

In the employment field, both the right to have one's heath safeguarded and the duty to preserve and foster health (Article 64.1 of the Constitution) sufficiently justify the worker's obligation to undergo all necessary and appropriate medical examinations to ensure – taking into account the nature of the work and the methods chosen for its performance, and always in accordance with reasonable criteria – that he or she does not present a risk to third parties. However, the nature and purpose of the medical examination must not be such as to render this obligation unreasonable, discriminatory or arbitrary.

The possibility of introducing a compulsory medical examination may conflict not only with the right to protection of privacy (to the extent that it requires access to information on the person's state of health), but also with general freedom of action itself. Article 26.1 of the Constitution explicitly recognises the right to free development of personality, which comprises individual autonomy and self-determination and guarantees everyone the freedom to develop their own life plan.

Summary:

The Attorney-General sought a finding of unconstitutionality, with general binding force, in respect of several provisions (contained in legislative Decree 26/94 of 1 February, amended by Act no. 7/95 of 29 March) concerning compulsory medical examinations to determine whether workers had the mental and physical aptitude required for their particular occupation and to ascertain the effects of working conditions on workers' health. In short, he argued that these provisions:

a. placed significant restrictions on the essential core of the right to protection of privacy;
b. created coercive machinery which could be used to subject workers to all examinations or tests deemed necessary by the "occupational physician", who enjoyed full discretion in the matter;
c. enabled the "occupational physician" (who was on the staff of the company employing the workers concerned) to create what was effectively a "data-bank" containing potentially detailed information on each worker's "state of health" without any control or supervision other than the general statement that this information was covered by professional secrecy; and enabled the "occupational physician", on the basis of the "medical" opinion relating to a worker's aptitude, to exert a decisive influence on the worker's occupational situation, without there being any appropriate safeguards which would make it possible to question that opinion.

He alleged that the provisions in question were therefore clearly inherently unconstitutional since, falling within the area of “rights, freedoms and guarantees”, they were covered by the reservation relating to Parliament's legislative power. On this point, the Court found that, in view of Parliament's “supervisory function in relation to legislative decisions”, the approval of an amending Act made it impossible to plead inherent unconstitutionality in the future, at least as regards the provisions contained in the Act and the provisions which Parliament wished to leave unchanged, or the provisions which, during the special parliamentary legislative procedure, were the subject of proposals for amendments which were rejected.

Secondly, the Attorney-General submitted that the two texts in question were unconstitutional in form as they fell within the scope of “labour legislation” and the right of the works committees and trade unions to participate in the preparation of these texts, in accordance with Article 54.5.b of the Constitution, had not been complied with. As the participation of workers' representative bodies in the drafting of Act 7/95 was a proven fact, the Court held that the fact that the preamble to the Act did not mention this was of no importance; moreover, even as regards the provisions which had not been amended by the Act, the works committees and trade unions had undoubtedly been sufficiently consulted on their retention. It might, however, be claimed that the question remained of the formal unconstitutionality of the provisions in question before publication of the Act. Nevertheless the Court decided not to consider that question as it was pointless to do so. As the provisions in question covered a very wide range of situations which were not controversial and which might be called into question in the event of a finding of unconstitutionality with general binding force, the Court limited the effects of this finding for reasons of legal certainty.

The Court then addressed important issues of substantive unconstitutionality. First of all, it dealt with the imposition on workers of an unlimited obligation to disclose their overall state of health and to undergo all medical examinations deemed necessary by the “occupational physician”. This might entail a “clear, disproportionate and intolerable restriction” of one of the core elements of the right to the protection of privacy (secured by Article 26 of the Constitution) and, hence, a violation of Article 18.2 and 18.3 of the Constitution, because systematic access to information on workers' health – not confined to “hazardous occupations” and strictly occupational diseases – entailed an excessive and disproportionate restriction of that individual right.

In the Court's view, the legal provision stipulating the obligation to undergo medical tests or examinations did not include forced physical submission to medical tests or examinations. If it did, that might conflict with the right to freedom and physical integrity. The Court recognised, however, that even if the carrying out of these medical tests or examinations presupposed the worker's agreement, in some cases it represented an obstacle to recruitment and, in others, a real legal obligation on which continued employment might even depend. However that may be, legally binding submission to medical tests or examinations – an intrusion in private life insofar as these tests or examinations were designed to collect data on health, which necessarily included information on private life – might, in some cases and under certain conditions, be permissible in view of the need to harmonise the right to protection of privacy with other legitimate rights or interests recognised by the Constitution (for example, the protection of public health or the administration of justice).

However, it also had to be determined whether the obligation to undergo a medical examination to ascertain “the effects of work and working conditions on the worker's health” in his or her own interest and even if he or she did not want it, was constitutionally admissible. Assessment of this issue should take into account the new version of Article 59.1.c of the Constitution, according to which workers were entitled to “safe and healthy working conditions”. The question was therefore whether the state's obligation to legislate to ensure protection of workers' health could go so far as to oblige workers to undergo medical examinations to protect their own health, even when they were unwilling to do so, in other words, where important public interests or fundamental rights of third parties were not essentially at stake. The Court held that, in terms of the Constitution, the obligation to undergo a medical examination could be based on the need actually to ensure – in the case of the weakest workers, in particular “pregnant women and women after childbirth”, “minors”, “persons with disabilities” and those who “perform particularly strenuous work or work under insalubrious, toxic or dangerous conditions” – that work was done without risk to the worker him – or herself. In its decision, the Court bore in mind that the protection of workers and elimination of the harmful social consequences of failure to protect them were, from the historical point of view, the raison d'être of labour legislation. Medical examinations at regular intervals were consistent with the Constitution, but the Constitution set out that they should be precisely tailored to the aim sought to be achieved.

The effective creation of a databank containing information on the overall state of health of all workers in all companies was a violation of Article 35 of the Constitution for two reasons: first, the databank on workers' health was created within the company employing the workers; secondly, the law did not establish any safeguards in relation to collection and processing of the data in question and access to it, other than by merely "declaring" it to be confidential. The Court held that even if it might be acknowledged that the two conditions were partly met on the date of the application, that was no longer the case and that, as in other legal systems, any "occupational physician" who passed on to the employer information reflecting a medical diagnosis was guilty of violating professional secrecy. This meant that it was impossible to take the view that the text in question allowed a databank on workers' health to be set up within the company employing them.

Lastly, the system introduced might also entail an intolerable and disproportionate restriction of the right to work and the fundamental right to choose and engage in an occupation in accordance with Article 47 of the Constitution. The Court held, however, that a worker's inability to engage in a particular occupation or type of work for reasons related to his or her physical or mental health was necessarily included in the restrictions allowed under the Constitution – because they were "inherent in his or her own capacity"; hence, that restriction was not disproportionate.

In short, since the purpose of the medical examinations provided for under the legislation was solely to prevent occupational hazards and promote workers' health, the Court dismissed the application and ruled that the provisions in question were not unconstitutional.

Supplementary information:

The Court referred to the judgment of 23 May 1994 in which the Italian Constitutional Court declared a section of the AIDS prevention and control programme unconstitutional insofar as it did not provide for HIV screening tests for persons engaging in activities involving risks to the health of third parties (*Raccolta Ufficiale delle Sentenze e Ordinanze della Corte Costituzionale*, vol. CXI, 1994, p. 639). A commentary on this judgment by Nicola Recchia can be found in *Giurisprudenza Costituzionale*, year XL, 1995, volume 1, p. 559).

In support of its argument, the Court also referred to the case-law of the European Commission and Court of Human Rights, according to which compulsory tuberculosis screening tests are permissible on public health grounds (application no. 10435/83, *Roger Acmane and others v. Belgium*), as are the compulsory subjection of a notary to a psychiatric examination (Application no. 8909/80, *P.G. v. Federal Republic of Germany*) or, in the interests of crime prevention (Application no. 21132/93, *Theodorus Albert Ivo Peters v. the Netherlands*), the compulsory provision of a urine sample for analysis to test for drug use by prisoners.

The Court also took into consideration Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (published in the *Official Journal of the European Communities*, no. L 183/1, of 29 June 1989), and particular Article 14 which states that measures to "ensure that workers receive health surveillance appropriate to the health and safety risks they incur at work" (para. 1) shall be "such that each worker, if he so wishes, may receive health surveillance at regular intervals" (para. 2).

Languages:

Portuguese.

Identification: POR-2002-3-007

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 15.10.2002 / **e)** 421/02 / **f)** / **g)** *Diário da República* (Official Gazette), 302 (Series II), 31.12. 2002, 21179-21183 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

1.3.4 **Constitutional Justice** – Jurisdiction – Types of litigation.
1.3.5 **Constitutional Justice** – Jurisdiction – The subject of review.
3.3.1 **General Principles** – Democracy – Representative democracy.
4.5.10 **Institutions** – Legislative bodies – Political parties.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.

Keywords of the alphabetical index:

Political party, disciplinary decision, appeal to constitutional court / Political party, punitive decisions, application to set aside / Activist, right / Exhaustion of internal remedies.

Headnotes:

The system for "challenging decisions taken by the organs of political parties" (and the corresponding preventive measures) set up under the Act on the Organisation, Functioning and Procedure of the Constitutional Court does not lead to constitutionally inadmissible state interference in the free functioning of political parties because it merely provides for machinery that is essential to safeguard existing constitutional and legal principles. The protection of activists' rights, combined with the constitutional guarantee of access to the courts, demands that it should be possible to submit punitive disciplinary decisions to external judicial review, which, moreover, does not conflict with freedom within the party, provided that the degree of the review is differentiated and that, with a view to safeguarding party autonomy, internal legal remedies have first been exhausted.

Summary:

Three Portuguese Communist Party (PCP) activists lodged applications challenging a decision taken by the Secretariat of the PCP's Central Committee on 19 July 2002, and ratified the same day by the party's Central Control Commission, and requested that the applications be given suspensive effect. This decision imposed (on two of them) the penalty of "expulsion from the party" and (on the third) the penalty of "suspension from activity within the party for 10 months".

In Judgment 361/02 of 21 August 2002 (delivered by its 2nd Division) the Constitutional Court decided not to hear the applications and the requests for suspensive effect because the internal remedies provided for under the party's statutes with regard to assessment of the validity and lawfulness of punitive decisions had not been exhausted, as required under the Constitutional Court Act; and, where one of them was concerned, because the punitive decision in question which had to be ratified by the PCP's Central Committee, was not in effect in the absence of such ratification.

The applicants' appeal against this judgment was heard by the Constitutional Court sitting in plenary. The applicants argued that "ratification" by the Central Control Commission and the "delegation of authority" by the Central Committee rendered the expulsion measure final and therefore meant that the internal remedies for assessing and reviewing the penalties imposed had been exhausted.

Under the terms of Articles 10.2 and 51.1 of the Constitution, political parties contributed to the organisation and expression of the will of the people, while respecting, *inter alia*, the principle of political democracy. Although the Constitution conferred certain rights on political parties, it had laid down as principles governing their operation "transparency, democratic organisation and management, and the participation of all its members" (Article 51.5 of the Constitution). These principles derived from the constitutional role played by political parties in the formation, organisation and expression of the citizens' political will: a largely party-based democracy could not dispense with the requirements of democracy within the parties too – this was its functional precondition.

The Act on the Organisation, Functioning and Procedure of the Constitutional Court (Constitutional Court Act) implemented Article 223.1.h of the Constitution (1997 revision) by introducing procedures for "challenging the election of the members of organs of political parties" and "challenging decisions taken by the organs of political parties" (and the corresponding preventive measures). With regard to the latter procedures, a distinction had to be drawn between, on the one hand, decisions that were challenged "on the basis of illegality or the violation of a statutory rule", punitive decisions taken by the organs of political parties in disciplinary proceedings, and decisions "directly and personally affecting" an activist's "rights of participation in the party's activities", and on the other hand, the right of "every activist" to challenge "the party organs' decisions on the grounds of a serious breach of the basic rules relating to the party's competence or democratic functioning".

The Constitutional Court sitting in plenary analysed the system for challenging decisions and the statutes of the PCP and found that the disciplinary decisions taken by the Secretariat of the Central Committee should be appealed against before the Central Committee as the body to which the PCP's Secretariat was subordinate. It considered that the fact that the empowering body and the empowered body were not only different but also held different positions was of political significance. The first of the two was the party's highest authority, vested with statutory powers in the area of punitive measures, and retaining those powers and (political) superiority in relation to the empowered body. The main purpose in delegating authority would simply be to decentralise functions without prejudice to the possibility open to the punished activists of applying to the Central Committee in accordance with the statutes and thus exhausting

internal remedies. The intervention of the Constitutional Court was a last resort.

In the light of the foregoing, the Constitutional Court decided to dismiss the appeal and, therefore, upheld Judgment no. 361/02, delivered by its 2nd Division, in which it had decided not to hear the applications to set aside the impugned decision and the requests for suspensive effect (because it could still be challenged before the PCP's Central Committee).

Languages:

Portuguese.

Identification: POR-2002-3-008

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 19.11.2002 / **e)** 474/02 / **f)** / **g)** *Diário da República* (Official Gazette), 292 (Series I-A), 18.12.2002, 7912-7921 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.
5.4.15 **Fundamental Rights** – Economic, social and cultural rights – Right to unemployment benefits.

Keywords of the alphabetical index:

Legislative omission, partial / Civil servant, unemployment, benefit, difference in treatment.

Headnotes:

A constitutional provision in respect of which unconstitutionality by omission is pleaded must be sufficiently precise and concrete for the Court to be able to determine what legal measures are necessary to implement it without having to give a decision on possible different policy choices. Hence, since the Constitution gives Parliament virtually unlimited possibilities, the Court could not find a violation of the duty to legislate on the basis of solely legal criteria. Consequently, since a political opinion cannot be the basis of a judicial finding of unconstitutionality by omission, it becomes impossible to reach such a finding.

A finding of unconstitutionality by omission therefore presupposes a concrete and specific case of violation of the Constitution, established on the basis of a sufficiently precise rule, which the ordinary legislature has not rendered enforceable in due time. Moreover, a finding of unconstitutionality by omission can also be based on constitutional provisions recognising social rights, provided the constitutional requirements are met.

Summary:

The *Provedor de Justiça* asked the Court to assess and review the unconstitutionality resulting from the lack of the requisite legislative measures for the rule contained in Article 59.1.e of the Constitution to be fully implemented in respect of public servants.

The Constitutional Court noted that, under the terms of Article 283 of the Constitution, a case of unconstitutionality by omission existed where:

1. a particular constitutional provision was not complied with;
2. that provision was not enforceable in itself;
3. the legislative measures necessary in the specific case were lacking or inadequate; and
4. that lack was the cause of failure to comply with the Constitution.

Accordingly, it was important to consider whether the constitutional provision concerning the right to material assistance in the event of unemployment met the requirements for finding a case of unconstitutionality by omission, even if that right was a social right and should not be regarded as analogous to rights, freedoms and guarantees. The material assistance referred to in Article 59.1.e of the Constitution must necessarily take the form of a specific benefit directly related to the situation of involuntary unemployment. This benefit must form part of the social security system and could only be established by means of legislation.

This was therefore a specific legislative obligation contained in a sufficiently precisely worded provision. That was of course without prejudice to the ordinary legislature's wide margin of appreciation. Parliament was required to provide a welfare benefit for those who found themselves involuntarily unemployed, but, in return, it could choose among the different forms of organisation and among the different criteria for fixing the amount of that benefit. Lastly, it should be noted that Article 59 of the Constitution was applicable to all workers, including, obviously, public administration workers.

Consequently, it could be concluded that the Constitution imposed on Parliament a specific and concrete obligation to provide a benefit corresponding to material assistance to workers – including public administration workers – who found themselves involuntarily unemployed, failing which an action might be brought for unconstitutionality by omission.

Although public administration workers, and more specifically those who were recruited to a post by appointment or by administrative contract, were generally not entitled to unemployment benefit, because they were not affiliated to the general social security scheme, some of them were now entitled to unemployment benefit under special legislation. This did not apply to those who were recruited under a fixed-term contract and those who, by way of an exception, were employed under an individual contract. Subject to these exceptions, public administration workers recruited to a post by appointment or by administrative contract were not yet entitled to unemployment benefit or to any other specific benefit in the event of involuntary unemployment, because these workers could not join the general social security scheme.

In the instant case, the result was a partial omission, given that Parliament had implemented a constitutional provision which required it to secure the right to material assistance to workers who found themselves involuntarily unemployed, but it had only secured that right to some of them, as public administration workers generally were not included. This partial omission was in itself sufficient for a finding of unconstitutionality by omission. Furthermore, if one took into consideration the time which had already elapsed since the Constitution came into force, the obvious conclusion was that sufficient time had elapsed for the legislative task in question to be accomplished.

The Constitutional Court found, therefore, that the Constitution had been violated in view of the failure to take the legislative measures required for the implementation of the right provided for under Article 59.1.e of the Constitution, in relation to public administration workers.

Languages:

Portuguese.

Identification: POR-2002-3-009

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 19.12.2002 / **e)** 509/02 / **f)** / **g)** *Diário da República* (Official Gazette), 36 (Series I-A), 12.02.2003, 905-917 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.5 **General Principles** – Social State.
3.9 **General Principles** – Rule of law.
3.11 **General Principles** – Vested and/or acquired rights.
3.17 **General Principles** – Weighing of interests.
3.19 **General Principles** – Margin of appreciation.
4.5.2 **Institutions** – Legislative bodies – Powers.
5.2.2.7 **Fundamental Rights** – Equality – Criteria of distinction – Age.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to a sufficient standard of living.

Keywords of the alphabetical index:

Social protection systems / Income, guaranteed minimum, beneficiary, difference in treatment / Integration income.

Headnotes:

The principle of respect for human dignity, which is embodied in Article 1 of the Constitution and which is derived also from the idea of the democratic state based on the rule of law, mentioned in Article 2 and again in Article 63.1 and 63.3 of the Constitution (which guarantees everyone the right to social security and requires the social security system to protect citizens in all situations in which the means of subsistence or the capacity to work have been lost or impaired), implies recognition of the right to or guarantees of a decent minimum income.

In implementing the right to a decent minimum income, Parliament enjoys the independence freedom, required to choose the appropriate instruments for that purpose. It can shape them according to circumstances and its own political criteria. In the instant case, Parliament might perfectly well take the view that, in relation to young people, the solution adopted should not be to make a grant – and, in particular, not to extend the scope of the social integration income – but to provide other benefits, in cash or in kind, such as study or training grants or apprenticeship wages (at least when they are linked to social integration schemes). The important thing, however, is that Parliament's choice

should guarantee the right to a decent minimum income with a minimum of legal efficacy in all cases.

Summary:

The President of the Republic requested a review of the constitutionality of a provision contained in a parliamentary decree which had been submitted to him for promulgation as a law. This text abolished the guaranteed minimum income provided for under the legislation in force and created the social integration income. The doubts with regard to constitutionality concerned the article determining who was entitled to the social integration income, since, according to the legislation in force, persons aged 18 or over were entitled to the minimum income, whereas the new text guaranteed the right to the social integration income only to persons aged 25 or over.

The point at issue was whether, by replacing the entire guaranteed minimum income scheme with the social integration income scheme, Parliament could generally deprive persons of under 25 years of age of the rights which they had previously enjoyed, without any constitutionally based ground justifying such discrimination in relation to persons aged 25 or over. The distinction according to age established by the provision in question was permissible only if it was not arbitrary, in other words if it was justified on reasonable grounds. Consequently, Parliament was not prohibited from making such a distinction if age could be regarded as an important factor for the adoption of other instruments as an alternative to the social integration income. If so, it would be necessary to put forward certain specific aims which it was hoped to achieve in relation to the 18-25 age group, i.e. a particular concern with regard to their integration in the world of work.

It seemed reasonable to assume that priority should be given to preparing young people for full integration in social life, with the emphasis on vocational training, apprenticeship and creation of the conditions for helping them to find their first job, especially as, under the terms of Article 70.1.b of the Constitution, "young people [...] shall receive special protection so that they may enjoy their economic, social and cultural rights", in particular with respect to "access to a first job, work and social security". That constituted a sufficient constitutional guarantee for the rules applied to them to reflect positive discrimination in this area.

The main question was whether there was a constitutional guarantee of a decent minimum income. A distinction needed to be drawn, however, between recognition of a right not to be deprived of what was regarded as essential to maintain the income required for a decent subsistence minimum, and recognition of a right to ask the state to ensure that minimum, particularly by means of allowances, as suggested by German legal theory and case-law. According to the latter, "the principle of human dignity and the principle of the welfare state give rise to a claim to benefits necessary to ensure subsistence". A guaranteed subsistence minimum included "sufficient welfare benefits", in accordance with the legislation on social welfare, in other words "the state is obliged to guarantee destitute citizens, by means of welfare benefits, the minimum conditions needed to live in a manner consistent with human dignity" (*BverfGE*, 82, 60 (85)).

According to the case-law of the Portuguese Constitutional Court, once the state had accomplished (fully or partly) the tasks imposed on it by the Constitution with a view to implementation of a social right, constitutional observance of that right was no longer only a positive obligation, but also a negative obligation. The state that was obliged to take action to realise the social right must now refrain from jeopardising the implementation of that right.

Generally, legal writers agreed on the need to strike a balance between the stability already achieved in the area of legislative implementation of social rights and Parliament's freedom of adaptation. To strike this balance it would be necessary to distinguish between the different situations arising. In cases where the Constitution contained a sufficiently precise and concrete order to legislate, Parliament's scope of freedom to reduce the level of protection already achieved was necessarily very limited, because it would only be able to do so to the strict extent that the desired legislative change did not result in unconstitutionality by omission. In other circumstances, however, the rule against reducing the level of protection of social rights could only operate in borderline cases, because if democratic alternation of power was to be regarded as more than a purely theoretical concept, it must entail the reversibility of political and legislative choices, even if they were fundamental choices.

In the instant case, there would no longer be any point in considering the question of a prohibition on reducing the level of protection if the conclusion were to be reached that the right to a decent minimum income was guaranteed by the Constitution and that there were no other instruments which could do so with a minimum of legal efficacy. Otherwise there would, after all, be a case of unconstitutionality through violation of that right, independently of the substance of the legislation previously in force. It was important, therefore, to see exactly what the Constitution stated with regard to the right to a decent minimum income.

The question of whether the substance of the right was reduced to the point of infringing the principle of equality was conceptually independent of the prohibition on reducing the level of protection, because it would be considered mainly in terms of the close links between the different situations regulated by the decree in question, and not in terms of a comparison between the treatment which would be applied to them in future and the treatment applied under the rules still in force.

Parliament enjoyed freedom of adaptation in choosing the appropriate instruments for implementing the right to a decent minimum income. It could decide on the "means and amount of assistance", without prejudice to an "essential minimum" which it would always have to provide. This freedom stemmed from the democratic principle which presupposed the possibility of making choices giving a meaning to pluralism and democratic alternation of power, albeit within the limits laid down by the Constitution. Here, it was necessary to strike a balance between the two pillars on which, according to Article 1 of the Constitution, the Portuguese Republic was founded: on the one hand, human dignity, and on the other, the will of the people expressed through elections.

However, the existing legal instruments, whose specific aim was to promote the integration of young people in working life or professional training, conferred no rights on the destitute and did not give young people proper access to the programmes they contained. The provision under review therefore violated the minimum content of the right to a decent minimum income. This right derived from the principle of respect for human dignity, which, in turn, was recognised by Article 1 of the Constitution and which also derived from the idea of the democratic state based on the rule of law mentioned in Article 2 of the Constitution and again in Article 63.1 and 63.3 of the Constitution.

In short, the Constitutional Court found the provision to be unconstitutional on the grounds that it violated the right to a decent minimum income inherent in the principle of respect for human dignity.

