

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 month period (volumes numbered 1 to 3). The three volumes of the series are published and delivered in the following year.

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

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

The decisions are presented in the following way:

1. Identification
 - a) country or organisation
 - b) name of the court
 - c) chamber (if appropriate)
 - d) date of the decision
 - e) number of decision or case
 - f) title (if appropriate)
 - g) official publication
 - h) non-official publications
2. Keywords of the Systematic Thesaurus (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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There was no relevant constitutional case-law during the reference period 1 September 2003 – 31 December 2003 for the following countries:

Bulgaria, Finland (Supreme Administrative Court), Slovakia, Sweden (Supreme Court), Sweden (Supreme Administrative Court).

Précis of important decisions of the reference period 1 September 2003 – 31 December 2003 will be published in the next edition, *Bulletin* 2004/1 for the following countries:

Japan, Portugal.

Albania

Constitutional Court

Statistical data

1 January 2003 – 31 December 2003

Number of decisions: 279

Types of decisions

- final decisions: 39
- inadmissible: 240

Final decisions on admissible applications

- appeal dismissed: 21
- appeal allowed: 15
- interpretation: 1
- declined for adjudication: -
- appeal withdrawn: 2

Effects

- *ex tunc*: 1
- *ex nunc*: 38
- *erga omnes*: 11
- *inter partes*: 28
- immediate: -
- deferred: -

Proceedings initiated by

- President of the Republic: -
- Prime Minister: -
- Group of 1/5th of the deputies: 1
- Head of High State Control: -
- ordinary courts: 5
- People's Advocate (Ombudsman): 1
- local government bodies: -
- religious communities: -
- political parties, associations and other organisations: 5
- individuals: 27
- Constitutional Court judge: -

Types of provisions reviewed

- Constitution (interpretation): 1
- laws: 8
- international treaties: -
- decrees of the Cabinet of Ministers: 1
- judicial decisions: 27
- other administrative acts: 2

Types of litigation

- fair trial: 28

- conflict of powers/jurisdiction: -
- electoral disputes: 1
- constitutionality of political parties: -
- impeachment: -
- constitutionality of acts of the executive: 2
- constitutionality of laws: 8
- interpretation of the Constitution: 1
- constitutionality of international treaties: -
- end of office of a constitutional judge: -

Type of control

- concrete review: 30
- abstract review: 9
- preventive review (*a priori*): -
- *a posteriori* review: 39

Important decisions

Identification: ALB-2003-3-004

a) Albania / **b)** Constitutional Court / **c)** / **d)** 19.11.2003 / **e)** 31 / **f)** Constitutionality of referenda / **g)** *Fletore Zyrtare* (Official Gazette), 94/03, 4160 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.3.4.6.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Admissibility of referenda and other consultations – Referenda on the repeal of legislation.

3.1 **General Principles** – Sovereignty.

3.3.1 **General Principles** – Democracy – Representative democracy.

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

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

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

4.9.2 **Institutions** – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy.

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

Keywords of the alphabetical index:

Pension, insurance scheme / Law, abrogation, partial, consequences / Referendum, initiative, requirements.

Headnotes:

The Constitution allows for the exercise of the sovereignty of the people by referendum as long as that exercise is not contrary to the legislative process. A referendum does not constitute an alternative to the legislative process of the Assembly. It is an instru-

ment for the integration and stimulation of the legislative process of the Assembly, where in a particular case there is a risk that the principle of compliance of the will of the parliamentary majority with that of the majority of the people may not be respected.

Regulating the system of social security falls under the exclusive competence of the lawmaker, which has to pay special attention to the limits laid down by the Constitution and the duty to respect the fundamental rights of citizens. The Court particularly referred to the constitutional restriction on holding a general referendum on the abrogation of part of a law in cases where the remaining part of that law is incapable of standing independently of the part abrogated.

In such cases, the abrogation of part of the law would create a legal vacuum putting the lawmaker under the obligation to fill that legal vacuum (even against its will). If this situation were to become very frequent, it would infringe the very principle of parliamentary democracy. The restriction in question aims at protecting the rule of law and the principle of legal security because requiring the law to remain applicable even after the abrogation of some of its parts serves the purpose of legal security.