Supplementary information:

In theory, the question of a prohibition on reducing the level of protection does not arise solely in relation to social rights. On the contrary, the French Constitutional Council introduced the idea of a "standstill effect" with a decision given in the field of fundamental freedoms (Decision DC 83-165 of 20 January 1984), in which it held that the total repeal of an act in this field was not possible unless it was replaced by another offering comparable guarantees of efficacy. It was only much later (DC 90-287 of 16 January 1991) that the Constitutional Council recognised that this standstill effect might also be applicable in the area of economic and social rights, despite legal writers' reservations about its scope.

The present judgment by the Constitutional Court stresses that, in 1988, the European Parliament declared itself in favour of establishing in all the member states a guaranteed minimum income to help ensure that the poorest citizens are integrated into society (*Official Journal of the European Communities,* no. C 262 of 10 October 1988, p. 194); refers to point 10 of the *Community Charter of the Fundamental Social Rights of Workers*; and notes that, in 1992, the European Council approved Recommendation no. 92/441/EEC on common criteria concerning sufficient resources and social assistance in social protection systems.

In addition to the case-law of the German Constitutional Court (Decision of 18 June 1975 – *BVerfGE* 40, 121 (134)), the present judgment is also based on Portuguese constitutional case-law, which is gradually recognising, albeit indirectly, a guaranteed right to a decent minimum income or a subsistence minimum, either in connection with the adjustment of occupational injury pensions (Judgment no. 232/91), or in connection with the exemption from attachment of certain social allowances (Judgments nos. 349/91, 411/93, 318/99, 62/02 and 177/02).

Languages:

Portuguese.

Romania
Constitutional Court

Important decisions

Identification: ROM-2002-3-006

a) Romania / **b)** Constitutional Court / **c)** / **d)** 24.09.2002 / **e)** 259/2002 / **f)** Decision on the challenge to the constitutionality of the provisions of Articles 409, 410, 411.4 and 412.1 of the Code of Criminal Procedure / **g)** *Monitorul Oficial al României* (Official Gazette), 23.10.2002, 770 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
3.18 **General Principles** – General interest.
4.6.6 **Institutions** – Executive bodies – Relations with judicial bodies.
4.7.4.3.1 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel – Powers.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
5.3.14 **Fundamental Rights** – Civil and political rights – *Ne bis in idem*.

Keywords of the alphabetical index:

Res iudicata / Public Prosecutor, powers / Appeal, extraordinary, procedure / Sentence, enforcement, suspension.

Headnotes:

In Romania, only the Principal State Prosecutor may exercise the extraordinary remedy of an application to set aside final court decisions, in view of his/her role in representing the general interest of society and defending the legal order and the citizens' rights and freedoms.

Decisions taken by the Principal State Prosecutor to suspend enforcement of final court decisions *(res iudicata)* prior to the formal application to set aside these decisions violated the principle of the separation of powers within the State.

Summary:

The Criminal Division of the Romanian Supreme Court of Justice referred a question to the Constitutional Court for a preliminary ruling on the constitutionality of the provisions of Articles 409, 410, 411.4 and 412.1 of the Code of Criminal Procedure.

The grounds for the reference regarding constitutionality were the following: Article 409 of the Code of Criminal Procedure violates Articles 21, 131.1 and 24 of the Constitution because it grants the Principal State Prosecutor the exclusive right to bring applications to set aside court decisions; Article 410 of the same Code infringes Article 4.1 Protocol 7 ECHR on the right not to be tried or punished twice for the same offence; and Article 411.4 violates the right to a fair trial secured under Article 6.1.3 ECHR.

Article 412.1 violates the principle of the separation of powers within the State. Regarding the issue of the constitutionality of these provisions, the Court noted that Articles 409, 410 and 411 of the Code of Criminal Procedure concerned the extraordinary procedure governing appeals to set aside court decisions.

In accordance with Article 125.3 of the Constitution in conjunction with Article 128 of the Constitution, the legislature is the sole authority empowered to regulate jurisdictional powers and trial procedures, as well as appeals against judicial decisions and the conditions for implementing such remedies. Under the terms of these Constitutional provisions, an appeal to set aside a court decision is an extraordinary remedy typified by the following: the Principal State Prosecutor has exclusive powers to initiate such appeals, acting *proprio motu* or at the request of the Minister of Justice. The Supreme Court of Justice has jurisdiction as regards interpretation, the exclusive subjects of the appeal are final judicial decisions, and the grounds for lodging the appeal are explicitly and exhaustively listed in Article 410 of the Code of Criminal Procedure. The Court noted that the provisions complained of comply with Articles 21 and 24 of the Constitution, with Article 6.1 ECHR, and with Article 4.1 Protocol 7 ECHR. The fact that this remedy is directed against final court decisions means that only the Principal State Prosecutor of Romania is statutorily entitled to exercise such an appeal, taking account of the provisions of Article 130.1 of the Constitution, which states that in the judicial field the Public Prosecutor's Office must represent the general interests of society and defend the legal order, as well as citizens' rights and freedoms. These provisions do not infringe the right to a fair trial because, in accordance with Article 413 of the Code of Criminal Procedure, the parties are summoned to appear and may exercise this right unhampered when the Court is adjudicating

the appeal, whether against sentenced or acquitted persons or in favour of defendants against whom all criminal charges have been dropped.

In connection with the violation of Article 6.1 ECHR, the Court noted that under the case-law of the European Court of Human Rights the "fair trial" requirement does not necessarily imply the existence of several judicial levels or of specified remedies against court decisions; consequently, it also does not necessitate entitling all parties to proceedings to exercise such remedies – including extraordinary remedies. Furthermore, an appeal cannot be considered as a retrial in the same case, but must be seen as a remedy aimed at redressing the mistakes on which certain final decisions are based and, implicitly at least, at restoring the legal order. This means that the alleged violation of the *ne bis in idem* principle referred to in the provisions of Article 4.1 Protocol 7 ECHR be discounted.

With regard to the issue of the constitutionality of Article 412.1 of the Code of Criminal Procedure, which allows the Principal State Prosecutor to order a suspension of the enforcement of the final court decision prior to the formal application to set the latter aside, the Court held that the statutory provisions violate the principle of the separation of powers within the State. From this angle, contrary to the civil procedure point of view, the Court ruled that the provisions to the effect that "the Principal State Prosecutor may order, for a limited period, the suspension of enforcement of legal decisions before initiating the appeal to have the latter set aside" violate the principle of the separation of powers within the State, which, even if it is not explicitly enshrined in the Constitution, can be inferred from the overall Constitutional provisions, particularly from those referring to the functions of and relations between the public authorities. Although the Public Prosecutor's Office belongs to the "judiciary", it does not discharge duties of a judicial nature, and the public prosecutors work under "the authority of the Ministry of Justice", a body which is essentially executive in nature, because they themselves are officials responsible to the executive.

The suspension of the enforcement of judicial decisions by the Principal State Prosecutor for reasons of expediency before the actual appeal is lodged with the Court therefore has no Constitutional justification.

Supplementary information:

The decision on the provisions of Article 412.1 of the Code of Criminal Procedure was adopted on a majority of votes, with one dissenting opinion by two judges.

Cross-references:

Decision no. 73 of 04.06.1996 was published in the Romanian Official Gazette *(Monitorul Oficial)*, Part 1, no. 255 of 22.10.1996, becoming final following Decision no. 96 of 24.09.1996 published in the Romanian Official Gazette *(Monitorul Oficial)* no. 251 of 17.10.1996.

Languages:

French.

Identification: ROM-2002-3-007

a) Romania / **b)** Constitutional Court / **c)** / **d)** 05.11.2002 / **e)** 293/2002 / **f)** Decision on the challenge to the constitutionality of the provisions of Article 28.3.1 of Law no. 92/1992 on the organisation of the judiciary, with subsequent amendments and additions / **g)** *Monitorul Oficial al României* (Official Gazette), 04.12.2002, 876 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

4.7.4.3.1 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel – Powers.

Keywords of the alphabetical index:

Public Prosecutor, powers / Public Prosecutor's Office, organisation / Hierarchical subordination.

Headnotes:

The Principal State Prosecutor's power to discharge any of the responsibilities of his/her subordinate public prosecutors does not constitute a substitution of the latter's powers, but rather the implementation of the principle of hierarchical subordination of public prosecutors enshrined in Article 131.1 of the Constitution as the principle of "hierarchical control". The limits and conditions of exercise of this principle are stipulated by separate statute.

Summary:

Galatzi Trial Court referred a question to the Constitutional Court for a preliminary ruling on the constitutionality of the provisions of Article 28.3.1 of Law no. 92/1992 on the organisation of the judiciary, with subsequent amendments.

The ground for the reference regarding constitutionality is that Article 28.3.1 of Law no. 92/1992 on the organisation of the judiciary is incompatible with Article 131.1 of the Constitution because it is inconceivable for the hierarchically superior public prosecutor to be allowed to supervise an official and at the same time assume the right to perform the work incumbent upon the person whom he or she is supervising. The Court considers that the Constitutional principles regulating the activity of public prosecutors should include the principle of hierarchical subordination, which typified the organisation and operation of the old State Counsel's Office that was abolished simultaneously with the adoption and entry into force of the Constitution. When examining the issue of the constitutionality of the provision in question, the Court noted that the legal provisions complained of, which allow the hierarchically superior public prosecutor to discharge any of the duties of his or her subordinate prosecutors, add nothing to Article 131.1 of the Constitution. Article 131 is in Section 2 – The Public Prosecutor's Office, Chapter VI – The Judiciary, Title III – The Public Authorities, and sets forth the three principles governing the activities of public prosecutors, viz the principle of legality, the principle of impartiality and the principle of hierarchical control.

The principle of hierarchical subordination refers to relations among law officers operating in the Public Prosecutor's Office, requiring that such officials submit to their superiors, i.e. to draw up, or refrain from drawing up, specified documents or decisions on their orders.

In the Constitution, the principle of hierarchical subordination was referred to as “hierarchical control” in order to harmonise with the other two principles set out in Article 131.1, the principle of legality and the principle of impartiality. Article 28 of Law no. 92/1992 establishes the substance and limits of this principle: the hierarchically superior prosecutor may discharge any of the duties of his/her subordinate prosecutors and suspend or invalidate any decisions or measures they may have adopted.

The legislator has introduced a series of restrictions to the principle of hierarchical control: hierarchically superior prosecutors may suspend or invalidate subordinate prosecutors' decisions or measures only where the latter violate the law. Only measures taken in accordance with law are binding upon subordinate prosecutors, and any prosecutor is free to submit to courts any conclusions which he/she considers legally justified, together with the evidence adduced in individual cases. The hierarchically superior prosecutor may not oblige subordinate prosecutors to draw up documents or adopt measures contrary to their convictions, based on analysis of the cases under consideration and the applicable legal standards, by virtue of the prosecutor's status enshrined in the Constitution.

Hierarchical control of the prosecutors' work necessitates allowing the hierarchically superior prosecutor to draw up documents and conduct other prosecution activities in person. The superior prosecutor is responsible for supervising the activity of his/her subordinate prosecutors. The Court noted that in its case-law on the concept of the judiciary, the European Court of Human Rights has ruled that where a member of the judiciary is empowered by law to exercise judicial functions, subordination to other members of the judiciary cannot be excluded.

Languages:

French.

Russia
Constitutional Court

Statistical data
1 September 2002 – 31 December 2002

Total number of decisions: 3

Categories of cases:
- Rulings: 3
- Opinions: 0

Categories of cases:
- Interpretation of the Constitution: 0
- Conformity with the Constitution of acts of state bodies: 3
- Conformity with the Constitution of international treaties: 0
- Conflicts of jurisdiction: 0
- Observance of a prescribed procedure for charging the President with high treason or other grave offence: 0

Types of claim:
- Claims by state bodies: 0
- Individual complaints: 3
- Referral by a court: 0

Important decisions

Identification: RUS-2002-3-007

a) Russia / **b)** Constitutional Court / **c)** / **d)** 21.11.2002 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 30.11.2002 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.
3.16 **General Principles** – Proportionality.
5.1.1.3.1 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Migrant, forced, convicted, for crime / Migrant, forced, withdrawal of status, criteria / Refugee, internal / Sanction, auxiliary.

Headnotes:

Withdrawing the status of “forced migrant” from a citizen if he/she is charged with a criminal offence implies that the State refuses to fulfil its obligation relating to that status and to assist in the restoration of legitimate rights and interests of its citizens. Because this measure is not laid down in criminal legislation, it is viewed as an auxiliary sanction and is thus contrary to the principles and criteria of constitutional law.

Summary:

The Court reviewed the constitutionality of a legal provision concerning forced migrants, according to which the migration office had to withdraw the status of forced migrant from a person charged with a criminal offence.

Examination of the case was initiated by an individual complaint by a citizen forced to leave the city of Grozny in 1995.

The Court noted that where in a Federation entity an extraordinary situation arises and where following such a situation legal certainty is disrupted causing inhabitants to leave their permanent residence against their will, the State shall be obliged to ensure conditions for social reintegration and reinstatement of the violated rights of such persons in accordance with the Constitution.

The legislation defines forced migrants as citizens who have had to leave the place of their residence because they or their families were subjects of violence or persecution or were in real danger of persecution based on their race, national origin, religion, language, membership in a particular social group or as a result of political opinions used as pretext to organise disruptive actions or seriously disturb public order.

The legislation provides for financial, social and legal guarantees to protect legitimate interests of forced migrants, including the right to accommodation, work, social security health protection and medical assistance. Due to the status granted of forced migrant, special legal relations between the citizens and the State are established obliging the State to facilitate migrants' settling into a new place of

residence and to compensate them for loss of their previous accommodation and other possessions.

The status of forced migrant is granted for a period of five years. Since the obligations for reinstatement of forced migrant's violated rights are fulfilled by the State, the additional guarantees deriving from their status shall be reduced. Provided there is no basis for its extension, the status of forced migrant shall come to end on the expiration date of the set period.

Because the status of forced migrant is defined by law, the federal legislature has the right to enforce legal liability for violation of laws relating to forced migrants as well as for any abuse of rights deriving from such status. However, such measures would imply restrictions of citizens' rights and freedoms and, therefore, may only be enforced by federal law where it is necessary to protect the underlying principles of the constitutional system, as well as integrity, health, or legitimate rights and interests of other persons or guarantee the State's defence or security.

According to the challenged provision, withdrawing the status of forced migrant from a citizen where he/she is charged with criminal conduct implies that the state unilaterally refuses to accept the previous status of the citizen as a person forced to leave his/her place of residence and, as a consequence, refuses to fulfil its obligation relating to that status to assist in the restoration of legitimate rights and interests of the citizens.

Withdrawal of the status of forced migrant because of criminal charges being brought against a person is not provided for in criminal legislation and is enforced by administrative procedure. This is viewed as an auxiliary sanction applied by the act of sentencing a person charged with criminal conduct.

Therefore, the challenged measure is not in accordance with the general principles of criminal liability, the legal and constitutional criteria, and proportionality. It imposes an undue constraint on citizen rights and adversely affects the principles of legal equality as well as protection of human rights and freedoms guaranteed by the State.

The legislature may provide for situations where the status of forced migrant is withdrawn because it conflicts with the nature of the crime committed and with the judgment delivered.

The Court finds the challenged provision to be contrary to the Constitution.

Languages:

Russian.

Slovenia
Constitutional Court

Statistical data
1 September 2002 – 31 December 2002

The Constitutional Court held 31 sessions (14 plenary and 17 in chambers) during this period. At the beginning of the period (1 September 2002), there were 451 cases pending in the field of the protection of constitutionality and legality (denoted by the prefix "U" in the Constitutional Court Register) and 823 cases pending in the field of human rights protection (denoted by the prefix "Up" in the Constitutional Court Register) from the previous year. The Constitutional Court accepted 115 new U and 235 Up new cases in the period covered by this report.

In the same period, the Constitutional Court decided:

- 98 U cases in the field of the protection of constitutionality and legality, in which the Plenary Court made:
  - 28 decisions and
  - 70 rulings;
- 41 U cases were joined to the above-mentioned cases for treatment and adjudication.

Accordingly, the total number of U- cases handled and completed was 139.

In the same period, the Constitutional Court handled and completed 250 Up cases in the field of the protection of human rights and fundamental freedoms (20 decisions issued by the Plenary Court, 230 decisions issued by a Chamber of three judges).

Decisions are published in the Official Gazette of the Republic of Slovenia, while rulings of the Constitutional Court are not generally published in an official bulletin, but are given to the participants in the proceedings.

However, all decisions and rulings are published and made available as follows:

- in an official annual collection (full text in Slovenian, including dissenting and concurring opinions, and English abstracts);
- in the *Pravna Praksa* (Legal Practice Journal) (Slovenian abstracts, with full text of the dissenting and concurring opinions);
- since 1 January 1987 via the on-line STAIRS database (full text in Slovenian and English versions);
- since June 1999 on CD-ROM (full text in Slovenian 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); and
- in the CODICES database of the Venice Commission.

Important decisions

Identification: SLO-2002-3-005

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 14.11.2002 / **e)** U-I-245/02 / **f)** / **g)** *Uradni list RS* (Official Gazette), no. 105/02 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
3.13 **General Principles** – Legality.
4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
4.8.6.1 **Institutions** – Federalism, regionalism and local self-government – Institutional aspects – Deliberative assembly.
4.9.6 **Institutions** – Elections and instruments of direct democracy – Representation of minorities.

5.3.38 **Fundamental Rights** – Civil and political rights – Electoral rights.
5.3.42 **Fundamental Rights** – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Local self-government body, election / Roma, representation / Roma, community, autochthonous.

Headnotes:

The Charters of the Municipalities of Beltinci, Grosuplje, Krško , Semic, Šentjernej and Trebnje are inconsistent with the Local Self-Government Act in so far as they do not include provisions on the composition of a municipal council enabling the Roma community to exercise the right to elect its representative to a municipal council.

Summary:

The Government of the Republic of Slovenia challenged the charters of the municipalities named above for allegedly being inconsistent with Article 65 of the Constitution and Articles 39 and 101.a of the Local Self-Government Act (hereinafter the ZLS). They did not ensure that the Roma community settled in those municipalities had the right to a representative in the municipal councils. The Government argued that, based on Article 65 of the Constitution, the legislature laid down in Article 39 of the ZLS a special right for the Roma community: the right to have a representative in the municipal councils of those municipalities where an autochthonous Roma community lives. Article 101.a of the ZLS named the municipalities in which an autochthonous Roma community lives and which were, therefore, obliged to ensure that the Roma community elected its representative to the municipal council in the 2002 local elections. For that right to be exercised, the municipalities named in Article 101.a had to adjust their charters accordingly. In particular, they should have redetermined the number of the members of the municipal council, and, while doing so, should have taken into account that at least one member of the council had to be a Roma community representative. Since the challenged charters did not contain provisions for the election of a Roma community representative, they were allegedly inconsistent with Articles 39 and 101.a of the ZLS, thereby preventing the Roma community from exercising its special right.

A request was sent for reply to all the municipalities concerned. Four municipalities replied to that request (Krško, Grosuplje, Beltinci and Semic) within the time limit. The Municipality of Krško stated that an amendment to the Charter to comply with Articles 39 and 101.a of the ZLS had been proposed to the Municipal Council but had not been adopted (for lack of quorum). The Municipalities of Grosuplje and Semic asserted that they were certain that the Roma living in their territory did not fulfil the minimum conditions of an autochthonous community or the criterion of historical or traditional settlement, that their number was low and that they were not organized. The Municipality of Beltinci stated that by the implementation of the ZLS, the Roma would be in a privileged position compared to other inhabitants, and the Municipality of Semic asserted that it could not accept the fact that the Roma community had a double right to vote.

The Constitutional Court noted that Article 39.4 of the ZLS laid down that in territories where an autochthonous settled Roma community lived, the Roma had the right to have at least one representative in the municipal council. The Court also noted that Article 101.a of the ZLS named the municipalities which were obliged to ensure the right of the Roma community settled in the municipality to have one representative in the municipal council for the regular local elections in 2002. The Court found that a clear obligation followed from those statutory provisions for those municipalities to ensure that the Roma community could exercise that right. The content of Article 101.a of the ZLS (adopted as an amendment to the ZLS, Official Gazette RS, no. 51/02) is a continuation or supplement of Article 39 of the ZLS. Article 39 of the ZLS provided for, on the basis of Article 65 of the Constitution, the special right of the Roma community; Article 101.a of the ZLS determined the municipalities which were obliged to ensure this right.

Moreover, the Constitutional Court held that the municipalities listed in Article 101.a of the ZLS (*inter alia*, the municipalities whose charters are reviewed in this case) were obliged to include in their charters provisions on the composition of a municipal council that would enable the Roma community to exercise its right to elect a Roma community representative to a municipal council. They did not do so. Therefore, the challenged charters were inconsistent with the ZLS; there was an unlawful gap in the law. The Court reasoned that Article 153.3 of the Constitution laid down that regulations and other general actions undertaken must be in compliance with the Constitution and laws (the compliance with legislation, the principle of legality). That also applied to the general actions undertaken by municipalities (see Constitutional Court Decision no. U-I-348/96, dated 27 February 1997, Official Gazette RS, no. 17/97 and DecCC VI, 25).

Finally, the Court held that the challenged charters were inconsistent with the statute as they did not regulate the issues that they should have regulated (Article 48.1 of the Constitutional Court Act – hereinafter the ZUstS). Thus the Constitutional Court could not but make a finding of unconstitutionality and order the municipal councils to remedy that unconstitutionality within a set time limit. As the ZLS required the municipalities named in Article 101.a to ensure that the Roma living in their territory could elect their representative to municipal councils in the 2002 local elections, the Constitutional Court, on the basis of Article 40.2 of the ZUstS, ordered the municipal councils to call elections for a Roma community representative within a set time limit. The municipal councils are required to set out in their charters the number of members of municipal councils that are to be members of Roma communities. The elections are to be carried out according to the rules that apply to early elections. In this way, the Roma will be able to exercise their right during the 2002-2006 term of office in those municipalities which have not yet respected the clear provisions of the ZLS. If in any of the municipalities mentioned above, a Roma community representative was elected during the 2002 regular elections on the basis of Article 101.a of the ZLS, and that municipality has not yet amended its charter, it is not obliged to call new elections unless the charter provides for a greater number of Roma community representatives than were actually elected. Moreover, the Constitutional Court added that the obligation to respect the ZLS (more exactly, the obligation to amend the charters and carry out the election of a Roma community representative) follows from Article 153.3 of the Constitution; therefore, the Constitutional Court need not intervene to create such an obligation. For these reasons in particular, the Constitutional Court found that the municipalities named above did not respect the Constitution and the ZLS.

The Constitutional Court had to set a time limit in which the illegality had to be remedied and a time limit in which the election of Roma community representatives had to be called.

The Constitutional Court ordered those municipalities to remedy the illegality within forty-five days of the first session of the newly elected municipal councils. The Court also decided that if municipal councils did not ensure that representatives were elected as determined by the charters in the regular elections of 2002, then the municipal councils of the municipalities concerned must call an election of members of the municipal councils and the representatives of the Roma community according to the provisions of the Local Self-Government Act relating to early elections within thirty days after the promulgation of the charters in the Official Gazette of the Republic of Slovenia.

Supplementary information:

Legal norms referred to:

- Articles 2, 3, 15, 138, 140 and 153 of the Constitution;
- Articles 39 and 101.a of the Local Self-Government Act;
- Articles 40.2 and 48 of the Constitutional Court Act.

Cross-references:

- Decision no. U-I-348/96 of 27.02.1997 (Official Gazette RS, no. 17/97);
- Decision no. U-I-315/02 of 03.10.2002 (Official Gazette RS, no. 87/02).

Languages:

Slovenian, English (translation by the Court).

South Africa
Constitutional Court

Important decisions

Identification: RSA-2002-3-016

a) South Africa / **b)** Supreme Court of Appeal / **c)** / **d)** 30.08.2002 / **e)** 240/2001, 136/2002 / **f)** Ndlovu v. Ngcobo; Bekker and Another v. Jika / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.19 **General Principles** – Margin of appreciation.
5.3.36.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
5.4.13 **Fundamental Rights** – Economic, social and cultural rights – Right to housing.

Keywords of the alphabetical index:

Occupation, immovable property / Occupier, unlawful, definition / Law, interpretation / Expulsion, administrative procedure.

Headnotes:

Where an Act of Parliament provides protection for "unlawful occupiers" of immovable property, in the absence of an express provision to the contrary, such protection includes those who initially took possession of the land lawfully, but who subsequently become unlawful occupiers.

Summary:

The courts are agreed that the term "unlawful occupier" contained in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE) applies to informal settlers who take possession of land without the owner's lawful consent. In this judgment, however, the Supreme Court of Appeal (SCA) addressed the question of whether this term includes persons who once had lawful possession of land but whose possession subsequently became unlawful, such as tenants who hold-over occupation after expiry of a lease agreement.

This question arises out of two appeals which were heard by the SCA concurrently. In the *Ndlovu* case, the appellant was a tenant of an urban residence in terms of a lease agreement. The lease was lawfully terminated; however the tenant refused to vacate, relying on the PIE. A magistrate ordered him to vacate. A Full Bench of the Natal Provincial Division of the High Court dismissed his appeal.

In the second appeal, Bekker and Bosch, the appellants were registered owners of residential property. The respondent was the former owner of that property. On the basis of the respondent failing to honour his obligations in terms of a mortgage bond, judgment was taken against him by the financing bank and the property sold to the appellant at a sale in execution. The respondent subsequently launched an application in the magistrate's court attempting to rescind the judgment against him and on this basis refused to vacate the property. The appellants then launched an application for the respondent's eviction. In the court of first instance it was held that the appellant had failed to comply with the PIE. It dismissed the application. A Full Bench of the Eastern Cape Division of the High Court similarly dismissed the appeal.

In the SCA, the majority of Harms, Mpathi and Mthiyane JJA found that the definition of "unlawful occupier" could not be restricted to persons who took occupation unlawfully such as informal settlers. They found the leading case of *Absa Bank Ltd v. Amod* ([1999] 2 All South African Law Reports 423 (W)) to have incorrectly restricted the definition of unlawful occupier based on the common law of eviction. There was no reason in the social and historical context of South Africa why the Legislature would have wished not to extend the protection of the PIE to an indigent tenant. It was held that by giving protection to tenants, the PIE served merely to suspend the exercise of the landowner's full proprietary rights until a court had exercised its discretion in deciding whether it was just and equitable to evict the unlawful occupier and under what conditions. This discretion was a wide one. The definition restricted occupation to dwellings or shelter of humans and therefore did not extend to lessees of commercial properties. The majority rejected the argument that the PIE forms part of a mosaic of statutes, each intended to protect a different class of occupier, and that the rights of tenants who hold-over was to be found exclusively within the parameters of the Rental Housing Act. It could not be assumed that Parliament did not pass overlapping Acts. On these grounds it was found that it could not be discounted that Parliament intended to extend the protection of the PIE to cases of holding over of dwellings and the like.

The minority judgment was written by Olivier JA. Nienaber JA wrote a separate, but brief concurring dissent. Olivier JA's judgment begins by looking at the provisions of the PIE. Although a textual interpretation of the word “occupy” supported a narrower reading of the provision, this was not determinative of the matter. Rather the PIE had to be understood within the constitutional and legislative framework of land tenure laws. After a comprehensive review of the High Court judgments dealing with the meaning of “unlawful occupier”, Olivier JA found that the Constitution prescribes three forms of land reform, the last of which imposes limitations on evictions. The various pieces of legislation enacted pursuant thereto attempt to ensure that evictions are not undertaken lightly or arbitrarily. He found that the Constitution addresses the problem of land tenure reform in a balanced and even-handed manner, recognising on the one hand rights to property and on the other, the right of access to land. Allowing tenants to hold-over infringes a landowner's property rights and can even be seen as a form of expropriation without compensation. There is, however, no equivalent constitutional justification for the protection of defaulters. After countering arguments upon which the majority relied for their decision, Olivier JA concluded that the provisions of the PIE do not apply either to residential and commercial occupiers or to ex-mortgagors of property on the basis that the PIE does not protect once lawful occupiers of property.

Cross-references:

- *Absa Bank Ltd v. Amod* [1999] 2 *All South African Law Reports* 423 (W).

Languages:

English.

Identification: RSA-2002-3-017

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 10.09.2002 / **e)** CCT 40/2001 / **f)** Du Toit and Another v. Minister of Welfare and Population Development and Others / **g)** / **h)** 2002 (10) *Butterworths Constitutional Law Reports* 1006 (CC); CODICES (English).

Keywords of the systematic thesaurus:

5.2.2.11 **Fundamental Rights** – Equality – Criteria of distinction – Sexual orientation.
5.2.2.12 **Fundamental Rights** – Equality – Criteria of distinction – Civil status.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Adoption, lesbian partners / Child, best interests / Spouse, definition.

Headnotes:

An Act which confirms the right jointly to adopt only on married couples, constitutes unfair discrimination against same-sex life partners on the intersecting grounds of sexual orientation and marital status. Furthermore, it infringes on their dignity rights and does not give effect to the paramountcy of the best interests of the child principle.

Summary:

This case concerns the rights of same-sex life partners jointly to adopt children. The applicants are partners in a longstanding lesbian relationship who some years ago brought an application in the Pretoria children's court jointly to adopt two children, a brother and sister. However, due to the provisions of the Child Care Act which confines joint adoption to married couples, the children's court could only grant custody and guardianship rights to one partner (the second applicant).

The applicants then brought an application in the Pretoria High Court challenging the constitutionality of certain provisions of the Child Care Act and Guardianship Act. They claimed that these two statutes sought to discriminate against them on the basis of their sexual orientation and marital status; that they infringe the dignity of the first applicant; and undermine the principle in the Constitution that the best interests of the child are paramount in determinations regarding children. The respondents withdrew their initial opposition to the matter and said that they would abide the court's decision. The High Court found that the provisions of the two statutes infringed the applicants' rights and accordingly ordered that certain words be read into these provisions so as to allow same-sex life partners jointly to adopt children. The applicants consequently approached this Court

for confirmation of the order made by the High Court, as required by the Constitution.

In the Constitutional Court, a curator *ad litem* was appointed to represent not only the interests of the children involved in this matter, but all children who may be affected by this Court's order. His report supported confirmation of the High Court's order. The applicants were also supported by the Gay and Lesbian Equality Project, which was admitted as an *amicus curiae* to provide additional evidence on issues not already before the Court.

In a unanimous judgment of the Court, Skweyiya AJ found that the provisions of the two statutes infringed several rights in the Bill of Rights. It was held that the restriction of joint adoption to married persons discriminates against the applicants in that their sexual orientation precludes them from entering into civil marriage and thereby jointly adopting children. Furthermore, the effect of these statutes limited the dignity of the first applicant because they denied her due recognition and status as a parent of the two children even though she has played a significant role in their upbringing. Finally, the Court found that current legislation infringes the constitutionally entrenched principle that a child's best interests be given paramountcy. This is especially the case in a country such as South Africa where there are diverse and changing conceptions of what constitutes a family and where adoption is a valuable way of affording children the benefits of family life which might not otherwise be available to them.

Although the application was unopposed, the Court considered the possibility that the two Acts might constitute a justifiable limitation in terms of the limitations clause in the Constitution. In particular, the Court was concerned about the absence of procedures available in our law for safeguarding the interests of the children where same-sex couples who may be joint adoptive parents terminate their relationship. Nevertheless, despite the absence of statutory regulation, the Court was satisfied that adequate mechanisms exist for protecting the best interests of minor children upon termination of same-sex relationships. Thus, the Act did not constitute a justifiable limitation on the applicants' rights. Accordingly, the Court confirmed the order made by the High Court.

Cross-references:

- *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others* 2000 (2) *South African Law Reports* 425 (CC); 2000 (1) *Butterworths Constitutional Law Reports* 86 (CC), *Bulletin* 2000/1 [RSA-2000-1-001];
- *Minister of Welfare and Population Development v. Fitzpatrick and Others* 2000 (3) *South African Law Reports* 422 (CC); 2000 (7) *Butterworths Constitutional Law Reports* 713 (CC), *Bulletin* 2000/2 [RSA-2000-2-006].

Languages:

English.

Identification: RSA-2002-3-018

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 09.10.2002 / **e)** CCT 31/2001 / **f)** Jordan and Others v. The State / **g)** / **h)** 2002 (11) *Butterworths Constitutional Law Reports* 1117 (CC); CODICES (English).

Keywords of the systematic thesaurus:

4.5.2 **Institutions** – Legislative bodies – Powers.
5.2.2.1 **Fundamental Rights** – Equality – Criteria of distinction – Gender.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.30 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Prostitution, state regulation / Prostitution, customer, gender / Brothel, owner / Criminal law.

Headnotes:

It is permissible for the State to regulate prostitution by criminalising the conduct of the prostitute. This does not amount to indirect gender discrimination because there is a qualitative difference between the person who conducts business as a prostitute and a customer; and under the common law and statute the customer is liable to prosecution as an accomplice to the offence committed by the prostitute and liable to the same punishment.

Summary:

The appellants in this case, a brothel-owner, a brothel employee and a prostitute or sex worker, were convicted in the Magistrates' Court of contravening the Sexual Offences Act 23 of 1957. They appealed to the High Court, arguing that the relevant provisions were unconstitutional. The High Court found that the section of the Act which criminalises carnal intercourse for reward (the prostitution provision) was unconstitutional but dismissed the appeal in respect of the sections of the Act which criminalise keeping or managing a brothel (the brothel provisions). The appellants then appealed to the Constitutional Court, arguing that the brothel provisions should be found to be unconstitutional. They also argued that the High Court order invalidating the prostitution provision should be confirmed. The state opposed the appeal on the brothel provisions and also opposed confirmation of the order invalidating the prostitution provision. A number of *amici curiae* were admitted by the Court and argued for the invalidation of all the provisions.

The Constitutional Court divided sharply on the question of whether the State's method of regulating prostitution amounts to unfair discrimination on the grounds of gender. The Court, however, was unanimous in upholding the High Court's finding that the brothel provisions are valid. Both the majority and minority judgments make it clear that the decision as to how to regulate prostitution is a matter primarily for the Legislature. Open and democratic societies around the world have chosen from a wide range of options to regulate prostitution. It is for Parliament, within the constraints of the Constitution, to decide which of these options suits South Africa best.

All the judges concluded that the prostitution provision does not infringe the rights to human dignity and economic activity and that if it does limit the right to privacy, such limitation is justifiable. They differ on the question of whether the prostitution provision constitutes unfair gender discrimination. Ngcobo J, for the majority, found that the provision criminalises male and female prostitution and is therefore not directly discriminatory; nor does it constitute indirect discrimination because:

a. there is a qualitative difference between the person who conducts business as a prostitute and a customer; and
b. under the common law and statute the customer is liable to prosecution as an accomplice to the offence committed by the prostitute and liable to the same punishment.

O'Regan and Sachs JJ, for the minority, held that the prostitution provision constitutes unfair discrimination: by making the prostitute the primary offender and regarding the patron at most as an accomplice, the law reinforces sexual double standards and perpetuates gender stereotypes in a manner impermissible in a society committed to advancing gender equality.

Languages:

English.

Identification: RSA-2002-3-019

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 06.12.2002 / **e)** CCT 02/2002 / **f)** National Education Health and Allied Workers Union v. University of Cape Town and Others / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.4.13 **Constitutional Justice** – Jurisdiction – Types of litigation – Universally binding interpretation of laws.
2.3.3 **Sources of Constitutional Law** – Techniques of review – Intention of the author of the enactment under review.
3.17 **General Principles** – Weighing of interests.
5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.

Keywords of the alphabetical index:

Labour law, interpretation / Employee, contract, automatic transfer.

Headnotes:

The proper interpretation of a statute which is enacted to give effect to a constitutional right is a constitutional matter. When interpreting such legislation, the Court should adopt a purposive approach in order to give effect to the constitutional right. Thus, where legislation is enacted to give effect to the rights of both workers and employers, an interpretation which favours both should be adopted.

Thus, upon the transfer of a business as a going concern as contemplated in Section 197, workers' employment contracts are automatically transferred to the new owner without the need for a prior agreement between the old and new employer.

Summary:

The issue is this matter was the interpretation of Section 197 of the Labour Relations Act 66 of 1995, and whether that provision could be interpreted to mean that, as a matter of law, employees' contracts of employment transfer automatically from the previous employer to the new employer where there is a transfer of the whole or any part of the business, trade or undertaking as a going concern.

In 1999, the Council of the University of Cape Town (UCT) decided to outsource certain services to contractors, and as a result, 267 employees of UCT were dismissed for operational reasons. The National Education Health and Allied Workers Union (NEHAWU), a union representing the dismissed workers, challenged this decision in an application to the Labour Court. They contended that the workers who had been dismissed should be taken over by the contractors as required by Section 197 of the Labour Relations Act. However, the Labour Court dismissed the application.

In an appeal to the Labour Appeal Court, the court dismissed the appeal and held that contracts of employment need only be taken over by a new owner where there is a prior agreement between the transferor employer and the transferee employer that the workers or a majority of them are part and parcel of the transaction.

NEHAWU then approached the Constitutional Court seeking special leave to appeal against the decision of the Court *a quo*. They contended that the interpretation of Section 197 by the majority of the LAC failed to give effect to the dismissed workers' constitutional right to fair labour practices. UCT and two of the contractors contested the appeal on the ground that the Constitutional Court did not have jurisdiction to hear the matter because it did not raise a constitutional issue and further that the proper interpretation of Section 197 is that given by the majority of the Labour Appeal Court.

In a unanimous decision, Ngcobo J found that the matter did raise a constitutional issue – where statutes are enacted to give effect to constitutional rights, the proper interpretation of these statutes is a constitutional matter. Upon an examination of the constitutional right to fair labour practices, he found that it was not possible to give precise content to this right, and that what constitutes fair labour practice is given content by the Labour Relations Act and the jurisprudence of the labour courts. Furthermore, the right to fair labour practices is applicable to both employers and employees.

He then went on to hold that the Labour Relations Act must be purposively construed in order to give effect to the right to fair labour practices. On a proper construction of Section 197, therefore, he found that the primary purpose of the section is to protect the employment contracts of workers while facilitating business transactions. Section 197 is therefore for the benefit of both employers and workers, striking a balance which is consistent with the right to fair labour practices.

Cross-references:

- *National Union of Metal Workers of South Africa and Others v. Bader Bop (Pty) Ltd and Another*, 13.12.2002, *Bulletin* 2002/3 [RSA-2002-3-021].

Languages:

English.

Identification: RSA-2002-3-020

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 12.12.2002 / **e)** CCT 37/2001 / **f)** Geuking v. President of the Republic of South Africa and Others / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
4.4.1.5 **Institutions** – Head of State – Powers – International relations.
5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.
5.3.13.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to a hearing.
5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Independence.

Keywords of the alphabetical index:

Extradition, proceedings / Extradition, evidence by receiving state.

Headnotes:

The President's consent to trigger extradition proceedings is not a trial, nor an administrative decision but rather, a policy decision. It is thus not a prerequisite that the nationality of the person sought for extradition be considered. A provision in the Extradition Act which provides that the magistrate holding an extradition enquiry must accept a certificate from the appropriate authorities in the foreign state as conclusive proof that they have sufficient evidence to warrant the proposed prosecution does not violate the person's rights to a fair trial, to freedom and security of the person, or to a fair hearing. The provision also does not interfere with the independence of the judiciary or violate the separation of powers doctrine.

Summary:

This judgment relates to extradition. The appellant was convicted in the Federal Republic of Germany (the FRG) and sentenced to imprisonment. He fled to South Africa and became a South African citizen, giving up his German citizenship. The FRG requested South Africa to extradite him to serve his sentence and to face a further 15 counts of fraud. The request described the appellant as a German citizen.

The President consented to the extradition in terms of Section 3.2 of the Extradition Act 67 of 1962 (the Act) which requires the consent of the President for the commencement of extradition proceedings against persons from South Africa to countries with which there is no extradition treaty. In the present case the President did not know that the appellant was a South African citizen. The appellant argued that the Act does not authorise the President to grant such consent, that the incorrect citizenship information made the consent constitutionally invalid and that the President must have regard to the constitutional entitlement that every citizen has the right to enter, to remain in and reside anywhere in the Republic.

The appellant also attacked the constitutionality of Section 10.2 of the Act, which provides that the magistrate hearing an extradition case must accept a certificate from the appropriate authorities in the foreign state as conclusive proof that they have sufficient evidence to warrant the proposed prosecution. The appellant contends that this infringes his constitutional rights to have a dispute resolved in a fair hearing; to freedom and security of the person; and to a fair trial as an accused person. He also contended that it violates the separation of powers doctrine and judicial independence.

Review proceedings in the Cape High Court failed and the appellant sought special leave to appeal to the Constitutional Court. Unlike the High Court, the Constitutional Court held that notice by the prosecution that a Section 10.2 certificate would be used, was a sufficient threat to the appellant's rights to warrant investigation of this subsection's constitutionality.

Justice Goldstone, for a unanimous Court, found no merit in the contention that the President lacks the power to consent in terms of Section 3.2. The section authorises a policy decision and the President can take into account any consideration relevant to our country's foreign affairs. Courts can intervene only if this power is abused or used contrary to the Constitution. The right to remain in the country is not relevant as the President's consent merely triggers the extradition procedure. Nor is there a trial requiring the protection given under the Constitution to accused persons. The enquiry merely determines whether there is reason to extradite for trial in the foreign state.

The Section 10.2 certificate relates to only one of a number of issues to be determined by the magistrate, namely, whether there is sufficient evidence to warrant prosecution under the law of the foreign state. That narrow question is not normally within the knowledge of South African judicial officers and use of the certificate does not deny the person concerned a fair hearing. Seen in its context of facilitating extradition, the magistrate's enquiry is sufficient to meet the constitutional requirement of just cause for deprivation of freedom. Nor does Section 10.2 interfere with the independence of the judiciary or violate the separation of powers.

The appeal was therefore dismissed.

Cross-references:

- *Harksen v. President of the Republic of South Africa* 2000 (1) *South African Law Reports* 1 (CC); 2000 (5) *Butterworths Constitutional Law Reports* 491 (CC), *Bulletin* 2000/1 [RSA-2000-1-004].

Languages:

English.

Identification: RSA-2002-3-021

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 13.12.2002 / **e)** CCT 14/2002 / **f)** National Union of Metal Workers of South Africa and Others v. Bader Bop (Pty) Ltd and Another / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

5.4.10 **Fundamental Rights** – Economic, social and cultural rights – Right to strike.

Keywords of the alphabetical index:

Labour law / Worker, collective bargaining / Union, representativeness / Organisational rights.

Headnotes:

An Act regulating labour organisational rights, which confers certain organisational rights on majority unions, should not be interpreted so as to preclude minority unions from striking to acquire such rights, where the right to strike is constitutionally protected and there is no express limitation of the right to strike in the Act.

Summary:

In this judgment, the South African Constitutional Court upheld the legality of minority union strike action to acquire organisational rights. These rights, especially the right to have shop stewards recognised, are secured for majority unions by the Labour Relations Act 66 of 1995 (the Act). In the Court *a quo*, the employer/respondent had successfully obtained an order interdicting the minority union/applicant on the basis that such strike action is unlawful and unprotected. The Court *a quo* held that the Act confers the right to have shop stewards recognised only on a union representative of a majority of the workers in a workplace and that strike action by a minority union to obtain such a right is therefore unlawful.

The Act does not explicitly regulate the manner, if any, in which unions which are not sufficiently representative to obtain the organisational rights mentioned, are able to obtain these rights. The issue which the Constitutional Court had to determine whether the Act should be interpreted to preclude non-representative unions from obtaining organisational rights, either through agreement with the employer, or through industrial action.

In reversing the order of the Court *a quo*, O'Regan J, in a unanimous judgment, emphasised the importance of the right to strike in achieving a successful collective bargaining system. The Act seeks to achieve four purposes: first, to give effect to the constitutional right to fair labour practices, including the right to strike; second, to give effect to South Africa's international law obligations; third, to provide a framework for collective bargaining; and lastly, to bring about an effective resolution of labour disputes.

After examining the International Labour Organisation's jurisprudence and the constitutional right to fair labour practices, O'Regan J concluded that a reading of the Act which allowed strike action by minority unions to secure organisational rights is in line with South Africa's international law obligations and avoids a limitation on the constitutionally entrenched right to strike, a limitation which neither the State, nor the respondent, sought in argument to justify. In practice, the interpretation adopted by the Court should have a limited impact on industrial relations, since it is only a union which has reached a certain threshold of representivity which will be able to launch an effective strike against the employer to secure the organisational rights in question.

In a separate concurring judgment, Ngcobo J – differing slightly in his reasoning but concurring in the order proposed – sought to classify the true nature of the dispute between the parties as the question whether the applicant was entitled to obtain organisational rights outside the ambit of the Act. He went on to conclude that the Act does not preclude an unrepresentative union from obtaining organisational rights and that such a union has a right to strike to secure these rights.

Cross-references:

- *National Education Health and Allied Workers Union v. University of Cape Town and Others*, 06.12.2002, *Bulletin* 2002/3 [RSA-2002-3-019].

Languages:

English.

Sweden
Supreme Court

There was no relevant constitutional case-law during the reference period 1 September 2002 – 31 December 2002.

Sweden
Supreme Administrative Court

Important decisions

Identification: SWE-2002-3-001

a) Sweden / **b)** Supreme Administrative Court / **c)** Grand Chamber / **d)** 13.09.2002 / **e)** 624-1999 / **f)** / **g)** *Regeringsrättens Årsbok* / **h)** CODICES (Swedish).

Keywords of the systematic thesaurus:

4.10.7 **Institutions** – Public finances – Taxation.
5.3.14 **Fundamental Rights** – Civil and political rights – *Ne bis in idem*.

Keywords of the alphabetical index:

Tax evasion, penalty / Tax, assessment, revised, application to set aside / Tax, offence, definition.

Headnotes:

An act leading to a person's final conviction for tax evasion and to the imposition of additional tax constitutes two different offences within the meaning of Article 4.1 Protocol 7 ECHR (right not to be tried or punished twice, *ne bis in idem*), because the latter, unlike tax evasion, does not require an element of intent or negligence on the part of the individual concerned.

Summary:

A taxpayer had taken goods from his limited company without declaring their value in his income tax return. The county administrative court ordered a revised tax assessment and the payment of additional tax. The taxpayer appealed against the court's decision. The appeal was dismissed by the Administrative Court of Appeal. The taxpayer was prosecuted at the same time for tax evasion. At the time of the Administrative Court's judgment, he had already been given a suspended sentence and ordered to pay a daily fine under a final judgment of the Court of Appeal.

The taxpayer applied to the Administrative Court of Appeal to set aside the revised tax assessment and the imposition of additional tax. The Supreme

Administrative Court declared admissible the question of whether, in the light of Article 4.1 Protocol 7 ECHR (right not to be tried or punished twice, *ne bis in idem*), the final finding of guilt against the taxpayer for tax evasion precluded the imposition of additional tax.

The Supreme Administrative Court observed that, in order to answer this question, it was necessary to know whether the taxpayer's act constituted one offence or two. In this connection the Court noted that, for someone to be found guilty of tax evasion, there had to be an element of intent or negligence. No such element was needed to require a person to pay additional tax. The Court accordingly established that tax evasion and liability to pay additional tax were two different offences within the meaning of the European Convention. The requirement to pay additional tax could, therefore, remain valid without there being any violation of the above-mentioned article.

Languages:

Swedish.

Identification: SWE-2002-3-002

a) Sweden / **b)** Supreme Administrative Court / **c)** Grand Chamber / **d)** 20.12.2002 / **e)** 7682-2000 / **f)** / **g)** *Regeringsrättens Årsbok* / **h)** CODICES (Swedish).