Summary:

53,000 electors submitted a request to the Constitutional Court. The request concerned the constitutionality of a referendum on the abrogation of some provisions of the law on social security increasing the age for obtaining an old-age pension (for men from 60 to 65 years of age and for women from 55 to 60 years of age). As to the constitutionality of the request, the Constitutional Court found that it was necessary to clarify three main issues.

1. The first issue concerned whether it was legitimate for the appellants to hold a general referendum. In that respect, the Constitutional Court used the principles of representative democracy as a basis. It pointed out that referenda are connected with the principle of the sovereignty of the people (Article 2.1 of the Constitution), which is exercised either directly or indirectly through its representatives. Instruments of direct democracy are not considered as amounting to a power competing with that of the representative bodies, but as instruments used to avoid the representatives' lack of action or to balance that lack of action. The Constitution allows for the exercise of the sovereignty of the people by referendum, as long as that exercise is not contrary to the legislative process. The Court held that a general abrogative referendum could be initiated only by the signatures

of at least 50,000 of citizens eligible to vote, whereas a referendum on the proposal and the adoption of a draft-law could be held only upon the consent of the Assembly of Albania. The reason for that restriction is to avoid a situation where referenda become a frequent phenomenon, since they would then compete with the parliamentary legislative process of the Assembly. Such a situation would not be in conformity with the above-mentioned fundamental constitutional principle. Therefore, the Constitution and Electoral Code have set out criteria for holding referenda, such as: a minimum number of initiators (50,000 of electors), exclusion of some categories of issues, etc.

2. The Constitutional Court also examined whether the law on which the referendum was to be held fell into the category of laws that were not allowed to be included in a referendum by the Constitution. Article 151.2 of the Constitution sets out that a referendum cannot be held on issues regarding the state budget, taxes and financial obligations. Although it appeared that the law in question did not fall into one of those specific categories, that law and its effects were directly related to the state budget. The social security system is an "open" system subject to changes and improvements due to the variable social and economic conditions. That system functions on the basis of employer-employee contributions in favor of beneficiaries. Any changes to the relation of contributors-beneficiaries have an effect on the state budget, because in cases where the contributions to the social security fund fall under the amount necessary to cover the beneficiaries, the difference is covered by the state budget. It is the state that regulates the relationship between these categories and guarantees the social security fund in the event of bankruptcy. In the case in question, increasing the age for obtaining an old-age pension would bring about the gradual increase in the number of contributors and decrease in the number of beneficiaries, which would lead to improvements in the social security system for future generations of pensioners.

3. The third issue concerned the constitutional restriction on holding a referendum on the abrogation of some parts of a law in cases where the remaining part of that law is incapable of standing independently of the part abrogated and would therefore not be applicable (Article 126.3 of Electoral Code). According to the Constitutional Court, that restriction conformed to the constitutional principle of representative democracy. The appellants limited their request to only the abrogation of provisions related to the age increase. But, the abrogation of those provisions would affect the part of the law concerning the calculation of the number of years worked and the

amount to be allowed by social security too. That part could not be self-executing in the event of the abrogation of the above-mentioned provisions.

For those reasons, the Constitutional Court considered that the request for holding a general referendum on the abrogation of the provisions in question was not in conformity with the Constitution.

Languages:

Albanian.



Argentina

Supreme Court of Justice of the Nation

Important decisions

Identification: ARG-2003-3-002

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 21.10.2003 / **e)** P. 335. XXXVI / **f)** Perini, Carlos Alberto y otro c/ Herrera de Noble, Ernestina y otro / **g)** *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 325 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
 5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of the written press.
 5.3.30 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Media, libel, press / Media, press, newspaper editor's liability / Malice / Reply, right.

Headnotes:

A newspaper is exempt from liability for publishing news potentially harmful to persons' reputations where it directly attributes the information to the relevant source, uses verbs in the conditional or does not reveal the identities of those involved in the events reported.

The criterion of real malice, which to be fulfilled requires intent or almost intentional negligence, does not apply in the case of a complaint lodged by a person other than a public official, even where the news published by the newspaper may be regarded as being of public or general interest.