Keywords of the systematic thesaurus:

3.26.1 **General Principles** – Principles of Community law – Fundamental principles of the Common Market.
4.10.7 **Institutions** – Public finances – Taxation.
5.3.16 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.
5.3.39 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Free movement of goods, quantitative restrictions / Alcohol, import / Fee, reimbursement / Court of Justice of the European Communities, preliminary ruling.

Headnotes:

The annual supervision fees and charges paid under the Swedish Law on Alcohol were in breach of Community law and must be reimbursed by the State. However, the State was not obliged to pay interest on the sums reimbursed because that reimbursement did not constitute damages.

Summary:

The Court of Justice of the European Communities found, in a preliminary ruling, that Articles 30 and 36 of the EC Treaty (which, following amendment, became Articles 28 and 30 EC) precluded national provisions allowing only traders with a production or wholesale licence to import alcoholic beverages on conditions such as those laid down in Swedish legislation (Judgment of 23 October 1997, *Franzén*, C-189/95, ECR I-05909).

Following that judgment, the Supreme Administrative Court held, in a dispute between a trader with a wholesale licence and the National Institute of Public Health (formerly the Alcohol Inspectorate), that the annual supervision fees and charges paid by the trader under the Swedish Law on Alcohol (Law 1994:1738) were in breach of Community law. The sums collected were to be reimbursed by the State in accordance with the reimbursement provisions of the Swedish Alcohol Ordinance (Ordinance 1994:2046). However, the State was not obliged to pay interest on the sums reimbursed because that reimbursement did not constitute damages (cf Judgment of 22 April 1997, *Sutton*, C-66/95, ECR I-02163) and the reimbursement provisions of the Swedish Alcohol Ordinance did not lay down any obligation to pay interest on the sums reimbursed.

Languages:

Swedish.

Switzerland
Federal Court

Important decisions

Identification: SUI-2002-3-003

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 29.05.2002 / **e)** 1P.648/2001 / **f)** Z. v. Public Prosecutor's Office and Appeal Chamber of Criminal Court of Canton of Basle-City / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 128 II 259 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.
5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.
5.3.30.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.

Keywords of the alphabetical index:

DNA, analysis / Personal data, processing / Child, protection / Child, sexual abuse / Criminal proceedings.

Headnotes:

Articles 9, 10.2 and 13.2 of the Federal Constitution; personal freedom; the right to protection against wrongful use of personal data; DNA profile in criminal proceedings.

Structure of the DNA profile information system (Point 2).

Infringement of the right to corporal security (Article 10.2 of the Federal Constitution) and the right to protection against the wrongful use of personal data ("*informationelles Selbstbestimmungsrecht*"; Article 13.2 of the Federal Constitution) by a taking a mouth swab for creating and processing a DNA profile respectively; legal basis for the infringement of fundamental rights; public interest; proportionality; "inviolable core" ("noyau intangible") (Point 3).

Constitutional right to the destruction of a mouth swab once a DNA profile has been successfully created (Point 4).

Jurisdiction according to the law of the Canton of Basle-City (Point 5).

Summary:

The Public Prosecutor's Office of the Canton of Basle-City launched criminal investigations against Z., who was suspected of acts of a sexual nature with children after having published advertisements for young boys to clean a motorcycle for payment or to spend leisure time together.

During one interview with Z., a police inspector took a mouth swab in order to establish his DNA profile. The Public Prosecutor rejected Z.'s application for destruction of the swab, and ordered the establishment of the profile. He also ordered the police authorities to check whether Z. was included in the Federal DNA profile information system. The reason for this decision was that between 1973 and 1984 Z. had been found guilty on several occasions of offences of a sexual nature with children, and that the advertisements which he had published had prompted rekindled suspicion as to his intentions. Lastly, several cases of such offences were still unsolved at the time. The Public Prosecutor's Office had eventually closed the criminal investigation for lack of evidence.

Z. lodged an appeal with the Federal Court requesting the setting aside of the Public Prosecutor's decision, an order for the destruction of the mouth swab and the removal of the DNA profile from his records. The Federal Court allowed the appeal in part and ordered the destruction of the swab, dismissed the rest of the appeal.

The Confederation runs an information system for the purpose of identifying offenders by facilitating comparison of different DNA profiles. The system is aimed at comparing DNA profiles established for the identification of certain individuals by means of mouth swabs, with other DNA profiles established on the basis of biological traces collected on the scenes of crimes. DNA information and profile processing is governed by a Federal Council Order. On the other hand, responsibility for ordering processing for the purposes of identifying an offender and evaluating biological traces collected are matters for criminal-law provisions, and in particular the Cantonal Codes of Criminal Procedure.

In his appeal to the Federal Court, Z. pleaded a violation of his fundamental rights. The Federal Court found that taking mouth swabs and establishing DNA profiles constituted interference with personal freedom and the right to protection against wrongful use of personal data. However, these actions only have minimal effect, as mouth swabs do not involve any physical intervention. DNA profiles are established on the basis of non-coding sequences of the DNA genetic material, facilitating definite identification of the individual in question; on the other hand, they reveal no information on the data subject's heredity or state of health. Moreover, the data is processed anonymously. In the light of the provisions of cantonal law and of the Federal Council Order, the measures complained of have an adequate legal basis.

Moreover, taking mouth swabs and establishing DNA profiles are measures aimed at identifying offenders. They help solve crimes and prevent future offences. In the instant case the aim was to protect children against sexual abuse. The measures complained of were therefore justified by an overriding public interest.

As regards the proportionality of the infringement of fundamental rights, the Federal Courts points out that a DNA profile guarantees accurate identification of the persons concerned, is particularly useful in elucidating offences of a sexual nature, and also helps to clear specific innocent persons of all suspicion. Basically, no other less intrusive measures providing the same degree of efficiency are available. Furthermore, Z. has already committed several offences involving sexual abuse of children. The advertisements which he placed in the press justified the serious suspicions directed against him. It is vitally important to protect children against such offences. The measures complained of were therefore in keeping with the proportionality rule.

The DNA profile must be deleted at the request of the person concerned five years after termination of proceedings, where the latter have failed to secure any conviction for lack of evidence. The appellant's request for the deletion of the DNA profile therefore had to be rejected. On the other hand, now that the DNA profile has been established, the mouth swab samples must be destroyed, in accordance with the aforementioned basic Constitutional right. Even if Federal and Cantonal law were to provide for longer time-limits, such provisions would not be applicable.

Languages:

German.

Identification: SUI-2002-3-004

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 12.06.2002 / **e)** 1P.458/2001 / **f)** X. v. Appeal Court, Canton of Basle-City / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 128 I 237 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

2.3.6 **Sources of Constitutional Law** – Techniques of review – Historical interpretation.
3.19 **General Principles** – Margin of appreciation.
4.7.2 **Institutions** – Judicial bodies – Procedure.
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Double degree of jurisdiction.

Keywords of the alphabetical index:

Proceedings, costs, advances / Proceedings, criminal, guarantees.

Headnotes:

The right to have a judgment delivered in criminal proceedings reviewed by a higher court.

This guarantee does not preclude demanding payment in advance of legal costs in criminal appeal proceedings.

Summary:

X. was found guilty of professional fraud by the Criminal Court of the Canton of Basle City, which sentenced him to 16 months' imprisonment. X. appealed against this decision to the Canton Court of Appeal, which requested payment of an advance on the costs of the appeal proceedings.

X. responded by lodging a Constitutional complaint asking the Federal Court to waive the compulsory payment of this advance on costs, on the grounds that this requirement is inconsistent with the right to secure review of a criminal decision by a higher court. The Federal Court rejected the complaint on this point.

Article 32.3 of the Federal Constitution, Article 2.1 Protocol 7 ECHR and Article 14.5 of the International Covenant on Civil and Political Rights ensure the right of every sentenced person to have his/her conviction or sentence reviewed by a higher tribunal. However, the conditions under which this right can be exercised are set out under national legislation. In a previous decision the Federal Court had held that it was compatible with the aforementioned principle for the court of second instance to freely examine the relevant legal issues but at the same time to confine its consideration of the facts and evidence adduced to those aspects which were manifestly unreasonable.

Similarly, the guarantee of review by a higher court not oblige cantons to provide for free legal proceedings. It is clear from the *travaux préparatoires* to the Constitution that the text is not aimed at forcing the cantons to provide judicial remedies free of charge, subject to the Constitutional right to legal assistance. Compulsory payment of an advance on legal costs is therefore not incompatible with the Federal Constitution or the international law invoked.

Languages:

German.

Identification: SUI-2002-3-005

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 26.08.2002 / **e)** 1P.91/2002 / **f)** Botta et al. v. Canton of Graubünden / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 128 I 327 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
3.13 **General Principles** – Legality.
3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.

Keywords of the alphabetical index:

Order, content, general clause / Law and order, protection and keeping / Police, powers.

Headnotes:

Order on the Cantonal Police Force issued by the Grand Council of Graubünden, right to issue orders on police measures to protect law and order, principle of the separation of powers, general policing clause, restriction of fundamental rights.

The powers of the Grand Council to legislate by way of order on police matters within the framework of the general policing clause; no violation of the principle of the separation of powers (Point 2).

An order of the Grand Council is a formal legal basis for the restriction of fundamental rights. The principle of the rule of law and the requirement of sufficiently detailed legal rules in police matters. Proportionality of the measures for maintaining order (measures prohibiting access, creation of prohibited zones and temporary seizure of objects) (Point 4).

Summary:

The Grand Council of the Canton of Graubünden (Cantonal Parliament) partially amended the Order on the Cantonal Police Force by adding a provision on policing measures to protect law and order. This provision generally sets out that with a view to protecting law and order and preventing various public dangers, the police may implement measures as dictated by the particular situation. In particular, the police may order individuals out of a specific place or area, prohibit access to specified buildings, grounds or areas, prohibit loitering in such areas, and temporarily confiscate objects presenting a danger or liable to be used in a dangerous manner. In the explanatory memorandum to the draft amendments, the Government of the Canton of Graubünden pointed out that the Cantonal Police Force was having to cope with an increasing workload in terms of protecting law and order and public safety and needed additional powers in order to meet these new needs. The new provision was needed, *inter alia*, to ensure the proper supervision of such major events as the Davos Economic Forum and the world skiing championships.

A number of individuals lodged a Constitutional complaint asking the Federal Court to quash this new provision, claiming that it violates the principle of the separation of powers and certain fundamental rights,

such as personal freedom. The Federal Court dismissed the complaint.

In accordance with the Constitution of the Canton of Graubünden, the Grand Council may issue orders without holding any compulsory referendum. Given that the Grand Council remained within the framework of the general policing clause, it did not violate the principle of the separation of powers by adding a provision on police measures to protect law and order to the Order on the Cantonal Police Force.

The impugned provision is general in scope. In order to discharge its duties the police force must take the requisite measures to protect law and order and public safety. These measures vary in accordance with the individual situation, and may, for instance, be taken in the wake of a road accident or a disaster with a view to evacuating inhabitants or prohibiting access to certain areas. The impugned provision is therefore closely linked to the general policing clause. Such measures can, however, infringe certain fundamental rights in a variety of ways, including personal freedom, freedom of assembly and opinion and the protection of property.

These fundamental freedoms may be restricted provided that there is a sufficient legal basis for doing so, that the measures taken correspond to a public interest, and that the measures comply with the proportionality rule. According to case-law, a Cantonal Parliament Order which is not subject to referendum is a sufficient legal basis.

The principle of legality requires statutes restricting fundamental rights to be accessible and sufficiently detailed to ensure certainty of the law, foreseeability of State actions and equality of treatment. However, the degree of detail required must not be defined in overall abstractions: rather it depends on the subject under consideration. In the policing field, the principle of legality comes up against very specific difficulties. Police forces are called upon to act in a wide variety of situations. This being the case, the general policing clause enables the authorities to face up to serious, direct and imminent dangers. In the instant case, the Grand Council cannot be blamed for not having set out more detailed regulations on the conditions and measures to be taken in the area of protecting law and order and public safety.

No one can seriously dispute the fact that protecting law and order and public safety corresponds to a public interest. Depending on the actual circumstances, it can sometimes be appropriate to prohibit access to certain places or to carry out evacuations. Moreover, the same applies in cases where demonstrators have asked the authorities to place certain street or squares at their disposal, because in such cases it may prove necessary to adopt special measures to ensure that the demonstration goes off smoothly.

The police force is often involved in situations requiring it to prevent dangers or rescue individuals or objects. Where such interests are at stake, the restrictions to fundamental rights provided for in the provisions complained of are not unreasonable: they are in fact proportional. In the case of “private” demonstrations, the demonstrators, participants, interested parties and third persons may have many opposing interests, which have to be weighed up very carefully. Substitute measures may be adopted to meet the needs of third persons. The complexity of such situations is such as to preclude any definitive appraisal under an abstract review of cantonal regulations by the Federal Court. It is therefore vital that the police implement the impugned provisions in an appropriate manner in each individual situation, in compliance with the proportionality rule.

Languages:

German.

"The Former Yugoslav Republic of Macedonia"
Constitutional Court

Important decisions

Identification: MKD-2002-3-006

a) "The Former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 12.09.2002 / **e)** U.br. 37/2002 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 73/2002 / **h)** CODICES (Macedonian).

Keywords of the systematic thesaurus:

4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
5.2 **Fundamental Rights** – Equality.
5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of opinion.
5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of worship.
5.3.25 **Fundamental Rights** – Civil and political rights – National service.

Keywords of the alphabetical index:

Conscientious objection, recognition, procedure / Weapon, refusal to carry and use.

Headnotes:

Conscientious objection is an external manifestation of the freedom of thought, conscience and religious confession. This right also includes freedom to change religious confession and conviction. This freedom implies the creation, change and repudiation of certain personal beliefs, moral or religious convictions. Something that is in one moment acceptable for the human conscience and convictions is not necessarily permanent and incapable of undergoing certain modifications or changes over time. This is especially important because military service is continuous and extends over a long period of time.

However, the conflict between personal convictions and civil duties exists only in relation to carrying and using weapons.

Summary:

Three petitioners challenged the constitutionality of Article 10.1 of the Law on Defence.

Article 10 provides that a recruit wishing to do military service as set out in Article 8 of the Law on Defence (military service in the Army carrying weapons or civil service) must submit a written request to the Ministry of Defence within 15 days from the reception of the notice of recruitment in which he states how he wishes to do his military service and his reasons.

The impugned Article 10 of the Law on Defence lays down the procedure by which this right should be exercised so that persons having that right may enjoy it.

Chapter V of the Law on Defence defines military service. Article 50 recognises 3 categories of persons that are under the obligation to do military service:

1. recruit – during a period of recruit duty,
2. soldier – during the time spent in the military, and
3. person in reserve under an obligation to serve in the military – after having completed military service.

All these categories of persons exercise their constitutional right and fulfil their duty as set out in the Law on Defence.

On the basis of the wording of Article 10 of the Law on Defence, one can conclude that only the recruits have a right of conscientious objection and not other persons under an obligation to serve in the military.

On the basis of the constitutional provisions relating to equality of citizens, freedom of religious belief and conviction, conscience, thought and public expression of thought as well the guarantees safeguarding the aforementioned freedoms and the international documents which constitute an integral part of national legal order and which relate to the question in dispute, the Court reached a decision to strike down Article 10.1. The Court considered in particular Articles 16, 19 and 54 of the Constitution, Articles 9 and 14 ECHR, Article 18 of the Universal Declaration on Human Rights, and Article 18 of the International Covenant on Civil and Political Rights.

The Court stated that conscientious objection was a right derived from freedom of conviction, conscience and thought. It is a means enabling a person enjoying this right to avoid certain legal duties, because fulfilling them would be in conflict with his/her moral, religious, philosophical or humanitarian convictions.

This right exists in relation to the defence of the country where certain individuals under certain strictly defined conditions could ask (and the state should permit) to be excluded from the civil duty to do military service.

However, it does not mean that these individuals are completely excluded from that duty.

Therefore, the state provides the conditions enabling these individuals to exercise their right and at the same time fulfil their duty in such a way so as not to conflict with their intimate convictions.

Languages:

Macedonian.

Identification: MKD-2002-3-007

a) "The Former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 18.09.2002 / **e)** U.br. 135/2001, U.br. 155/2001 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 78/2002 / **h)** CODICES (Macedonian).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
4.4.1 **Institutions** – Head of State – Powers.
4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.

Keywords of the alphabetical index:

Armed forces, commander / Minister of Defence.

Headnotes:

The Supreme Commander is a separate and an individual organ in the field of defence with strictly defined competences and the right to decide as to the command and use of the Army.

The term "system of defence" is not identical to that of "armed forces", because "defence" is a broader term covering wider spheres, while the "Army" is strictly defined as an armed force under the command of the President as Supreme Commander used in the defence of the sovereignty and territorial integrity of the State.

In that respect, a provision requiring the command of the Army to be conducted through the Minister of Defence leads to a deconcentration of the orders of command and an insertion of an organ in the vertical line of command as an intermediary between the President and the General Staff. That leads to a weakening of responsibility in the system of defence which relies on the principles of subordination and one superior to ensure a faster and quicker transfer of orders and a rapid functioning of the command.

Summary:

Two petitioners from Skopje and Prilep challenged the constitutionality of Article 28.2 and the part of Article 168.1.2 of the Law on Defence where it reads "for the intention".

Article 28.2 of the Law on Defence provides that the President of the Republic commands the Army through the Minister of Defence in accordance with the Constitution and the Law on Defence.

Article 168.1.2 lays down that a citizen who does not notify the Ministry of Defence of his/her intention of travelling abroad is to be fined or convicted to 60 days in prison.

In delivering its decision, the Court considered Article 79.2 of the Constitution according to which the President of the Republic is the Supreme Commander of the Armed Forces of Macedonia.

Article 122 states that the Armed Forces of Macedonia protect the territorial integrity and the independence of the Republic.

From those constitutional provisions as well as the full text of the Law on Defence, it emerges that in the field of defence the terms "system of defence" and "armed forces" are not identical because "defence" is a broader term covering wider spheres, whereas the "Army" is strictly defined as an armed force under the command of the President as Supreme Commander for the protection of the sovereignty and territorial integrity of the Republic.

The purpose of this constitutional provision is to ensure the principle of unity of command in the use of the forces and means of the Armed Forces. The highest grade of efficiency of the Armed Forces in executing their tasks as prescribed by the Constitution and Law of Defence is achieved by the consistent application of this principle.

For achieving that efficiency, it is necessary to concentrate the orders of command in one organ and that is the President of the Republic as the Supreme Commander of the Armed Forces.

The system of command is hierarchically regulated with one commander and one executor. Furthermore, the Court found that Article 28.2 created division between the President of the Republic as a Supreme Commander of the Armed Forces and the Minister of Defence as a head of an organ of administration, thereby restricting the powers of the Supreme Commander.

Moreover, that system of command in the Army results in a mixing of the command and executive functions of the Minister which is not allowed in the Army, i.e. the Minister of Defence as a member of the Government cannot have duties of command in the Army.

The final decision of the Court was to strike down the impugned Article 28.2.

Regarding Article 168.1.2, the Court also decided to strike down that article on the ground that it did not comply with Articles 13.1 and 14.1 of the Constitution.

Article 13.1 states that a person indicted for an offence should be considered innocent until his/her guilt is established by a legally valid Court verdict.

Article 14.1 states that no person may be punished for an offence which had not been declared to be an offence punishable by law or by any other legislation prior to the offence being committed, and for which no punishment had been prescribed.

Languages:

Macedonian.

Turkey
Constitutional Court

Important decisions

Identification: TUR-2002-3-008

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 30.04.1998 / **e)** K.1998/10 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 24936, 14.11.2002 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.19 **General Principles** – Margin of appreciation.
4.5.2 **Institutions** – Legislative bodies – Powers.
5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Prosecution, criminal, time-limit / Penalty, time-limit / Criminal law.

Headnotes:

The determination of a time-limit for public prosecution, trial and punishment falls within the appreciation (discretion) of the legislative power provided that it acts within the boundaries of the Constitution, taking into account the seriousness of crimes, their effects on public order and criminal law policies.

Summary:

In dealing with a case on theft, the Nevsehir Court of First Instance applied to the Constitutional Court for the striking down of the clause "more than five years of imprisonment" in Article 102.3 of the Criminal Code.

According to Article 102 of the Criminal Code, public prosecution is discontinued if ten years have elapsed since the crime was committed where a crime is punishable by more than five years and less than twenty years of imprisonment.

Article 493 of the Criminal Code, which is to be applied by the Court of First Instance, provides for imprisonment from three years to eight years. (Under the case-law of the Court of Cassation, prescription of

public prosecution is determined on the basis of the maximum period of imprisonment in the articles.) In this case, the time-limit for public prosecution and trial is ten years. According to another rule of the Criminal Code, Article 112.1, the time-limit for punishment in this case is also ten years.

The applicant Court submitted that the time-limit for punishment should be much shorter than that for conducting prosecution and trial, whereas in this case they are equal.

Article 10 of the Constitution states that "all individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations. No privilege shall be granted to any individual, family, group or class. State organs and administrative authorities shall act in compliance with the principle of equality before the law in all their proceedings". Equality before law does not mean that everybody shall be bound by the same rules. It is a natural consequence of the equality rule that individuals having the same legal status shall be bound by the same rules, while individuals having different legal status shall be bound by different rules.

According to Article 2 of the Constitution "The Republic of Turkey is a democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk; and, based on the fundamental tenets set forth in the Preamble". The rule of law means that the State shall respect human rights, shall protect those rights, shall establish a legal order on the basis of equity and equality, and its acts and actions shall be subject to judicial review.

The challenged provision does not privilege any individual and it is applicable to persons having committed a crime punishable by more than five years of imprisonment. As a result, there is no discrimination.

In every legal regulation for determining time-limits, different consequences arise from small changes to the periods of time to be applied.

The same time-limits for public prosecution, trial and punishment arise from the length of imprisonment in Article 493 of the Criminal Code and the case-law of the Court of Cassation.

On the other hand, since the lapse of time for public prosecution, trial and punishment serve different legal purposes, public prosecution, trial and punishment should not be taken as a basis of comparison for the time-limits.

Therefore, the application was unanimously rejected.

Supplementary information:

- Case no. E.1997/26, K.1998/10.

Languages:

Turkish.

Identification: TUR-2002-3-009

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 29.09.1998 / **e)** K.1998/59 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 24937, 15.11.2002 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
5.2.2.1 **Fundamental Rights** – Equality – Criteria of distinction – Gender.

Keywords of the alphabetical index:

Woman, married, family surname / Name, surname, taken from husband, obligatory / Family, protection / Tradition.

Headnotes:

It is not contrary to the principle of equality for individuals to be bound by different rules on just grounds. Recognising the priority of one of the spouses in order to protect the family union and preferring the use of the surname of the husband over that of the wife is in compliance with the Constitution since the impugned provision allows the wife to use her surname in front of the family surname.

Summary:

The Ankara Fourth Court of Peace applied to the Constitutional Court to have Article 153.1 of the Civil Code struck down for being contrary to Articles 12 and 17 of the Constitution.

Article 153.1 of the Civil Code provides “the wife shall take the surname of her husband when she gets married; however, she may use her previous surname in front of her husband's surname provided that she applies to the registry official or subsequently to the registry administration”.

Articles 12.1 and 17 of the Constitution respectively state: “Everyone possesses inherent fundamental rights and freedoms which are inviolable and inalienable” and “Everyone has the right to life and the right to protection and development of his material and spiritual entity”.

The provision that “the wife shall take the surname of her husband when she gets married” stems from the dictates of some social realities and the institutionalisation of long tradition by the legislation. There are some legal theories in Family Law putting forward that a woman should be protected against some social realities and dictates, family relations should be strengthened and family unity should be ordered and uniform.

When a family name (surname) is transferred from one generation to another, the family unity and entity is maintained. The lawmaker recognised the priority of one of the spouses in order to protect the family union. The public order, the public interest and some dictates have led to preference for husband’s surname. The impugned provision allows the woman to use her surname with her husband's surname upon application to the registry.

The objection that Article 153.1 of the Civil Code discriminates against women on the basis of sex is not valid. The principle of equality enshrined in Article 10 of the Constitution does not mean that all individuals shall be bound by the same rules.

It is not contrary to the principle of equality for individuals to be bound by different rules on just grounds. Since there are just grounds for that issue, it is not contrary to the principle of equality for the lawmaker to prefer the surname of the husband as the family surname.

Therefore, the application was rejected.

The judges Acargün, Bumin and Kantarcioglu had dissenting opinions.

Supplementary information:

- Case no. E.1997/61, K.1998/59.

Languages:

Turkish.

Identification: TUR-2002-3-010

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 20.09.2000 / **e)** K.2000/25 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 24896, 04.10.2002 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
3.18 **General Principles** – General interest.
4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
5.3.36.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Municipality, property, confiscation.

Headnotes:

The terms the public interest, the social interest, the common interest and the general interest are used interchangeably and they indicate a common interest which is superior to an individual interest.

The exclusion of some municipal property from sequestration is not contrary to the Constitution and it does not constitute an infringement of the right to property since other municipal property that is not listed in the Law may be sequestrated.

Summary:

Küçükçekmece Enforcement and Bankruptcy Court applied to the Constitutional Court alleging that Article 82.1 of Law on Enforcement and Bankruptcy and Article 19.7 of the Law on Municipalities are contrary to the Constitution.

Article 82.1 of the Law on Execution and Bankruptcy provides that property belonging to the State and the property listed in related statutes may not be sequestrated. Article 19.7 of the Law on Municipali-

ties indicates that one right of municipalities is that municipal taxes and fees, and property devoted to public services not be sequestrated.

The applicant Court claimed that these two provisions violated the right to property and were contrary to Articles 35 of the Constitution (the right to property) and 138 of the Constitution (independence of courts).

Article 35 of the Constitution states “Everyone has the right to own and inherit property. These rights may be limited by law only in view of public interest”. On the other hand, Article 13 of the Constitution envisages some provisions on the restriction of fundamental rights and freedoms.

The impugned provision limits the right to property since it states that non-rentable municipal property (i.e. unrented municipal property that is devoted to public services) may not be sequestrated. However, since it is possible that rentable municipal property may be sequestrated, then the right to property is not totally restricted. If municipal property devoted to continuing municipal services were subject to sequestration, it would doubtlessly bring about unwanted results. The aim pursued in the impugned provision is the preference of public interest over that of individuals. It is possible to sequestrate municipal property other than the property listed in impugned provision.

Therefore, the impugned provisions are not contrary to Articles 13, 35 and 138 of the Constitution.

Mr Bumin, Mr Adali, Ms Kantarcioglu, Mr Ilicak and Mr Sönmez had dissenting opinions.

Supplementary information:

- Case no. E.1999/46, K.2000/25.

Languages:

Turkish.

Identification: TUR-2002-3-011

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 28.03.2002 / **e)** K.2002/42 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 24867, 05.09.2002 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.
4.8.7.1 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects – Finance.
5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.

Keywords of the alphabetical index:

Taxpayer / Fee, payment / Action, against municipality, conditions.

Headnotes:

The requirement to pay half of the municipal participation fees before bringing an action against a municipality is unconstitutional in so far as it restricts the freedom to protect fundamental rights.

Summary:

The Ninth Chamber of the Council of State (the High Administrative Court) applied to the Constitutional Court claiming that the last paragraph of Article 89.a of the Law on Municipal Revenues was contrary to the Constitution.

The challenged provision provides: “In order to bring an action against municipal participation fees, it is compulsory to pay half of the fees”.

Article 36 of the Constitution provides: “Everyone has the right to litigate either as plaintiff or defendant and the right to a fair trial before the courts through lawful means and procedures. No court shall refuse to hear a case within its jurisdiction”. The right to litigate has a characteristic of a fundamental right and it is one of the most efficient guarantees of the enjoyment of other fundamental rights and freedoms. The most efficient and guaranteed way of defending oneself is to exercise one’s rights to go before the courts. To ensure individuals the right to litigate before the courts constitutes a precondition of a fair trail. Moreover, in the judgements of the European Court

of Human Rights on fair trail it was found that fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings (Judgment of *Golder v. United Kingdom*, 21.02.1975, paragraph 36).

The challenged provision requires taxpayers to pay half of the imposed participation fees to the municipality in question before bringing an action. It is understood that the reasoning of the challenged provision is that municipalities must be able to collect the fees as soon as possible in order to accomplish their projects without delay, to minimise the number of cases and to alleviate the burden on the courts. However, according to Article 13 of the Constitution, fundamental rights and freedoms may be restricted only by law and for the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. In Article 36 of the Constitution, the freedom to claim rights is regulated but no reasons of restriction are mentioned in that article. For these reasons, the last paragraph of Article 89.a of the Law on Municipal Revenues is contrary to Constitution.

The aforementioned provision was struck down. Judge Ersoy had a dissenting opinion.

Supplementary information:

- Case no. E.2001/5, K.2002/42.

Languages:

Turkish.

Identification: TUR-2002-3-012

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 08.10.2002 / **e)** K.2002/89 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 24975, 26.12.2002 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

4.6.9.1 **Institutions** – Executive bodies – The civil service – Conditions of access.
4.11.3 **Institutions** – Armed forces, police forces and secret services – Secret services.
5.3.28.1 **Fundamental Rights** – Civil and political rights – Right to participate in public affairs – Right to participate in political activity.
5.3.38 **Fundamental Rights** – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Security service, access / Political party, membership.

Headnotes:

The requirement not to have been a member of any political party for five years prior to being employed by the special security organisations is contrary to the Constitution in so far as this requirement prevents individuals from participating in political organisations. There are no requirements for employment in the public service other than the requirements of office.

Summary:

Twelfth Chamber of the Council of State applied to the Constitutional Court to strike down Article 16.h of Law 2495 (Law on Protection and Security of Some Institutions and Establishments).

This provision requires that in order for a person to be employed by the Special Security Organisations, that person must not have been a member of any political party or not have performed any duty for any political party for at least five years before the date of application for a job at the Security Organisation.

The rights to vote, to stand for election, to engage in political activities and to take part in a referendum are among the indispensable safeguards of a democratic state. In Article 67 of the Constitution, those principles are set out so as to guarantee these freedoms. Article 68.1 of the Constitution states: “Citizens have the right to form political parties and, in accordance with the established procedures, to join and withdraw from them”. Article 68.5 made some exceptions that “judges and prosecutors, members of higher judicial organs including those of the Court of Accounts, civil servants in public institutions and organisations, other public servants who are not considered to be labourers by virtue of the services they perform, members of the armed forces and students who are not yet in institutions of higher education, shall not become members of political parties”.

The freedoms safeguarded by these two articles may only be realised when participation in political parties is encouraged and when the obstacles to participation are eliminated.

According to Article 13 of the Constitution, fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. Since in Articles 67 and 68 of the Constitution do not set up any obstacles to being member of a political party with the exception of the professions listed, the restriction in Article 16.h of Law 2495 does not comply with the Constitution.

Moreover, under Article 70 of the Constitution, every Turk has the right to enter the public service and no criterion other than the qualifications for the office concerned shall be taken into consideration for recruitment into the public service.

There is no doubt that the requirement not to have been a member of any political party for the five years prior to application is not a criterion to be taken into account by the special security organisations office.

Therefore, the challenged provision is contrary to Articles 2, 13, 67, 68 and 70 of the Constitution. It was struck down unanimously.

Supplementary information:

- Case no. E.2002/38, K.2002/89.

Languages:

Turkish.

Ukraine
Constitutional Court

Important decisions

Identification: UKR-2002-3-016

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 17.10.2002 / **e)** 17-rp/2002 / **f)** Official interpretation of the provisions of Articles 75, 82, 84, 91, 104 of the Constitution of Ukraine (as to authorities of the *Verkhovna Rada* of Ukraine) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 44/2002 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
4.5.1 **Institutions** – Legislative bodies – Structure.
4.5.4.3 **Institutions** – Legislative bodies – Organisation – Sessions.
4.5.4.4 **Institutions** – Legislative bodies – Organisation – Committees.
4.5.6.2 **Institutions** – Legislative bodies – Law-making procedure – Quorum.

Keywords of the alphabetical index:

Parliament, work / Parliament, voting procedure.

Headnotes:

The Parliament of Ukraine *(Verkhovna Rada)* is a collective and representative body of legislative power which is authorised to adopt laws when it meets during its sessions. It is competent to adopt laws and exercise its other competences on the condition that no less than two-thirds of its constitutional composition has been elected and the oath has been taken by at least this number of elected deputies.

Plenary meetings are the principal form of the parliament's activities. Decisions are adopted exclusively at plenary meetings of the parliament, by voting. Decisions are adopted if they are voted for by the number of deputies specified by the Constitution.

Summary:

The definition of the parliament as the sole body of legislative power means that no other state authority is authorised to adopt laws. The parliament exercises its power independently. Parliamentary activity can only be conducted in meetings of the parliament, during its sessions. Indeed, the parliament works in sessions by holding plenary meetings in which matters within its competence are considered and settled.

The parliament is entitled to adopt laws and exercise other competences provided for by the Constitution on the condition that the specified minimum number of deputies, which, in accordance with the Constitution, is necessary for adopting a relative decision, participates in its plenary meetings.

Languages:

Ukrainian.

United Kingdom
House of Lords

Introduction

In the last edition of the *Bulletin* we included a précis of a decision of the Special Immigration Appeals Commission (*Bulletin* 2002/2, [GBR-2002-2-004]), concerning the United Kingdom's purported derogation from Article 5 ECHR with respect to the detention of foreign nationals suspected of involvement in international terrorism. The Court of Appeal has now overturned that decision and we include a précis of the Court of Appeal's decision below at (*Bulletin* 2002/3, [GBR-2002-3-005]).

Important decisions

Identification: GBR-2002-3-005

a) United Kingdom / **b)** Court of Appeal / **c)** / **d)** 25.10.2002 / **e)** / **f)** A and others v. Secretary of State for the Home Department / **g)** [2002] *EWCA Civ* 1502 / **h)** *The Times*, 29.10.2002.

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.19 **General Principles** – Margin of appreciation.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.18 **Institutions** – State of emergency and emergency powers.
5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
5.1.4 **Fundamental Rights** – General questions – Emergency situations.
5.2.2.3 **Fundamental Rights** – Equality – Criteria of distinction – National or ethnic origin.
5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.

Keywords of the alphabetical index:

Foreigner, detention without trial / European Convention on Human Rights, derogation / Terrorism.

Headnotes:

By Article 15 ECHR, Parliament was entitled to limit anti-terrorist measures so as to affect only foreign nationals suspected of terrorist links: the derogation from Article 5 ECHR could only permit derogation from the rights protected under that article so far as was strictly required by the exigencies of the situation. Parliament was entitled to decide that only the indefinite detention of foreign nationals suspected of involvement in international terrorism was strictly required, and that the extension of the measures to British nationals went beyond what was required.

The Anti-terrorism, Crime and Security Act 2001 (the "2001 Act") authorising the indefinite detention without trial of foreign nationals who were suspected of being international terrorists was incompatible with Article 5 ECHR but the Human Rights Act 1998 (Designated Derogation) Order 2001 was lawful and therefore the detention of nine foreign nationals under the 2001 Act was lawful since the exercise of the powers of detention was not discriminatory and did not breach Article 14 ECHR.

Summary:

The government appealed against the decision of Court below (the Special Immigration Appeals Commission) that found that whilst the United Kingdom's partial derogation from Article 5 ECHR and its legislative measures authorising the indefinite detention without trial of foreign nationals suspected of being international terrorists was otherwise lawful, it was illegal in that it was contrary to Article 14 ECHR as it discriminated, irrationally, between suspected international terrorists who were foreign nationals and those who were British nationals (who could not be detained under the provisions). The précis of the decision below appeared in the last issue of the *Bulletin* (2002/2 [GBR-2002-2-003]).

The Court of Appeal allowed the government's appeal holding that the provisions permitting the detention were not discriminatory for the following reasons.

British nationals were not in the same position as foreign nations since British nationals could not be removed from the country, whereas foreign nationals could only not be removed where there were fears for their safety. Such foreign nationals had no right to remain in the country but only had a right not to be removed for their own safety.

There were many other instances in international law that allow the state to distinguish between nationals and non-nationals. Immigration law, for instance, was based on discrimination on grounds of nationality and it was obviously not arguable that immigration controls were, *per se*, contrary to Article 14 ECHR. Discrimination between nationals and non-nationals was even more common during an emergency.

Whilst the Court had a responsibility to scrutinise government legislation under the Human Rights Act 1998, in times of a public emergency the Executive is in a better position than the Court to determine what measures are necessary and it should thus be allowed a relatively wide margin of appreciation.

Languages:

English.

Identification: GBR-2002-3-006

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 31.10.2002 / **e)** / **f)** Regina v. Secretary of State for the Home Department (*ex parte* Saadi and others) / **g)** [2002] *United Kingdom House of Lords* 41 / **h)** [2002] 1 *Weekly Law Reports* 3131.

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.20 **General Principles** – Reasonableness.
5.1.1.3.1 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.
5.3.11 **Fundamental Rights** – Civil and political rights – Right of asylum.

Keywords of the alphabetical index:

Asylum, seeker / Detention, without trial / Conditions.

Headnotes:

The automatic detention, for short periods of time, of certain classes of asylum seekers was not unlawful or contrary to Article 5 ECHR. The detention, in reasonable conditions, was permitted as its aim was

to prevent unauthorised entry into the United Kingdom, one of the conditions justifying detention under Article 5.1.f ECHR.

Summary:

The four appellants were asylum seekers detained for short periods at the Oakington Reception Centre whilst their claims were determined. They had successfully challenged their detention by way of judicial review on the grounds that it violated their rights to liberty under Article 5.1 ECHR. However, the Court of Appeal found their detention was lawful and fell within the exceptions set out in Article 5.1.f ECHR. The appellants appealed against that decision.

The House held that whilst detention at Oakington constituted a deprivation of liberty, the physical conditions there were not open to criticism. The centre made provision for legal and medical advice, recreation and religious practice. The justification for the detention was that those detained fell within the category of cases capable of speedy decision and this could be best achieved by having applicants in one place for a short period of time. The House found the detention was not unlawful in domestic law or according to Article 5 ECHR for the following reasons.

National legislation authorised the detention of a person applying for leave to enter the United Kingdom pending the examination and decision of their applications, so long as the period of detention was reasonable in the circumstances.

With respect to Article 5 ECHR, the Appellants' detention could only be justified if one of the two alternative situations specified in Article 5.1.f ECHR was established: detention must either be to prevent a person effecting unauthorised entry or be of a person against whom action is being taken with a view to deportation or extradition.

It was a long established principle of international law that sovereign states can regulate the entry of aliens into their territory, subject to any treaty obligation of a state. The United Kingdom had the right to control entry and continued presence of aliens in its territory and Article 5.1.f ECHR appeared to be based on this assumption.

The power to detain is to “prevent” unauthorised entry. Until the state has “authorised” entry, entry is unauthorised. The State has the power to detain without violating Article 5.1 ECHR until the application has been considered and entry authorised – otherwise there would be no power to arrest or detain a person even for a short period whilst arrangements were made for the consideration of his request for asylum. It is not necessary to show an applicant is seeking to enter by evading immigration control for detention to be justified under Article 5.1 ECHR.

Subject to any question of proportionality the action taken against the Appellants was taken to prevent them effecting unauthorised entry within the meaning of Article 5.1.f ECHR. Neither the methods of selection of cases for detention (on the basis of suitability for speedy decision) or their objective (speedy decision) or the way in which people are held for a short period in reasonable physical conditions can be said to be arbitrary or disproportionate. Getting a speedy decision is in the interests of applicants and those increasingly in the queue. Accepting the arrangements at Oakington provided reasonable conditions for individuals and families and that the period of detention was short, the detention procedure is proportionate and reasonable.

Languages:

English.

Identification: GBR-2002-3-007

a) United Kingdom / **b)** Court of Appeal / **c)** / **d)** 05.11.2002 / **e)** / **f)** Mendoza v. Ghaidan / **g)** [2002] *EWCA Civ* 1533 / **h)** [2002] 4 *All England Reports* 1162.

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
3.19 **General Principles** – Margin of appreciation.
5.2.2.11 **Fundamental Rights** – Equality – Criteria of distinction – Sexual orientation.
5.3.31 **Fundamental Rights** – Civil and political rights – Right to family life.
5.3.31.2 **Fundamental Rights** – Civil and political rights – Right to family life – Succession.

Keywords of the alphabetical index:

Homosexuality, family life / Housing, policy / Tenancy, right.

Headnotes:

A statute that appeared to afford less protection to homosexual partners than heterosexual partners was discriminatory and contrary to Article 14 ECHR. Discrimination was a question of high constitutional importance, Article 14 ECHR has a wide ambit; a narrow margin of appreciation would be afforded to the legislature where issues of discrimination are involved. There was no reasonable justification for the discriminatory policy. Discrimination on grounds of sexual orientation was now an impermissible ground, on the same level as any others listed in Article 14 ECHR.

Summary:

M., a homosexual partner of the deceased tenant of a flat, appealed from a decision of a court that he could only be awarded an assured tenancy and not a statutory tenancy under the Rent Act 1977, following the decision of the House of Lords in *Fitzpatrick v. Sterling Housing Association Ltd*. The decision in Fitzpatrick was that whilst a surviving homosexual partner could qualify as a member of tenant's "family" under the Rent Act (and thus be entitled to an assured tenancy), he could not qualify as a "spouse" under the Act (and thus receive the greater protection available from a statutory tenancy). The decision meant that an unmarried heterosexual partner of a deceased tenant had greater protection than a homosexual partner in the same position. M. appealed to the Court of Appeal.

The central issue was whether M. could rely on Article 14 ECHR. Whilst Article 14 ECHR could only come into play where another article of the European Convention on Human Rights was engaged, the Court held that a wide view of the ambit of Article 14 ECHR should be adopted. Once a Court was satisfied a case could fall within the ambit of other European Convention on Human Rights, Article 14 applied. It was accepted that, adopting this wide approach, M's rights fell within the ambit of Article 8 ECHR, and thus M. could rely on Article 14 ECHR.

In cases involving Article 14 ECHR, the following four questions must be asked. First, do the facts fall within the ambit of one or more of the substantive rights under the European Convention on Human Rights. Secondly, if so, was there different treatment as respects that right between the complainant and other persons put forward for comparison ("the chosen comparators")? Thirdly, were the chosen comparators in an analogous situation to the complainant's situation? Fourthly, if so, did the difference have an objective and reasonable justification: in other words, did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship of proportionality to the aim sought to be achieved?

Having established that the facts fell within the ambit of one or more rights under the European Convention on Human Rights, and that the second and third questions had to answered in the affirmative, the Court went on to consider the fourth question: whether there was an objective and reasonable justification for the discrimination between homosexual and heterosexual partners of deceased tenants.

The Respondent relied on two arguments to show there was an objective and reasonable justification. First, such difference fell within the legitimate ambit of the state's margin of appreciation to arrange its housing policy. Secondly, the policy of treating homosexual and heterosexual couples differently was legitimate and reasonable and was required by the jurisprudence of the Convention and the European Court of Justice (ECJ).

The Court held that deference to the will of Parliament could not be relied on. When Article 14 ECHR is engaged and discrimination is demonstrated, it is for the discriminator to prove that the discrimination was justified. This requires positive argument; reliance on the margin of appreciation was not sufficient. In addition, whilst decisions of the legislature involving social or economic questions, such as housing policy, would normally involve a relatively wide margin of appreciation being afforded, a narrower margin would be afforded with respect to questions of constitutional importance. Discrimination was a question of high constitutional importance.

The Court further held there was no reasonable justification for the discrimination. If the aim of the policy was the protection of heterosexual family life, it was not accepted that such an aim was promoted by handicapping persons unwilling or unable to enter into such relationships. The aim could not reasonably be the protection of the interests of landlords and the promotion of flexibility within the housing market, as Parliament had extended the full statutory protection to unmarried heterosexual partnerships who formed a larger group than homosexual partners.

The Court also rejected the Respondent's reliance on the jurisprudence of the ECJ and the European Court of Human Rights. European Union law did not specifically prohibit discrimination in the same broad

terms as Article 14 ECHR, and the ECJ cases relied on by the Respondent were concerned with discrimination on grounds of sex, not sexual orientation. So far as the European Convention on Human Rights was concerned, the Court had to construe the Convention as a living instrument. In 2002 it was clear that sexual orientation was recognised as an impermissible ground of discrimination, on the same level as the examples specifically set out in the text of Article 14 ECHR.

Applying the rules of interpretation under Section 3 of the Human Rights Act 1998, that a statute be interpreted and applied in a way that is compatible with the European Convention on Human Rights wherever it is possible to do so, the Court held that words must be read into the provision in the Rent Act to make it European Convention on Human Rights compliant. Thus, where an Act provides that "a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant. Those words should be read as "a person who was living with the original tenant as if they were his or her wife or husband".

Cross-references:

- *Fitzpatrick v. Sterling Housing Association Ltd*., [2001] 1 *Appeals Cases* 27.

Languages:

English.

United States of America
Supreme Court

Important decisions

Identification: USA-2002-3-008

a) United States of America / **b)** Supreme Court / **c)** / **d)** 24.06.2002 / **e)** 01-595 / **f)** United States v. Ruiz / **g)** 122 *Supreme Court Reporter* 2450 (2002) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
4.7.2 **Institutions** – Judicial bodies – Procedure.
5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.
5.3.13.7 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right of access to the file.

Keywords of the alphabetical index:

Drug, possession, unlawful / Witness, informant, prosecution, impeachment information / Plea bargaining / Right, waiver.

Headnotes:

Protections to criminal defendants afforded by constitutional due process and fair trial guarantees do not include a requirement that the prosecution must disclose information bearing on the credibility of informants and other witnesses (impeachment information) prior to entering into a plea agreement with a defendant.

The Constitution does not prohibit criminal defendants from waiving, as part of a plea agreement, their right to prosecutorial disclosure of information bearing on the credibility of informants and other witnesses.

A criminal defendant who pleads guilty not only relinquishes the right to a fair trial, but also certain accompanying constitutional protections.

Summary:

Angela Ruiz was arrested at a border crossing when immigration agents discovered thirty kilograms of marijuana in her luggage. Using the so-called “fast track” plea bargain system, federal prosecutors offered Ms Ruiz a reduced prison sentence if she would plead guilty to the charge of unlawful drug possession. As part of this arrangement, in which she was asked to waive her rights to a trial and appeal, the prosecutors stated they had provided her with any information in their possession that would establish her innocence. In return, she was asked to agree to waive the right to receive any impeachment information relating to any informants or other witnesses (information that might tend to reduce the credibility of such persons). Ms Ruiz said that she would not agree to such a waiver, and the prosecutors withdrew their plea bargain offer.

Ms Ruiz was then indicted for unlawful drug possession, and despite her earlier rejection of the plea bargain, she pled guilty to the charge. In the sentencing phase of the proceeding, she asked the judge to grant her the same reduced sentence that the prosecutors had proposed in their fast track agreement. The trial court denied her request.

On appeal, the Court of Appeals for the Ninth Circuit overturned Ms Ruiz's sentence. Relying on the 1963 Supreme Court decision in *Brady v. Maryland*, which held that constitutional due process considerations require the prosecution to disclose evidence that is material and favourable to the defendant, the Court of Appeals ruled that this mandate extends to the plea bargaining process and requires that impeachment information be provided to a defendant. In addition, the Court of Appeals ruled that due process does not allow defendants to waive this right. As a result, the prosecution's plea bargain offer, requiring such a waiver, was unconstitutional.

The Supreme Court agreed to review the decision of the Court of Appeals, and reversed that decision, ruling that the Constitution does not require federal prosecutors to disclose impeachment information relating to informants or other witnesses prior to entering into a binding plea agreement with a criminal defendant.