Summary:

The plaintiffs had brought an action against a newspaper and its editor for damages they alleged to have suffered through the publication of articles that they described as abusive and insulting. Both defendants were found guilty. They lodged an extraordinary appeal with the Supreme Court, which upheld the contested judgment.

Concerning the first possible ground of exemption from liability referred to in the headnotes, the Court held that attribution of the news to a source must be "honest", since in that case the news would cease to be linked to the newspaper and its origin would become clear. Such honest attribution would accordingly, firstly, ensure that readers associated the news not with the newspaper which had relayed it to them but with the specific source from which it originated and, secondly, benefit those concerned by the news, in that any complaints they might wish to make could be lodged against those from whom the information originated, not against those who had merely served as a channel for its distribution. This meant that the news must be attributed to an "identifiable" source and consist in a literal or a substantially identical transcript of the source's statements. In that connection, the Court found that mention of the "national police force" and "high-placed judicial sources" was merely a general, unspecific allusion, which did not make it possible to identify the person from whom the news had originated.

As to use of the conditional, the second hypothesis raised in the headnotes, the Court considered that the real purpose of this rule of case-law was to protect someone who had referred to a merely hypothetical piece of news without making any assertions, that is to say without seeking to affirm a proposition and defend it as the truth. According to the doctrine, not only was it necessary to use verbs in a given mood – the conditional – but also the entire purport of the statements, which should advance hypotheses not assertions, must be considered, since otherwise mechanical repetition of the almost magic formula – the conditional – would suffice in order to be able to attribute anything, even the most harmful statements, to a source without having to answer for it.

In the event that, as also mentioned in the headnotes, the real malice doctrine did not apply, the generally applicable rules of civil liability must be followed, whereby a mere fault committed by a member of staff was enough for the newspaper to be held liable. The Court nonetheless referred to its established case-law regarding the difficulties encountered by the media covering the daily news in verifying the accuracy of information on unlawful behaviour which undeniably had a public impact and the need to safeguard individuals'

moral integrity and reputation, which were protected by the Constitution. Newspapers must accordingly be required to exercise caution and to avoid taking an assertive line when they had been unable properly to corroborate information. Moreover, in the case of a series of articles successively dealing with a subject considered of the highest importance, the conduct of the media must be assessed from a standpoint which takes due account of the entire range of complex circumstances in which news came into being and of the continuity of reporting, day after day, without assigning liability solely on the basis of isolated elements.

In that respect, the Court held that, in the case under consideration, there was extremely significant factual evidence showing that the newspaper had omitted to take the elementary precautions necessary to avoid harming the plaintiff's reputation. Those precautions first and foremost required that the news reported should be consistent with reality, especially since it was potentially libellous or defamatory.

From another point of view the Court held that the publication of a correction by the newspaper, shortly after the articles had appeared, was no impediment to a finding of liability, since that correction not only implied in practice that the newspaper acknowledged its guilt but, moreover, on account of its small size and the space assigned to it, did not have the same impact as the serious allegations made in the articles complained of, and, accordingly, this remedy could not be considered as capable of repairing the damage caused. Furthermore, Article 14.2 of the American Convention on Human Rights of 1969 provided "The correction or reply shall not in any case remit other legal liabilities that may have been incurred."

The Court lastly held that the liability should extend to the newspaper's editor, who had failed to perform her duty of supervision over disclosure of news that was sufficiently likely to damage the plaintiffs' reputation and dignity, especially since the last of the impugned articles had expressly stated that the news originated from the newspaper's own agency, without identifying the author (Articles 902, 1067 and 1109 of the Civil Code).

Supplementary information:

Two judges delivered concurring opinions.

Languages:

Spanish.



Armenia

Constitutional Court

Statistical data

1 September 2003 – 31 December 2003

- 20 referrals made, 20 cases heard and 20 decisions delivered, including:
 - 20 decisions concerning the conformity of international treaties with the Constitution. All treaties examined were declared compatible with the Constitution.

Information on the activities of the Constitutional Court of the Republic of Armenia during the reference period.