The Court stated that due process protections, and the right to a fair trial under the Sixth Amendment to the Constitution, do require prosecutors, upon request, to provide evidence favourable to an accused where the evidence is material either to guilt or to punishment. In this regard, the Court recognised that the Constitution mandates that a defendant's guilty plea must be “voluntary” and any related waivers must be made “knowingly, intelligently, and with sufficient awareness of the relevant circumstances and likely consequences”.

However, the Court also stated that criminal defendants do not have a general constitutional right to discovery of all information in the possession of the prosecution. Therefore, the Constitution does not require the prosecution to share all useful information with the defendant. The key distinction, according to the Court, lies between the nature of information that defendants are entitled to receive during pre-trial plea bargaining as opposed to the trial process itself. While a defendant has a right to a broad array of favourable evidence to insure a fair trial, a defendant who pleads guilty forfeits not only a fair trial, but also certain accompanying constitutional guarantees. Thus, while a defendant has a trial-related right to impeachment information, this right does not extend to the plea bargaining process.

In making this determination, the Court balanced the interests of defendants and the government, stating that due process considerations include not only the nature of the private interest at stake, but also the value of the additional safeguard and the adverse impact of the requirement upon the Government's interests. The Court found that the value to defendants of such a right would be limited, in light of the fact that the prosecution must provide information establishing factual innocence under the plea agreement. At the same time, the Court concluded that a constitutional rule requiring disclosure of impeachment information would have a serious negative impact on the Government's interest in securing guilty pleas by disrupting ongoing investigations and exposing potential witnesses to the risk of intimidation and harm. As a result, the Court concluded that due process does not require “so radical a change in order to achieve so comparatively small a constitutional benefit”.

Supplementary information:

In the Constitution, a defendant's due process rights in federal and state criminal proceedings are found in the Fifth and Fourteenth Amendments, respectively.

Cross-references:

- *Brady v. Maryland*, 373 *United States Reporter* 83, 83 *Supreme Court Reporter* 1194, 10 *Lawyer's Edition Second* 215 (1963).

Languages:

English.

Court of Justice of the European Communities and Court of First Instance

Important decisions

Identification: ECJ-2002-3-001

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 05.03.1999 / **e)** C-154/98 P / **f)** Guérin automobiles EURL v. Commission of the European Communities / **g)** *European Court Reports*, I-1451 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.4.6.1 **Constitutional Justice** – Procedure – Grounds – Time-limits.
2.1.1.3 **Sources of Constitutional Law** – Categories – Written rules – Community law.
5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.

Keywords of the alphabetical index:

European Community, institutions, acts / Remedy, judicial, availability and time-limits, obligation to inform addressees.

Headnotes:

Articles 189, 190, 191 and 192 of the EC Treaty, which define precisely the nature of and rules applicable to the legal measures that may be adopted by the Community institutions, do not impose on those institutions any general obligation to inform the addressees of those measures of the judicial remedies available or of the time-limits for availing themselves thereof.

In the absence of express provisions of Community law, the Community administration and judicature cannot be placed under any such general obligation (see paras 13, 15).

Summary:

An appeal was lodged before the Court of Justice by *Guérin automobiles EURL*, a car dealer in judicial liquidation, against the order of the Court of First Instance of the European Communities of 13 February 1998 (Case T-276/97 *Guérin automobiles/Commission,* ECR II-261) in which the latter had dismissed as inadmissible an application for the annulment of Commission Decision SG(97) D/823182. By letter dated 25 April 1997, the Commission had rejected the dealer's complaint challenging the distribution system set up by Volvo in France and requesting the withdrawal of the exemption granted to the manufacturer under Commission Regulation (EEC) no. 123/85 on the application of Article 85.3 of the EEC Treaty to certain categories of motor vehicle distribution and servicing agreements. In delivering the contested order, the Court of First Instance had declared the appeal by *Guérin automobiles* manifestly inadmissible on the ground that proceedings had not been commenced within the period of two months laid down in the fifth paragraph of Article 173 of the EC Treaty [which, after amendment, became Article 230.5 EC].

In support of its appeal, the applicant relied on a single plea in law, based on the general Community law principles of the protection of legitimate expectations, legal certainty, respect for the rights of the defence and the right to an effective judicial remedy, and on the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It argued that in order to make the right to a judicial remedy effective, it was necessary to indicate the remedies available and the time-limits to be complied with.

This argument did not convince the Court. Confirming the assessment of the Court of First Instance, it stated that in the absence of express provisions of Community law, the Community administration and judicature could not be placed under a general obligation, whenever a decision was adopted, to inform individuals of the remedies available and the conditions under which they could be exercised. Accordingly, it dismissed the appeal as manifestly unfounded.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish.

Identification: ECJ-2002-3-002

a) European Union / **b)** Court of First Instance / **c)** Second Chamber, Extended Composition / **d)** 11.03.1999 / **e)** T-156/94 / **f)** Siderúrgica Aristrain Madrid SL v. Commission of the European Communities / **g)** *European Court Reports*, II-0645 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.3.5.2.1 **Constitutional Justice** – Jurisdiction – The subject of review – Community law – Primary legislation.
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.
5.3.13.1.4 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Litigious administrative proceedings.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Independence.
5.3.13.14 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Impartiality.

Keywords of the alphabetical index:

European Coal and Steel Community, treaty / Competition, rules, violation / Commission, administrative procedure, guarantees.

Headnotes:

1. Claims are inadmissible where they seek to challenge the lawfulness of the system introduced by Articles 65 and 66 of the ECSC Treaty for preventing and penalising agreements, decisions and concerted practices or of the system introduced by Articles 33 and 36 thereof for the judicial review of administrative acts. The Treaty itself is not an act of the Commission and it is not amenable, therefore, to review by the Community judicature under Articles 33 or 36 (see paras 95-96).

2. Fundamental rights form an integral part of the general principles of law, the observance of which the Community judicature ensures. The Court of Justice and the Court of First Instance draw inspiration from the constitutional principles common to the Member States and also from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that context, the European Convention on Human Rights – to which reference is made in Article F.2 of the Treaty on European Union – has special significance (see paras 99-100).

3. During administrative proceedings which culminate in the adoption of a decision finding that the competition rules have been infringed and imposing a fine under the ECSC Treaty, the Commission is obliged to observe the procedural guarantees laid down by Community law. The fact that the Commission combines the functions of prosecutor and judge is not contrary to those safeguards and they do not require the Commission to adopt an internal arrangement under which an official is not permitted to act as both investigator and rapporteur in the same case.

The requirement of effective judicial review of any Commission decision establishing and penalising an infringement of the Community competition rules is a general principle of Community law which follows from the constitutional traditions common to the Member States. The unlimited jurisdiction of the Court of First Instance, an independent and impartial tribunal, to review the penalty, pursuant to Article 36 of the Treaty – in conjunction, where necessary, with a review of the legality of the other elements of the decision, pursuant to Article 33 of the Treaty – is consistent with that requirement (see paras 101-102, 105-107, 115).

Summary:

An appeal was lodged before the Court of First Instance for the annulment of Commission Decision 94/215/ECSC relating to proceedings under Article 65 of the ECSC Treaty concerning agreements and concerted practices engaged in by European producers of beams (OJ L 116, p. 1) in which the Commission had found that 17 steel undertakings and one of their trade associations had engaged in a series of agreements, decisions and concerted practices designed to fix prices, share markets and exchange confidential information on the market for beams in the Community, in breach of Article 65.1 of the ECSC Treaty, and imposed fines on 14 undertakings in this sector for the infringements committed.

The applicant, a steel-manufacturing company incorporated under Spanish law, to which the above decision was addressed, argued that this decision had been taken in violation of the fundamental right to an independent and impartial tribunal as guaranteed by Article 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The violation of this right was caused primarily by the fact that the proceedings conducted by the Commission failed to confer the investigation and decision-making functions on different organs or persons, despite the fact that the Treaty made no provision for an automatic appeal against decisions of the Commission to a tribunal with unlimited jurisdiction of the type required by the Convention. The Court first of all stated that it was the ECSC Treaty which set out the arrangements for penalising agreements and that the Treaty was not liable to a review of legality.

Having clarified this point, it then looked at whether the fact that within the Commission, the failure to assign the functions of investigation and decision-making to separate organs or bodies constituted a violation of the fundamental rights which Community law must uphold, which included procedural guarantees. It found that such was not the case because Commission decisions were subject to effective judicial control, carried out by the Court which, in pursuance of Article 33 of the ECSC Treaty, had unlimited jurisdiction to review decisions. In view of the power invested in the Court both to assess the legality of the sanction and to modify it, this offered interested parties the guarantees required by Article 6 of the Convention.

The Court then considered the applicant's complaints concerning the administrative proceedings before the Commission, and found that the *inter partes* principle had not been violated nor had the duration of the proceedings been excessive.

Rejecting the appeal for the remainder, the Court simply reduced the fine imposed on the applicant in view of the failure of the Commission to take account of the fact that the applicant had not been involved in part of the practices for which they had been penalised.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish.

Identification: ECJ-2002-3-003

a) European Union / **b)** Court of First Instance / **c)** Fifth Chamber, Extended Composition / **d)** 25.03.1999 / **e)** T-102/96 / **f)** Gencor Ltd v. Commission of the European Communities / **g)** *European Court Reports*, II-753 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
2.3.9 **Sources of Constitutional Law** – Techniques of review – Teleological interpretation.
3.8 **General Principles** – Territorial principles.
3.25 **General Principles** – Market economy.
3.26 **General Principles** – Principles of Community law.

Keywords of the alphabetical index:

Undertakings, concentration / Proceedings for annulment, admissibility / Competition, community rules / Regulation, community, field of application / Public international law.

Headnotes:

1. An action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the contested measure being annulled; that is the position where annulment would enable future repetition of the alleged illegality to be avoided.

The undertaking to which a decision declaring a concentration incompatible with the common market was addressed has an interest in bringing proceedings and in having the legality of that decision examined by the Community judicature (see paras 40-42).

2. Application of Regulation no. 4064/89 is justified under public international law when it is foreseeable that a proposed concentration between undertakings established outside the Community will have an immediate and substantial effect within the Community.

The fact that, in a world market, other parts of the world are affected by the concentration cannot prevent the Community from exercising its control over a concentration which substantially affects competition within the common market by creating a dominant position (see paras 90, 98).

3. It is necessary, when interpreting a legislative measure, to attach less importance to the position taken by one or other Member State when the measure was drawn up than to its wording and objectives. The fact that, after the adoption of a measure, certain Member States contest a particular interpretation cannot mean that it is inaccurate. Since Member States are not bound by positions which they may accept at the time of the debate within the Council, the possibility cannot be ruled out that one of them may subsequently change its view or decide to raise the question of the measure's legality before the Community judicature.

Since interpretations based on the wording, history and conceptual structure of a measure do not permit its precise scope to be assessed, that measure must be interpreted by reference to its purpose (see paras 128, 130, 148).

Summary:

Gencor Ltd lodged an application before the Court of First Instance for the annulment of a Commission decision declaring as incompatible with the common market and the functioning of the European Economic Area agreement a proposed concentration, notified by the applicant and the Lonrho company in accordance with Article 4.1 of Council Regulation no. 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

Gencor, a company incorporated under South African law, and Lonrho, a company incorporated under English law, are the parent companies of groups operating mainly in the mineral resources and metals industries. Gencor and Lonrho planned to acquire joint control of Implats, and through that undertaking, of Eastplats and Westplats, and on 20 June 1995 announced that they had concluded an agreement to merge their respective platinum group metal operations. The South African Competition Board, apprised of the transaction, raised no objection. Accordingly, on 10 November 1995, the parties signed a series of agreements relating to the concentration, including the purchase agreement which was subject to the fulfilment of a number of conditions precedent. These included approval of the transaction by the Commission. On 17 November 1995, Gencor and Lonrho notified the Commission of the agreements in question. Following a procedure lasting almost 5 months, the Commission declared that the concentration was incompatible with the common market and the functioning of the EEA Agreement because it would have led to a dominant duopoly position between Amplats and Implats in the world platinum and rhodium market. On 28 June 1996, Gencor filed an action for the annulment of the contested decision.

The Commission submitted that the appeal was inadmissible on the ground that the applicant no longer had any legal interest in bringing proceedings since the proposed purchase agreement had now lapsed. The Court dismissed that argument. Pointing out that an interest in having a measure annulled existed only if the annulment was of itself capable of having legal consequences, it observed that the fact that the contested decision had been addressed to the applicant conferred upon the latter an interest in bringing proceedings. Accordingly, it rejected the plea of inadmissibility raised by the Commission.

With regard to the substance, the applicant relied in support of its action on a number of pleas. Amongst these, the applicant challenged the compatibility of the contested decision with international law. The proposed concentration related to economic activities conducted within the territory of a non-member country, the Republic of South Africa, and had been approved by the authorities of that country. In accordance with the principle of territoriality, a general principle of public international law, this transaction fell outside the scope of Regulation no. 4064/89 and, consequently, outside the jurisdiction of the Commission. In this respect, the Court found that the concentration agreement would have altered the competitive structure within the common market. It was foreseeable that the transaction would have had an immediate and substantial effect in the Community. The Court concluded that application of Regulation no. 4064/89, in the instant case, was in conformity with public international law.

Similarly, the applicant claimed that Regulation no. 4064/89 could not be interpreted as preventing concentrations which created or strengthened a collective dominant position. With reference to the legislative history of the Regulation, the applicant observed that this issue had been debated at the time of its adoption and that as no consensus could be reached in the Council, the concept of “collective dominant position” was omitted from the text of Regulation no. 4064/89. Referring to the judgment of 31 March 1998, *France/Commission* [C-68/94 and C-30/95, *ECR* p. I-1375], the Court dismissed this argument: collective dominant positions fell within the scope of Regulation no. 4064/89. The legislative history could not be considered to express clearly the intention of the authors of the Regulation as to the scope of the term “dominant position”. Accordingly, the position adopted by one or other member state after the adoption of Regulation no. 4064/89 was irrelevant: member states were not bound by the positions they might have accepted at the time of the debate within the Council. The Court added that since

the interpretations of Regulation no. 4064/89 based on the wording and the history did not enable the difficulties of interpretation to be resolved, it was necessary to look at the scheme of the regulation, i.e. the general structure of its provisions. The Court found once again that this provided no further insight into the scope of the concept of “dominant position”. The legislation in question must therefore be interpreted by reference to its purpose. Accordingly, the Court held that collective dominant positions could not be excluded from the scope of Regulation no. 4064/89.

After considering the remaining grounds of challenge put forward by the applicant concerning the ascertainment and classification of facts, the Court confirmed the various analytical stages which had led the Commission to adopt the contested decision. Consequently, it dismissed the appeal lodged by Gencor.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish.

Identification: ECJ-2002-3-004

a) European Union / **b)** Court of Justice of the European Communities / **c)** Sixth Chamber / **d)** 22.04.1999 / **e)** C-272/97 / **f)** Commission of the European Communities v. Federal Republic of Germany / **g)** *European Court Reports*, I-2175 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.26 **General Principles** – Principles of Community law.
5.3.13.1.5 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Non-litigious administrative proceedings.

Keywords of the alphabetical index:

Community law, failure to fulfil obligation / European Commission, reasoned opinion, adoption procedure / Collegiality, principle, scope.

Headnotes:

The decision of the Commission to issue a reasoned opinion in the context of the procedure under Article 169 of the Treaty is subject to the principle of collegiality but the formal requirements for effective compliance with that principle vary according to the nature and legal effects of the acts adopted by that institution. Since it is part of a preliminary procedure which does not have any binding legal effect for the addressee and since it is merely a pre-litigation stage of a procedure which may lead to an action before the Court, such a decision must be the subject of collective deliberation by the college of Commissioners, which implies that the information on which it is based must be available to the members of the college. It is not necessary, however, for the college itself formally to decide on the wording of the act which gives effect to such a decision and to put it in final form.

Summary:

The Commission of the European Communities commenced proceedings under Article 169 of the EC Treaty [now Article 226 EC] for a declaration that, by failing to implement within the prescribed period all measures necessary to comply with Directive 90/605 amending Directive 78/660 on annual accounts and Directive 83/349 on consolidated accounts, the Federal Republic of Germany had failed to fulfil its obligations under that treaty.

The German Government contended, principally, that the action was inadmissible because the reasoned opinion issued by the Commission had been drawn up in breach of the principle of collegiality laid down in Article 163 of the EC Treaty [now, after amendment, Article 219 EC] and Article 16 of the Commission's Rules of Procedure. The Court dismissed that argument. In line with its judgment of 29 September 1998, *Commission v. Germany* [C-191/95, *European Court Reports* p. I-5449], the Court held that while the Commission's decision to issue a reasoned opinion must be the subject of collective deliberation by the college, it was unnecessary for the college itself formally to decide on the wording of the act which gave effect to that decision and put it in final form. The plea of inadmissibility was therefore rejected.

With regard to the substance, the Court found that, since Directive 90/605 had only been partially transposed, Germany had failed to fulfil its obligations under that directive.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish.

Identification: ECJ-2002-3-005

a) European Union / **b)** Court of Justice of the European Communities / **c)** Second Chamber / **d)** 29.04.1999 / **e)** C-224/97 / **f)** Erich Ciola v. Land Vorarlberg / **g)** *European Court Reports*, I-2517 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.2.1.6.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Primary Community legislation and domestic non-constitutional legal instruments.
3.26 **General Principles** – Principles of Community law.
5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Treaty, effect in domestic law / Freedom to provide services, violation / Discrimination, indirect.

Headnotes:

Since the provisions of the EC Treaty are directly applicable in the legal systems of all Member States and Community law takes precedence over national law, those provisions create rights for the persons concerned which the national authorities must observe and safeguard, and any conflicting provision of national law therefore ceases to be applicable.

The obligation not to apply any conflicting provision of national law is incumbent not only on the national courts but also on all administrative bodies, including decentralised authorities. Moreover, provisions of national law which conflict with such a provision of Community law may be legislative or administrative, the latter category comprising not only general abstract rules but also specific individual administrative decisions.

Consequently, in so far as Article 59 of the Treaty becomes a direct source of law in new Member States upon their accession, a prohibition which is contrary to the freedom to provide services, laid down before the accession of a Member State to the European Union not by a general abstract rule but by a specific individual administrative decision that has become final, must be disregarded when assessing the validity of a fine imposed for failure to comply with that prohibition after the date on which the act of accession entered into force.

Summary:

This preliminary ruling issued under Article 117 of the EC Treaty [now Article 234 EC] was an opportunity for the Court of Justice to take a fresh look at the concept of indirect discrimination and clarify its case-law relating to the primacy and direct effect of Community law.

Mr Ciola was the manager of a company which rented out moorings for pleasure boats on the shore of Lake Constance. The *Bezirkshauptmannschaft* Bregenz (the administrative authority of first instance of the *Land* of Vorarlberg) addressed an individual administrative decision to the company on 9 August 1990 informing it that, with effect from 1 January 1996, the number of moorings in the harbour for boats whose owners were resident abroad would be limited to 60. By decision of 10 July 1996, the *Unabhängiger Verwaltungssenat* (independent administrative senate) found Mr Ciola guilty of exceeding that quota and ordered him to pay a fine. Mr Ciola appealed against this decision to the *Verwaltungsgerichtshof*, which decided to stay proceedings and put two questions to the Court of Justice relating to the interpretation of provisions of Community law.

In its first question, the national court asked the Court of Justice whether the provisions of the EC Treaty concerning the freedom to provide services precluded a Member State from establishing a maximum quota of moorings which could be rented to boat owners resident in another Member State. The Court's reply was based on an argument in three steps. First, the Court satisfied itself that the case before it fell within the scope of Articles 59 to 66 of the EC Treaty [now Articles 49 to 55 EC]. It noted in this connection that the right freely to provide services could be relied upon by an undertaking as against the State in which it was established if the services were provided for persons established in another Member State. Consequently, the provisions of Articles 59 to 66 applied to a service such as that provided by Mr Ciola's company to boat owners resident in another Member State. Secondly, the Court

considered to what extent a restriction on moorings of the kind at issue in the main proceedings infringed the prohibition under the first paragraph of Article 59 of the Treaty of all discrimination with regard to providers of services. It found that since this restriction was not based on the nationality of non-resident boat owners, it could not be regarded as direct discrimination. It observed, however, that national rules under which a distinction was drawn on the basis of residence were liable to operate mainly to the detriment of nationals of other Member States, as non-residents were in the majority of cases foreigners. A provision of this kind constituting indirect discrimination was contrary to the provisions of Article 59 and, as such, prohibited. Thirdly, the Court referred to the possibility of tolerating a discriminatory measure where it was dictated by reasons of public policy, public security or public health, within the meaning of Article 56 of the Treaty [now Article 46 EC]. In the case in point, however, the imposition of a quota on moorings for non-resident owners was based on economic reasons, which were excluded from the scope of Article 56. Consequently, in the absence of any express derogation in the Act of Accession of Austria, Finland and Sweden, a restriction of this kind was found to be contrary to the principle of freedom to supply services.

In its second question, the national court asked whether the principles of primacy and direct effect were applicable where the national provision conflicting with Community law was not contained in a general abstract rule but in a specific individual administrative decision. The Court's reply was unambiguous: whatever the case – general abstract rule or specific individual administrative measure – the courts and administrative authorities of a Member State were obliged, from the time of that State's accession, to refrain from applying any national provision found to be incompatible with an unconditional provision of Community law.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish.

Identification: ECJ-2002-3-006

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 01.06.1999 / **e)** C-126/97 / **f)** Eco Swiss China Time Ltd v. Benetton International NV / **g)** *European Court Reports*, I-3055 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.2.1.6.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Primary Community legislation and domestic non-constitutional legal instruments.
3.26 **General Principles** – Principles of Community law.

Keywords of the alphabetical index:

Arbitration, award, annulment, grounds / European Community, member states, procedural autonomy / Public order / Effective remedy.

Headnotes:

1. Where domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85 of the Treaty (now Article 81 EC). That provision constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. Also, Community law requires that questions concerning the interpretation of the prohibition laid down in Article 85 should be open to examination by national courts when they are asked to determine the validity of an arbitration award and that it should be possible for those questions to be referred, if necessary, to the Court of Justice for a preliminary ruling.

2. Community law does not require a national court to refrain from applying domestic rules of procedure according to which an interim arbitration award which is in the nature of a final award and in respect of which no application for annulment has been made within the prescribed time-limit acquires the force of *res judicata* and may no longer be called in question by a subsequent arbitration award, even if this is necessary in order to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement which the interim award held

to be valid in law is nevertheless void under Article 85 of the Treaty (now Article 81 EC), where the time-limit prescribed does not render excessively difficult or virtually impossible the exercise of rights conferred by Community law.

Summary:

The *Eco Swiss* judgment, delivered by the Court of Justice following a reference by the *Hoge Raad der Nederlanden* for a preliminary ruling, represents a new development in the line of decisions which began with the judgments of 16 December 1976 (*Comet* (45/76, *European Court Reports* p. 2043) and *Rewe* (33/76, *European Court Reports* p. 1989), on the Member States' procedural autonomy.

The questions referred to the Court originated in a dispute between Benetton and Eco Swiss concerning the former's termination of the licensing agreement under which the latter had been granted the right to manufacture watches and clocks bearing the words "*Benetton by Bulova"*. In accordance with the terms of the agreement, the dispute was first of all referred to arbitration. Applying Netherlands law, the arbitrators directed that Benetton should compensate Eco Swiss for the loss suffered as a result of early termination of the agreement, then determined the amount of damages to be paid. Benetton applied to the *Rechtbank* for annulment of the arbitration awards on the grounds of the nullity of the licensing agreement under Article 85 of the EC Treaty [now Article 81 EC]. However, this application was dismissed, whereupon Benetton appealed to the *Gerechtshof te 's-Gravenhage*. As well as applying for annulment of the awards, Benetton also requested the *Rechtbank* to stay enforcement of the award determining the amount of damages to be paid to Eco Swiss, which the *Rechtbank* refused to do. The company then lodged an appeal against that decision with the *Gerechtshof,* which essentially allowed the claim on the grounds that the award of damages to compensate for loss resulting from the wrongful termination of the licensing agreement would amount to enforcing that agreement, whereas it was contrary to the provisions of Article 85 of the Treaty in that it would have enabled the parties to operate a market-sharing arrangement. The *Gerechtshof* found that, in the procedure for annulment, the award determining the amount of damages to be paid could therefore be held to be contrary to public policy and, for that reason, annulled pursuant to Article 1065.1.e of the Code of Civil Procedure. Cassation proceedings were brought before the *Hoge Raad,* which decided to refer the matter to the Court of Justice for a preliminary ruling.

The main difficulty identified by the Court was that while national law did indeed provide for the possibility of annulling an arbitration award on grounds of inconsistency with public policy, the mere fact that through the terms or enforcement of such an award no effect was given to a prohibition laid down by competition law was not generally regarded by national law as being inconsistent with public policy. According to the *Hoge Raad*, the judgment of 14 December 1995 in the *Van Schijndel and Van Veen* cases (C-430/93 and C-431/93, *European Court Reports* p. I-4705) supported that view and precluded annulment of the award handed down against Benetton. After noting that it was in the interest of efficient arbitration proceedings that, in particular, annulment of an award should be possible only in exceptional circumstances, the Court stressed, however, that Article 85 of the Treaty constituted a fundamental provision of Community law which, as such, must be regarded as a matter of public policy. It concluded, therefore, that a national court to which an application was made for annulment of an arbitration award must grant that application if it considered that the award in question was in fact contrary to Article 85 of the Treaty, where its domestic rules of procedure required it to grant an application for annulment founded on failure to observe national rules of public policy.

Continuing its examination of the questions raised by the *Hoge Raad*, the Court held that Community law did not preclude the application of domestic rules of procedure which limited the possibility of applying for annulment of an arbitration award, despite its being inconsistent with Article 85 of the Treaty, by prescribing a time-limit for lodging an application, provided the time-limit prescribed did not render excessively difficult or virtually impossible the exercise of rights conferred by Community law.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish.

Identification: ECJ-2002-3-007

a) European Union / **b)** Court of First Instance / **c)** First Chamber, Extended Commission / **d)** 15.06.1999 / **e)** T-288/97 / **f)** Regione autonoma Friuli Venezia Giulia v. Commission of the European Communities / **g)** *European Court Reports*, II-1871 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
4.8.2 **Institutions** – Federalism, regionalism and local self-government – Regions and provinces.
5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to participate in the administration of justice.

Keywords of the alphabetical index:

Proceedings for annulment, interest justifying action / European Community, member states, regional authority.

Headnotes:

The purpose of Article 173.4 of the Treaty (now, after amendment, Article 230 EC) is to provide appropriate judicial protection for all persons, natural or legal, who are directly and individually concerned by acts of the Community institutions. Standing to bring an action must accordingly be recognised in the light of that purpose alone and the action for annulment must therefore be available to all those who fulfil the objective conditions prescribed, that is to say, those who possess the requisite legal personality and are directly and individually concerned by the contested act. This must also be the approach where the applicant is a public entity which satisfies those criteria.

A regional authority is individually concerned by a Commission decision, addressed to the Member State, finding that an aid programme set up by that authority is incompatible with the common market. This is because such a decision not only affects measures adopted by the authority in question, but also prevents the authority from exercising its own powers as it sees fit. It prevents the authority from continuing to apply the associated legislation, nullifies the effects of that legislation and requires the authority to initiate the administrative procedure for recovery of the aid. The regional authority is directly concerned by such a decision where the national authorities to whom it was addressed did not act in the exercise of a discretion when communicating it to the regional authority.

Furthermore, a regional authority has a separate interest in challenging the decision, distinct from that of the Member State addressed, where it possesses rights and interests of its own and the aid in question constitutes a set of measures taken in the exercise of legislative and financial autonomy vested in the authority directly under the constitution of the Member State concerned.

Summary:

This ruling originated in a dispute between the autonomous region of Friuli Venezia Guilia (Italy) and the Commission of the European Communities over aid granted by that regional authority to road haulage companies in the region.

Friuli Venezia Giulia Regional Law no. 4/1985 of 7 January 1985 provided for several measures to aid carriage of goods by road for hire or reward. These included financing of interest on loans and coverage of investment costs. By decision of 30 July 1997 addressed to the Italian Republic, the Commission declared this aid incompatible with the common market and ordered its recovery. By application lodged on 28 October 1997, Italy commenced proceedings before the Court of Justice, under Article 173.2 of the EC Treaty [now, after amendment, Article 230.2 EC] for annulment of that decision. Another application for annulment, this time before the Court of First Instance, was lodged at the same time by the Friuli Venezia Giulia region under Article 173.4. Contesting essentially the regional authority's standing to bring an action, the Commission raised an objection of inadmissibility under Article 114.1 of the Rules of Procedure of the Court of First Instance. The present ruling concerns this question of admissibility.

The Commission put forward five arguments in support of its objection of inadmissibility. It disputed successively the applicant's standing to bring an action under Community law, its standing to bring an action under Italian law and the existence of an interest justifying action. It also considered that the applicant was neither directly nor individually affected by the decision at issue. However, none of these arguments succeeded in convincing the Court of First Instance. As a public entity, the Friuli Venezia Giulia region must be allowed to lodge an application for annulment under Article 173.4 of the EC Treaty provided it was directly and individually concerned by the decision at issue. The Court of First Instance

found that this decision not only affected measures adopted by the applicant, but also prevented it from exercising its own powers as it saw fit. The Friuli Venezia Giulia region was therefore individually and directly concerned by the contested decision. In this connection, the applicant's interest in challenging the Commission's decision was distinct from that of the Italian State. The aid referred to in the contested decision constituted a set of measures taken in the exercise of legislative and financial autonomy vested in the region directly under the Italian Constitution. Furthermore, the applicant's lack of standing under Italian law to bring an action in the sphere of external relations was irrelevant to the question of assessing the admissibility of an application for annulment before the Community courts as the only relevant conditions governing admissibility in this area were those provided for in Article 173 of the EC Treaty. The Court of First Instance therefore dismissed the objection of inadmissibility raised by the Commission and ordered the proceedings to be continued.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish.

Identification: ECJ-2002-3-008

a) European Union / **b)** Court of Justice of the European Communities / **c)** Sixth Chamber / **d)** 08.07.1999 / **e)** C-199/92 P / **f)** Hüls AG v. Commission of the European Communities / **g)** *European Court Reports*, I-4287 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.4.8.7.1 **Constitutional Justice** – Procedure – Preparation of the case for trial – Evidence – Inquiries into the facts by the Court.
3.10 **General Principles** – Certainty of the law.
3.13 **General Principles** – Legality.
5.3.13.21 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Presumption of innocence.

Keywords of the alphabetical index:

Procedings, reopening / Appeal, pleas in law / Competition, rules, violation / Fine, determination.

Headnotes:

1. The fact that the Court has, by a previous order, given a person leave to intervene in support of the form of order sought by a party does not preclude a fresh examination of the admissibility of the intervention.

2. Pursuant to Articles 168.a of the Treaty (now Article 225 EC) and Article 51.1 of the Statute of the Court of Justice, an appeal may rely only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts. The appraisal by the Court of First Instance of the evidence put before it does not constitute, save where the clear sense of that evidence has been distorted, a point of law which is subject, as such, to review by the Court of Justice.

It follows that, inasmuch as they relate to the assessment by the Court of First Instance of the evidence adduced, an appellant's complaints cannot be examined in an appeal. However, it is incumbent on the Court to verify whether, in making that assessment, the Court of First Instance committed an error of law by infringing the general principles of law, such as the presumption of innocence and the applicable rules of evidence, such as those concerning the burden of proof.

3. Acts of the Community institutions are in principle presumed to be lawful and accordingly produce legal effects, even if they are tainted by irregularities, until such time as they are annulled or withdrawn.

However, by way of exception to that principle, acts tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order must be treated as having no legal effect, even provisional, that is to say they must be regarded as legally non-existent. The purpose of this exception is to maintain a balance between two fundamental, but sometimes conflicting, requirements with which a legal order must comply, namely stability of legal relations and respect for legality.

From the gravity of the consequences attaching to a finding that an act of a Community institution is non-existent it is self-evident that, for reasons of legal certainty, such a finding is reserved for quite extreme situations.

4. A request by a party that the Court of Justice order measures of inquiry for the purpose of ascertaining the circumstances in which the Commission adopted the decision which was the subject of the contested judgment goes beyond the scope of an appeal, which is limited to questions of law.

On the one hand, measures of inquiry would necessarily lead to the Court ruling on questions of fact and would change the subject-matter of the proceedings commenced before the Court of First Instance, in breach of Article 113.2 of the Rules of Procedure of the Court of Justice.

On the other hand, an appeal relates only to the contested judgment and it is only if that judgment were set aside that the Court of Justice could, in accordance with Article 54.1 of the Statute of the Court of Justice, deliver judgment itself in the case and examine possible defects in the decision that was challenged before the Court of First Instance.

5. A party is entitled to ask the Court of First Instance, as a measure of organisation of procedure, to order the opposite party to produce documents which are in its possession. However, when such a request is made after the oral procedure is closed, the Court of First Instance need only rule on the request if it decides to reopen the oral procedure.

6. If made after the oral procedure is closed, a request for measures of inquiry can be admitted only if it relates to facts which may have a decisive influence on the outcome of the case and which the party concerned could not put forward before the close of the oral procedure. The same applies with regard to the request that the oral procedure be reopened. It is true that, under Article 62 of its Rules of Procedure, the Court of First Instance has discretion in this area. However, the Court of First Instance is not obliged to accede to such a request unless the party concerned relies on facts which may have a decisive influence on the outcome of the case and which it could not have put forward before the close of the oral procedure.

7. The Court of First Instance is not obliged to order that the oral procedure be reopened on the ground of an alleged duty to raise of its own motion issues concerning the regularity of the procedure by which a Commission decision was adopted. Any such obligation to raise matters of public policy could exist only on the basis of the factual evidence adduced before the Court.

8. The presumption of innocence resulting in particular from Article 6.2 of the European Convention on Human Rights is one of the fundamental rights which, according to the Court's settled case-law, reaffirmed in the preamble to the Single European Act and in Article F.2 of the Treaty on European Union, are protected in the Community legal order.

Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments.

9. It is not for the Court of Justice, where it is deciding questions of law in the context of an appeal, to substitute, on grounds of fairness, its own appraisal for that of the Court of First Instance adjudicating, in the exercise of its unlimited jurisdiction, on the amount of a fine imposed on an undertaking by reason of its infringement of Community competition law.

Summary:

An appeal was lodged with the Court of Justice against the judgment of the Court of First Instance of 10 March 1992, *Hüls v. Commission* (T-9/89, *European Court Reports* p. II-499). Hüls had commenced proceedings before the Court of First Instance for annulment of the “Polypropylene Decision” (Commission Decision 86/398/EEC of 23 April 1986, OJ L 230, p. 1), in which the Commission had found, *inter alia*, that Hüls, a company active in the European petrochemical industry, had infringed Article 85.1 of the EC Treaty [now Article 81.1 EC] by participating in an agreement and a concerted practice. Companies in this sector were accused by the Commission of having held meetings leading, in particular, to the joint setting of target prices and the setting of sales targets based on quotas.

In its judgment, the Court of First Instance had upheld the Commission's decision on the grounds that it had properly established the applicant's role in the infringement. However, it had reassessed the duration of Hüls's participation in the infringement in the company's favour.

The Court of First Instance had refused to grant the applicant's request to reopen the oral procedure and order measures of enquiry to determine the actual existence of the contested measure. This request was based on elements which had come to light during the hearing held in another case pending before the Court of First Instance (*BASF and others v. Commission*, “the PVC judgment”, of 27 February 1992, T-79/89, T-84/89 and T-86/89, T-89/89, T-

91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89, *European Court Reports* p. II-315). This hearing had taken place after the oral procedure in the Hüls case had been closed. According to Hüls, the information disclosed on the Commission's practices of failure to comply with rules on languages, subsequent alterations to decisions and failure to sign original documents entailed the legal non-existence of the contested measure. In its judgment, the Court of First Instance had held that, in an application for annulment, it was required to consider of its own motion the question of the non-existence of a contested measure only insofar as the parties had put forward sufficient evidence of that non-existence. In the instant case, the evidence put forward had been deemed insufficient.

In the appeal before it, the Court of Justice issued an order allowing the intervention of another petrochemical company implicated in the Commission's decision, DSM. The Court found in its judgment that this order did not preclude it from reconsidering the admissibility of the intervention at a later stage in the proceedings (*Roquettes Frères v. Council* Judgment of 29 October 1980, case C-138/79, *European Court Reports* p. 3333). However, the intervention in question was found to be admissible as regards those submissions having no other purpose than to support the orders sought by Hüls. Indeed, DSM had an interest in having the contested decision declared legally non-existent.

Hüls and DSM alleged various breaches of Community law by the Court of First Instance.

In the opinion of the Court of Justice, the question of whether the lack of signatures, subsequent alterations to a Commission decision and failure to comply with language rules entailed the non-existence of the contested decision was indeed a point of law subject to review by the Court. However, it considered that these irregularities were not of such obvious gravity that the decision must be treated as legally non-existent. The Court of Justice considered, moreover, that Hüls's requests to it to order measures of enquiry into these irregularities were not questions of law coming under the jurisdiction of the Court in the context of an appeal.

Hüls also alleged irregularities in the conduct of the proceedings before the Court of First Instance. The Court of Justice found that, in the instant case, the indications relating to a possible failure to comply with language rules and possible subsequent alterations to the decision were of a general nature, were the result of elements emerging from other cases, and could not be regarded as decisive for the purposes of the determination of the Hüls case. Consequently, they did not justify reopening the oral procedure. As regards the defect relating to the absence of signed originals, alleged by Hüls in its appeal, the Court of Justice found that, in the proceedings before the Court of First Instance, Hüls had failed to produce decisive facts such as would justify reopening the oral procedure.

The application also alleged that the Court of First Instance had infringed Community law when establishing and reviewing the facts submitted to it for assessment, when assessing the individual responsibility of those participating in the infringement and when setting the amount of the fine.

Hüls accused the Court of First Instance of violating the presumption of innocence. It alleged that the Court of First Instance had not taken sufficient account of its arguments and that it had not provided sufficient evidence in support of its findings. Recalling that the presumption of innocence was one of the fundamental rights protected in the Community legal order, the Court of Justice observed that it was not required to assess evidence in the context of an appeal. The Court of First Instance had based its assessment on several concordant items of evidence. The burden of proof in the area of competition law lay indeed with the Commission. But once the Commission had proved Hüls's participation in meetings with an anti-competitive object, it was for the latter to prove that it had not participated in those meetings with an anti-competitive intention and that it had not subscribed to the price initiatives decided on at those meetings. It had been unable to provide proof of this before the Court of First Instance.

The Court of Justice also noted that, in a case brought under Article 85.1, there was no need to take account of the concrete effects of an agreement if its object was to restrict competition.

Lastly, in response to Hüls's argument that the fine should be determined individually for each company on the basis of the facts, the Court of Justice noted that the Commission was entitled to take account solely of a company's turnover and that it was not for the Court of Justice to substitute its appraisal for that of the Court of First Instance with regard to the amount of the fine imposed.

The appeal was therefore dismissed in its entirety.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish.

Identification: ECJ-2002-3-009

a) European Union / **b)** Court of Justice of the European Communities / **c)** Sixth Chamber / **d)** 08.07.1999 / **e)** C-235/92 P / **f)** Montecatini SpA v. Commission of the European Communities / **g)** *European Court Reports*, I-4539 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

1.4.8.7.1 **Constitutional Justice** – Procedure – Preparation of the case for trial – Evidence – Inquiries into the facts by the Court.
1.4.10 **Constitutional Justice** – Procedure – Interlocutory proceedings.
1.6.5.2 **Constitutional Justice** – Effects – Temporal effect – Retrospective effect (*ex tunc*).
3.10 **General Principles** – Certainty of the law.
3.13 **General Principles** – Legality.
5.3.13.21 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Presumption of innocence.
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of assembly.

Keywords of the alphabetical index:

Infringement, continuous, definition / Burden of proof / Procedings, reopening, conditions.

Headnotes:

1. Acts of the Community institutions are in principle presumed to be lawful and accordingly produce legal effects, even if they are tainted by irregularities, until such time as they are annulled or withdrawn.

However, by way of exception to that principle, acts tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order must be treated as having no legal effect, even provisional, that is to say they must be regarded as legally non-existent. The purpose of this exception is to maintain a balance between two fundamental, but sometimes conflicting, requirements with which a legal order must comply, namely stability of legal relations and respect for legality.

From the gravity of the consequences attaching to a finding that an act of a Community institution is non-existent it is self-evident that, for reasons of legal certainty, such a finding is reserved for quite extreme situations (see paras 96-98).

2. If made after the oral procedure is closed, a request for measures of inquiry can be admitted only if it relates to facts which may have a decisive influence on the outcome of the case and which the party concerned could not put forward before the close of the oral procedure. The same applies with regard to the request that the oral procedure be reopened. It is true that, under Article 62 of its Rules of Procedure, the Court of First Instance has discretion in this area. However, the Court of First Instance is not obliged to accede to such a request unless the party concerned relies on facts which may have a decisive influence on the outcome of the case and which it could not have put forward before the close of the oral procedure (see paras 102-103).

3. The Court of First Instance is not obliged to order that the oral procedure be reopened on the ground of an alleged duty to raise of its own motion issues concerning the regularity of the procedure by which a Commission decision was adopted. Any such obligation to raise matters of public policy could exist only on the basis of the factual evidence adduced before the Court (see para 107).

4. A request by a party that the Court of Justice order measures of inquiry for the purpose of ascertaining the circumstances in which the Commission adopted the decision which was the subject of the contested judgment goes beyond the scope of an appeal, which is limited to questions of law.

On the one hand, measures of inquiry would necessarily lead to the Court ruling on questions of fact and would change the subject-matter of the proceedings commenced before the Court of First Instance, in breach of Article 113.2 of the Rules of Procedure of the Court of Justice.

On the other hand, an appeal relates only to the contested judgment and it is only if that judgment were set aside that the Court of Justice could, in accordance with the first paragraph of Article 54 of the Statute of the Court of Justice, deliver judgment itself in the case and examine possible defects in the decision that was challenged before the Court of First Instance (see paras 109-111).

5. Freedom of expression, of peaceful assembly and of association, enshrined *inter alia* in Articles 10 and 11 of the European Convention for the Protection of Human Rights, constitute fundamental rights which,

as the Court of Justice has consistently held and as is reaffirmed in the preamble to the Single European Act and in Article F.2 of the Treaty on European Union (now, after amendment, Article 6.2 EU), are protected in the Community legal order (see para 137).

6. Although a situation of necessity might allow conduct which would otherwise infringe Article 85.1 of the Treaty (now Article 81.1 EC) to be considered justified, such a situation can never result from the mere requirement to avoid financial loss (see para 143).

7. The presumption of innocence resulting in particular from Article 6.2 of the European Convention on Human Rights is one of the fundamental rights which, according to the Court's settled case-law, reaffirmed in the preamble to the Single European Act and in Article F.2 of the Treaty on European Union, are protected in the Community legal order.

Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see paras 175-176).

8. Although the concept of a continuous infringement has different meanings in the legal orders of the Member States, in any event it comprises a pattern of unlawful conduct implementing a single infringement, united by a common subjective element.

The Court of First Instance was therefore right in holding that the activities which formed part of schemes, involving regular meetings and the setting of price targets and quotas, and pursued a single purpose constituted a continuous infringement of the provisions of Article 85.1 of the Treaty (now Article 81.1 EC), so that the five-year limitation period provided for in Article 1 of Regulation no. 2988/74 concerning limitation periods in proceedings and the enforcement of sanctions relating to competition could not begin to run until the day on which the infringement ceased (see paras 195-196).

Summary:

Following the Polypropylene Decision by which the Commission fined several enterprises in the petrochemical industry for unlawful concerted practice, one of them – the Montecatini SpA (formerly Montedipe SpA – brought an action seeking an annulment of the ruling. In its judgment of 10 March 1992, *Montedipe/Commission* (T-14/89, *Reports* p. II-1155), the Court of First Instance held that the fine imposed was appropriate having regard to the duration and the gravity of the breach of the competition rules which the appellant had committed, and accordingly dismissed the application. While vainly attempting to have this judgment reviewed (Court order of 4 November 1992, T-14/89 Rev., *Reports* p. II-2409), Montecatini brought before the Court of Justice an application whose outcome is the present decision. By order of the Court of Justice of 30 September 1992, the company DSM NV was given leave to intervene in support of the appellant's submissions. At the Commission's request, there being no objections from Montecatini, the proceedings were suspended until 15 September 1994 pending the judgment of 15 June 1994 in the case of *Commission/BASF and Others* (C-137/92 P, *Reports* p. I-2555), delivered on the appeal brought against the BASF judgment of the Court of First Instance (T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 et T-104/89, *Reports* p. II-315).

In support of its appeal, Montecatini made five pleas in law. Firstly, the Court had allegedly failed to verify whether the impugned decision existed, contrary to the duty to perform the necessary verifications of its own motion and also contrary to the principles governing burden of proof. Having regard to the defects which vitiated the decision, the Court should at the very least have ordered its annulment. The Court dismissed this first plea in law. While recalling the rules on non-existence of acts of the Community institutions, it noted firstly that the gravity of the alleged procedural defects did not appear sufficient to justify the non-existence of the challenged decision. Next, with regard to the arguments for annulment, it held that this plea in law had been raised for the first time in the request that the procedure be reopened and that measures of inquiry be taken. In fact such a request can be admitted only if it relates to facts which may have a decisive influence on the outcome of the dispute and which the party concerned could not put forward before the close of the oral procedure. That was not the case in this instance. Nor was the Court obliged to order that the procedure be reopened on the ground of an alleged duty to raise of its own motion issues concerning the regularity of the procedure by which the decision was adopted. Indeed, any such obligation could exist only on the basis of the factual evidence adduced before the Court. Lastly, inasmuch as the Court was asked to order measures of inquiry so as to establish the conditions under which the Commission adopted the Polypropylene Decision, the Court pointed out that such measures are outside the scope of appeal, limited to points of law.

By its second plea in law, the appellant complained that the Court of First Instance had in many respects infringed Article 85 of the EC Treaty [now Article 81 EC]. It was claimed that the Court, in disregard of fundamental human rights, had regarded as an unlawful act *per se* the mere participation of an undertaking in meetings between producers in the same sector. Also, it was claimed that the Court had not taken account of the situation of necessity in which the incriminated undertakings allegedly found themselves and which was represented as justifying the anti-competitive conduct. The Court did not accept the arguments put forward. After recalling that freedom of expression, association and peaceful assembly were indeed part of the fundamental rights secured under the Community legal system, it observed that the regular meetings of polypropylene producers had not been held contrary to Article 85.1 of the Treaty *per se*, but only inasmuch as their purpose was anti-competitive. As to the alleged situation of necessity, the Court declined to qualify in these terms a concern to avoid financial loss, however substantial.

In its third plea in law, Montecatini contended in particular that the Court had infringed the principle of presumption of innocence by requiring the undertaking to produce another explication than the one accepted by the Commission to justify the substance of the meetings at issue. The Court again rejected the plea in law. The principle of presumption of innocence was of course a fundamental right, protected as such in the Community legal order. That being so, it should certainly be accommodated in the law of competition. In the case before it, however, the Court in no way relied on presumptions for the purpose of establishing the anti-competitive character of the meetings in question, but on evidence whose assessment could not be questioned in an appeal.

The plea in law which relied on the time-barring of prosecution gave the Court occasion to clarify the substance of the concept of a continuous infringement; it held that the starting-point of the limitation period applicable in the instant case had been correctly determined by the Court of First Instance.

Considering finally the complaints relating to the disproportionate size of the fine, the Court held that the Court of First Instance had not committed any error of law in determining the amount of the fine to be imposed on the appellant.

Since none of the pleas in law in law put forward by Montecatini were upheld, the appeal was dismissed in its entirety.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish.

Identification: ECJ-2002-3-010

a) European Union / **b)** Court of First Instance / **c)** Third Chamber / **d)** 08.07.1999 / **e)** T-12/96 / **f)** Area Cova SA e.a. v. Council of the European Union and Commission of the European Communities / **g)** *European Court Reports*, II-2301 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.2.2 **Constitutional Justice** – Types of claim – Claim by a private body or individual.
1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.

Keywords of the alphabetical index:

Action for annulment, admissibility / Treaty, international, application / Fishing, quota.

Headnotes:

An association formed to promote the collective interests of a category of persons cannot be considered to be individually concerned, for the purposes of Article 173.4 of the Treaty (now, after amendment, Article 230.4 EC), by a measure affecting the general interests of that category. It is not entitled, therefore, to bring an action for annulment on behalf of its members where they cannot do so individually.

Although the presence of particular circumstances, such as the role played by an association in a procedure which has led to the adoption of an act within the meaning of Article 173 of the Treaty, may establish the admissibility of an action brought by an association whose members are not directly and individually concerned by that act, in particular where its position as negotiator has been affected by the act, that is not the position where the applicant

association did not take on the role of negotiator (which was reserved for the contracting parties) and the relevant legislation does not grant them any right of a procedural nature (see paras 35, 37, 39, 44, 53, 58, 60, 64, 68, 71-73).

2. The possibility afforded by Article 184 of the Treaty (now Article 241 EC) of pleading the inapplicability of a regulation, or of a measure of general application forming the legal basis of the contested implementing measure, does not constitute an independent right of action and recourse may be had to it only as an incidental plea in law. That provision may not be invoked in the absence of an independent right of action (see para 77).

Summary:

The Court had before it an application under Article 173.4 of the EC Treaty [after amendment, Article 230.4 EC] for annulment of Commission Regulation 2565/95 concerning the stopping of fishing for Greenland halibut by vessels flying the flag of a Member State. It was also asked to declare inapplicable, in the instant case, Council Regulation 1761/95 which established a Community quota for catches of Greenland halibut in 1995, together with the bilateral fisheries agreement signed on 20 April 1995 between the Community and the Canadian Government.

Under the Convention on Future Multilateral Cooperation in the North-West Atlantic Fisheries, an instrument designed in particular to promote the conservation, optimum utilisation and rational management of the fishery resources of the North-West Atlantic area, limits may be placed on catches of certain species by arrangement between Contracting Parties. For that purpose, the Parties fix a total allowable catch and then determine the share of the catch available to each of them. The Council of the European Communities for its part apportions the Community quota among the Member States.

In September 1994, the Fisheries Commission of the North-West Atlantic Fisheries Organisation fixed a total allowable catch for Greenland halibut for the first time, and some months later decided as to its apportionment among the Contracting Parties. Contesting the share allocated to it, the Community raised an objection pursuant to Article XII.1 of the Convention challenging the Community allocation, and established an autonomous Community quota though not questioning the actual principle of the total allowable catch set by the Fisheries Commission. In order to end the diplomatic dispute arising from these events, the Community and the Canadian Government on 20 April 1995 signed an agreement on fisheries in the context of the Convention. In accordance with the agreement, the Council adopted Regulation 1761/95 which established a new Community quota for 1995 applicable to catches of Greenland halibut in the sub-areas concerned. Once the set quota was exhausted, the Commission called a halt to fishing for Greenland halibut by issuing Regulation 2565/95.

By application lodged at the Registry of the Court of First Instance on 25 January 1996, 28 Spanish boat-owners together with three boat-owners' associations brought the action described here. The Council and Commission challenged the standing of the applicants to take action, and raised an objection of inadmissibility in accordance with Article 114 of the Rules of Procedure of the Court. By order of the Court of First Instance of 29 May 1997, the objections submitted in this regard were joined for final judgment.

Considering firstly the question of the admissibility of the application brought by the boat-owners, the Court did not accept any of the arguments raised in support of admissibility. It held, to begin with, that the applicants were affected by the provisions of Regulation 2565/95 by virtue of a situation which it objectively determined, that is to say as operators of vessels flying the flag of a Member State likely to engage in fishing for Greenland halibut in the sub-areas concerned. Therefore the contested measure was indeed of general application, in consequence whereof it constituted a regulation within the meaning of Article 189 of the EC Treaty [now Article 249 EC]. Admittedly, the Court went on to point out, a provision of a measure of general application could happen to be of individual concern to certain of the economic operators affected. That was so when the measure affected a natural or legal person by reason of certain attributes peculiar to him or by reason of circumstances differentiating him from all other persons. Therefore, the Court went on to determine whether that was so in the case before it, and the finding was not favourable to the applicants – at the end of a close examination, the Court held that Regulation 2565/95 could not be deemed to concern the 28 boat-owners individually.

Turning next to the question of the admissibility of the application brought by the three associations of boat-owners, the Court recalled the fact that an association formed to promote the collective interests of a category of persons amenable to justice is not entitled to bring an action for annulment on behalf of its members except where they can do so individually. Failing special circumstances that would exceptionally warrant the admissibility of such an application, the Court could only hold that the

associations of boat-owners were not individually concerned by the challenged regulation.

Finally, regarding the objection of illegality raised by the applicants, the Court emphasised the incidental character of such a pleading. Thus, in the absence of an independent right of action, Article 184 of the EC Treaty could not be invoked in order to prevent the application, in the instant case, of Regulation 1761/95 and the bilateral fisheries agreement concluded by the Community and the Canadian Government. As the Court observed, taking these two instruments to constitute the legal basis for Regulation 2565/95, the action for annulment of that regulation was inadmissible and consequently the plea in law of illegality raised against the former instruments was likewise inadmissible.

Languages:

English, French, Finnish, Danish, Dutch, German, Greek, Italian, Portuguese, Spanish, Swedish.

European Court of Human Rights

Important decisions

Identification: ECH-2002-3-008

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 11.07.2002 / **e)** 28957/95 / **f)** Christine Goodwin v. the United Kingdom / **g)** *Reports of Judgments and Decisions* 2002-VI / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
3.17 **General Principles** – Weighing of interests.
3.19 **General Principles** – Margin of appreciation.
5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
5.3.30 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Transsexuality, recognition / Gender, biological difference / Registry of births, marriages and deaths, modification / Marriage, right.

Headnotes:

In the light of a continuing international trend in favour of legal recognition of post-operative transsexuality and in the absence of any real detriment to the public interest flowing from such recognition, it could no longer be maintained that the matter fell within the State's margin of appreciation. The difficulties posed by any major change to the birth registration system were not insuperable if confined to post-operative transsexuals.

In the light of developments in medicine and science in the field of transsexuality, gender could no longer be determined by purely biological criteria and there was no justification for barring post-operative transsexuals from enjoying the right to marry.

Summary:

The applicant, who was registered at birth as male, lived as a woman from 1985 and in 1990 underwent gender reassignment surgery, provided and paid for by the National Health Service. She complains of the lack of legal recognition of her change of sex. In particular, she alleges that her employer was able to trace her identity because the Department of Social Security refused to give her a new National Insurance number, that the department's records still show her sex as male and that her file is marked “sensitive”, causing her practical difficulties. She further complains that she did not become ineligible for a state pension at the age of 60, the age of entitlement for women. Finally, she claims that she has had to forgo certain advantages because she did not wish to present her birth certificate, which records sex at the time of registration.

In the application lodged with the Court, the applicant claimed that the lack of legal recognition of her change of gender violated her right to respect for private life. She relied on Article 8 ECHR. She further complained, relying on Article 12 ECHR, that because the law treated her as a man, she was unable to marry her male partner. She also complained under Articles 13 and 14 ECHR.

With regard to the complaint concerning the absence of legal recognition of the applicant's gender re-assignment, the Court had previously held that the refusal of the respondent government to alter the register of births or to issue modified birth certificates could not be considered an interference with the right to respect for private life and that there was no positive obligation to alter the existing system or to permit annotations to the register of births. However, the Court had signalled its consciousness of the serious problems facing transsexuals and stressed the importance of keeping the need for appropriate legal measures under review and therefore decided to assess what was the appropriate interpretation and application of the Convention “in the light of present-day conditions”.

In the present case, despite having undergone gender reassignment surgery, the applicant remained, for legal purposes, a male, with consequent effects on her life where sex was of legal relevance. The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law could not be regarded as a minor inconvenience arising from a formality. The applicant's gender reassignment was carried out by the National Health Service and it appeared illogical to refuse to recognise the legal implications of the result. As to countervailing arguments of a public interest nature, the Court was not persuaded that the state of medical science or scientific knowledge provided any determining argument as regards the legal recognition of transsexuals. It also attached less importance to the lack of evidence of a common European approach to the matter than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.

As to the historical nature of the birth registration system, exceptions were already made in the cases of legitimation and adoption and making a further exception in the case of transsexuals would not pose a threat to the whole system or create any real prospect of prejudice to third parties. Moreover, the government had made proposals for reform which would allow ongoing amendment to civil status data. While the level of daily interference suffered by the applicant was not as great as in other cases, the very essence of the Convention is respect for human dignity and freedom and in the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society could not be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals lived in an intermediate zone was no longer sustainable.

The difficulties posed by any major change in the system were not insuperable if confined to post-operative transsexuals. No concrete or substantial hardship or detriment to the public interest had been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, society could reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them. The government could no longer claim that the matter fell within the margin of appreciation and the fair balance inherent in the Convention tilted decisively in favour of the applicant. There had therefore been a violation of Article 8 ECHR.

With regard to the complaint concerning the impossibility for the applicant to marry a man, while the first sentence of Article 12 ECHR refers in express terms to the right of a man and woman to marry, the Court was not persuaded that it could still be assumed that those terms had to refer to a determination of gender by purely biological criteria. There had been major social changes in the

institution of marriage since the adoption of the Convention, as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality.

The Court had found under Article 8 ECHR that a test of congruent biological factors could no longer be decisive in denying legal recognition to a change of gender. However, the right under Article 8 ECHR did not subsume all the issues under Article 12 ECHR, where conditions imposed by national laws are accorded a specific mention, and the Court therefore considered whether in the present case the allocation of sex in national law to that registered at birth was a limitation impairing the very essence of the right to marry. In that regard, it was artificial to assert that post-operative transsexuals had not been deprived of the right to marry because they remained able to marry a person of their former opposite sex. The applicant lived as a woman and would only wish to marry a man but had no possibility of doing so and could therefore claim that the very essence of her right to marry had been infringed.

While it was for the Contracting State to determine the conditions in which it could be established that gender reassignment had been properly effected or in which past marriages ceased to be valid and the formalities applicable to future marriages, there was no justification for barring the transsexual from enjoying the right to marry under any circumstances. There had therefore been a violation of Article 12 ECHR.

With regard to the applicant's allegation of discrimination, the Court considered that the issues had been examined under Article 8 ECHR and that no separate issue arose under Article 14 ECHR.

As regards the complaint concerning the lack of an effective remedy, the Court considered that in so far as no remedy existed in domestic law prior to the Human Rights Act 1998 taking effect, Article 13 ECHR could not be interpreted as requiring a remedy against the state of domestic law. Following that date, it would have been possible for the applicant to raise her complaints before the domestic courts. There had therefore been no violation of Article 13 ECHR.

Cross-references:

- *Tyrer v. the United Kingdom*, 25.04.1978, Series A, no. 26; *Special Bulletin ECHR* [ECH-1978-S-002];
- *Dudgeon v. the United Kingdom*, 22.10.1981, Series A, no. 45; *Special Bulletin ECHR* [ECH-1981-S-003];
- *James and Others v. the United Kingdom*, 21.02.1986, Series A, no. 98;
- *Rees v. the United Kingdom*, 17.10.1986, Series A, no. 106;
- *F. v. Switzerland*, 18.12.1987, Series A, no. 128; *Special Bulletin ECHR* [ECH-1987-S-004];
- *Cossey v. the United Kingdom*, 27.09.1990, Series A, no. 184;
- *B. v. France*, 25.03.1992, Series A, no. 232-C; *Special Bulletin ECHR* [ECH-1992-S-001];
- *Barberà, Messegué and Jabardo v. Spain*, 13.06.1994 (Article 50), Series A, no. 285-C; *Special Bulletin ECHR* [ECH-1988-S-008];
- *Aksoy v. Turkey*, 25.09.1996, *Reports of Judgments and Decisions* 1996-VI; *Bulletin* 1996/3 [ECH-1996-3-017];
- *X., Y. and Z. v. the United Kingdom*, 22.04.1997, *Reports of Judgments and Decisions* 1997-II;
- *Sheffield and Horsham v. the United Kingdom*, 30.07.1998, *Reports of Judgments and Decisions* 1998-V;
- *Cakici v. Turkey*, no. 23657/94 [GC], ECHR 1999-IV;
- *Chapman v. the United Kingdom* [GC], no. 27238/95, ECHR 2001-I; *Bulletin* 2001/1 [ECH-2001-1-001];
- *Mikulic v. Croatia,* no. 53176/99, ECHR 2002-I;
- *Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III; *Bulletin* 2002/1 [ECH-2002-1-006];
- *Stafford v. the United Kingdom* [GC], no. 46295/99, ECHR 2002-IV.

Languages:

English, French.

Identification: ECH-2002-3-009

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 17.12.2002 / **e)** 35373/97 / **f)** A. v. the United Kingdom / **g)** *Reports of Judgments and Decisions* 2002-X / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
3.16 **General Principles** – Proportionality.
3.19 **General Principles** – Margin of appreciation.
4.5.11 **Institutions** – Legislative bodies – Status of members of legislative bodies.
5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
5.3.29 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Immunity, parliamentary / Defamation, legal aid, absence.

Headnotes:

The absolute immunity attaching to statements made by a Member of Parliament in the course of a parliamentary debate pursued the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers. Furthermore, taking into account the importance of freedom of expression for elected representatives and the fact that most signatory states as well as the Parliamentary Assembly of the Council of Europe and the European Parliament have some form of parliamentary immunity, such a rule could not in principle be regarded as imposing a disproportionate restriction on the right of access to court.

Summary:

During a parliamentary debate on municipal housing policy, the Member of Parliament for the constituency in which the applicant lived mentioned her several times, giving her name and address. He referred to her as an example of “neighbours from hell” and indicated that she and her children were involved in various types of anti-social behaviour. The following day, two newspapers published articles based on a press release issued by the MP, the contents of which were substantially the same as those of his speech. The applicant, who denied the allegations, had to be re-housed after receiving hate mail and being subjected to abuse. Her solicitors wrote to the MP to outline her complaints but were informed that his remarks were protected by absolute parliamentary privilege.

In the application lodged with the Court, the applicant alleged that both the absolute nature of the privilege which protected the Member of Parliament's statements about her in parliament and the absence of legal aid for defamation proceedings violated her right of access to court. She relied on Article 6.1 ECHR. She further complained that the absolute nature of the privilege violated her right to respect for private life (Article 8 CEDH). She also complained under Articles 13 and 14 ECHR.

In respect of the complaint concerning the denial of access to court on account of the absolute nature of the privilege, the Court considered that it was unnecessary to settle the precise nature of the privilege, since the central issues of legitimate aim and proportionality which arose in relation to the applicant's procedural complaint under Article 6 ECHR were the same as those arising in relation to her substantive complaint under Article 8 ECHR. The Court therefore proceeded on the basis that Article 6 ECHR was applicable. The parliamentary immunity enjoyed by the MP pursued the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers. As to proportionality, while the broader an immunity the more compelling must be its justification, the fact that an immunity is absolute was not decisive. Freedom of expression is especially important for elected representatives and very weighty reasons must be advanced to justify interfering with that freedom. Furthermore, the immunity enjoyed by MPs in the United Kingdom was in several respects narrower than that applicable in other states, in particular as it attached only to statements made in the course of parliamentary debates. The absolute immunity was designed to protect the interests of parliament as a whole rather than those of individual MPs. Moreover, victims of defamatory statements were not entirely without means of redress, since they could seek through another MP to secure a retraction, while in extreme cases deliberately misleading statements might be punishable by parliament as a contempt. In all the circumstances, the application of a rule of absolute privilege could not be said to exceed the margin of appreciation. While the allegations about the applicant were extremely serious and clearly unnecessary and the consequences were entirely foreseeable, these factors could not alter the conclusion as to the proportionality of parliamentary immunity. Accordingly, there had been no violation of Article 6 ECHR in that respect.

As to the complaint concerning the unavailability of legal aid for defamation actions, the Court observed that since the MP's parliamentary statements were covered by absolute privilege and the press reports

were covered by qualified privilege, any legal proceedings in relation to them would have had no prospects of success. It therefore restricted its analysis to the unprivileged press release issued by the MP. The applicant was entitled to two hours' free legal advice under the “Green Form” scheme and, after July 1998, could have engaged a solicitor under a conditional fee arrangement. While she would have remained exposed to a potential costs order if unsuccessful in legal proceedings, she would have been able to evaluate the risks in an informed manner if she had taken advantage of the “Green Form” scheme. In the circumstances, the unavailability of legal aid did not prevent her from having access to court. There had therefore been no violation of Article 6 ECHR in that respect.

With regard to the complaint under Article 8 ECHR, the Court found that since the central issues were the same as those examined under Article 6 ECHR, there had been no violation of Article 8 ECHR.

As to alleged discrimination contrary to Article 14 ECHR, the Court considered that the complaints were identical to those already examined under Article 6 ECHR and in any event no analogy could be drawn between what was said in parliamentary debates and what was said in ordinary speech. There had therefore been no violation of Article 14 taken together with Article 6 ECHR.

Finally, with regard to the alleged absence of an effective remedy in respect of the applicant's complaints, the Court was satisfied that the applicant had an arguable claim that Articles 6.1, 8 and 14 ECHR had been violated, but recalled that Article 13 ECHR does not guarantee a remedy allowing primary legislation to be challenged. There had accordingly been no violation of Article 13 ECHR.

Cross-references:

- *Golder v. the United Kingdom*, 21.02.1975, Series A, no. 18; *Special Bulletin ECHR* [ECH-1975-S-001];
- *Agee v. the United Kingdom*, no. 7729/76, Commission decision of 17.12.1976, *Decisions and Reports* 7, p. 164;
- *Airey v. Ireland*, 09.10.1979, Series A, no. 32; *Special Bulletin ECHR* [ECH-1979-S-003];
- *James and others v. the United Kingdom*, 21.02.1986, Series A, no. 98;
- *Boyle and Rice v. the United Kingdom*, 27.04.1988, Series A, no. 131;
- *Fayed v. the United Kingdom*, 21.09.1994, Series A, no. 294-B;
- *Young v. Ireland*, no. 25646/94, Commission decision of 17.01.1996, *Decisions and Reports* 84, p. 122;
- *Waite and Kennedy v. Germany* [GC], no. 26083/94, ECHR 1999-I;
- *Jerusalem v. Austria*, no. 26958/95, ECHR 2001-II; *Bulletin* 1999/1 [ECH-1999-1-005];
- *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI; *Bulletin* 2002/1 [ECH-2002-1-002];
- *Fogarty v. the United Kingdom* [GC], no. 37112/97, ECHR 2001-XI;
- *McElhinney v. Ireland* [GC], no. 31253/96, ECHR 2001-XI;
- *McVicar v. the United Kingdom*, no. 46311/99, ECHR 2002-III.

Languages:

English, French.

Systematic thesaurus *

* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

1 Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).
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.

11 Referrals of preliminary questions in particular.
12 Enactment required by law to be reviewed by the Court.
13 Review *ultra petita*.
14 Horizontal distribution of powers.
15 Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.
16 Decentralised authorities (municipalities, provinces, etc.).
17 This keyword concerns decisions on the procedure and results of referenda and other consultations.
18 This keyword concerns decisions preceding the referendum including its admissibility.

19 Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (questions relating to the distribution of powers as between the State and federal or regional entities are the subject of another keyword 1.3.4.3.)
20 As understood in private international law.
21 Including constitutional laws.
22 For example organic laws.
23 Local authorities, municipalities, provinces, departments, etc.
24 Or: functional decentralisation (public bodies exercising delegated powers).
25 Political questions.
26 Unconstitutionality by omission.
27 For the withdrawal of proceedings, see also 1.4.10.4.

28 Pleadings, final submissions, notes, etc.
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.

[32] For questions of constitutionality dependent on a specified interpretation, use 2.3.2.

2 Sources of Constitutional Law

2.1 Categories

- 2.1.1 Written rules
  - 2.1.1.1 National rules
    - 2.1.1.1.1 Constitution
    - 2.1.1.1.2 Quasi-constitutional enactments[33]
  - 2.1.1.2 Foreign rules 53
  - 2.1.1.3 Community law 53, 265, 297, **537**
  - 2.1.1.4 International instruments 15, 20, 30, 47, 64, 68, 69, 124, 133, 263, 319
    - 2.1.1.4.1 United Nations Charter of 1945 69
    - 2.1.1.4.2 Universal Declaration of Human Rights of 1948 ..... 13, 109, 112
    - 2.1.1.4.3 European Convention on Human Rights of 1950[34] 15, 17, 22, 23, 24, 48, 53, 73, 109, 111, 112, 119, 121, 132, 133, 148, 156, 158, 160, 162, 164, 166, 168, 206, 221, 224, 271, 281, 283, 299, 312, 337, 347, 348, 349, **392**, **393**, **437**, **493**, **533**, **538**, **553**, **555**
    - 2.1.1.4.4 Geneva Convention on the Status of Refugees of 1951
    - 2.1.1.4.5 European Social Charter of 1961
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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.).

[34] Including its Protocols.

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.
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.

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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.
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.
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 having their own independent organisational structure, independent of public authorities, but controlled by them. For other administrative bodies, see also 4.6.7 and 4.13.

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.

[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.

76 See also keywords 5.3.38 and 5.2.1.4.
77 Proportional, majority, preferential, single-member constituencies, etc.
78 For aspects related to fundamental rights, see 5.3.38.2.
79 For the creation of political parties, see 4.5.10.1.
80 E.g. Names of parties, order of presentation, logo, emblem or question in a referendum.
81 Tracts, letters, press, radio and television, posters, nominations, etc.
82 Impartiality of electoral authorities, incidents, disturbances.
83 E.g. signatures on electoral rolls, stamps, crossing out of names on list.
84 E.g. in person, proxy vote, postal vote, electronic vote.
85 E.g. Panachage, voting for whole list or part of list, blank votes.
86 E.g. Auditor-General.

87 Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.
88 E.g. Court of Auditors.
89 The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.
90 Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.
91 Including state of war, martial law, declared natural disasters, etc; for human rights aspects, see also keyword 5.1.4.
92 Positive and negative aspects.
93 For rights of the child, see 5.3.41.

94 The question of "*Drittwirkung*".
95 See also 4.18.
96 Taxes and other duties towards the state.
97 Here, the term "national" is used to designate ethnic origin.
98 For example, discrimination between married and single persons.
99 This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.
100 Detention by police.

101 Including questions related to the granting of passports or other travel documents.
102 May include questions of expulsion and extradition.
103 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.
104 This keyword covers the right of appeal to a court.
105 Including the right to be present at hearing.

106 Covers freedom of religion as an individual right. Its collective aspects are included under the keyword “Freedom of worship” below.
107 This keyword also includes the right to freely communicate information.
108 Militia, conscientious objection, etc.
109 Aspects of the use of names are included either here or under “Right to private life”.
110 Including compensation issues.
111 For institutional aspects, see 4.9.5.

[112] This keyword also covers “Freedom of work”.

[113] 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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