The Eighth Yerevan International Conference on “Basic Criteria of the Limitation of Human Rights in the Practice of Constitutional Justice” took place on 3 – 4 October 2003.

The Conference was organised by the Constitutional Court of the Republic of Armenia, the Venice Commission of the Council of Europe and the Conference of Constitutional Control Organs of the Countries of Young Democracy (CCCOCYD).

The participants were G. Buquicchio, Secretary of the Venice Commission; Lech Garlicki, Judge of the European Court of Human Rights; Jose Manuel Cardoso Da Costa, member of the Venice Commission, former President of the Constitutional Court of Portugal; Grigory Vasilevitch, President of the Constitutional Court of Belarus; Jony Khetzuriani, President of the Constitutional Court of Georgia; Egidijus Kuris, President of the Constitutional Court of Lithuania; Vladimir Strekozov, Vice President of the Constitutional Court of the Russian Federation; Shukhrat Mustafakulov, First Vice President of the Constitutional Court of Tajikistan; Jean-Paul Moerman, Judge of the Court of Arbitration of Belgium; Dimiter Gotchev, Justice of the Constitutional Court of Bulgaria; Pierre Mazeaud, Member of the Constitutional Council of France; Nicolas Douvas, Councilor of the State of Greece; István Bagi, Judge of the Constitutional Court of Hungary; Ugo De Siervo and Franco Bile, Judges of the Constitutional Court of Italy; Vytautas Sinkevicius, Judge of the Constitutional Court of Lithuania; Elena Safaleru, Judge of the

Constitutional Court of Moldova; Ciril Ribičič, Judge of the Constitutional Court of Slovenia; Vladimir Ivashenko and Valery Pshenichniy, Judges of the Constitutional Court of Ukraine; Kai-Uwe Riese, Representative of the Constitutional Federal Court of Germany; Miguel Angel Montañés Pardo, Representative of the Constitutional Court of Spain; as well as scientists, officials, politicians, professors, students and representatives of the mass media.

In the framework of the conference, the Co-operation Agreement between the Conference of the Constitutional Control Organs of the Countries of Young Democracy and the Venice Commission was signed. This agreement aims at facilitating the exchange of information between the participants, in particular, by providing for an exchange of publications in the field of constitutional justice (Articles 1-2). According to Article 4 of the Co-operation Agreement: “The Parties will – within their budgetary limits – attempt to co-organise annual seminars on constitutional justice”.

There was no relevant constitutional case-law during the reference period 1 September 2003 – 31 December 2003.



Austria

Constitutional Court

Statistical data

Sessions of the Constitutional Court during September/October 2003

- Financial claims (Article 137 B-VG): 7
- Conflicts of jurisdiction (Article 138.1 B-VG): 0
- Review of regulations (Article 139 B-VG): 34
- Review of laws (Article 140 B-VG): 137
- Challenge of elections (Article 141 B-VG): 0
Article 142/143 B-VG: 1
- Complaints against administrative decrees (Article 144 B-VG): 348
(205 declined for examination)

and during November/December 2003

- Article 126a B-VG: 3
- Financial claims (Article 137 B-VG): 9
- Conflicts of jurisdiction (Article 138.1 B-VG): 1
- Review of regulations (Article 139 B-VG): 22
- Review of laws (Article 140 B-VG): 52
- Challenge of elections (Article 141 B-VG): 1
- Complaints against administrative decrees (Article 144 B-VG): 359
(214 declined for examination)

Important decisions

Identification: AUT-2003-3-003

a) Austria / **b)** Constitutional Court / **c)** / **d)** 08.10.2003 / **e)** G 119, 120/03 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
 3.12 **General Principles** – Clarity and precision of legal provisions.
 3.19 **General Principles** – Margin of appreciation.
 5.3.32 **Fundamental Rights** – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Immigration, quota system / Family reunion, right / Settlement, permit / Residence, permit.

Headnotes:

The legislator is in general free to establish a quota system for also immigrants entering the country for the purpose of family reunion or formation. The legislator must however not entirely ignore Article 8 ECHR when defining the requirements for immigration.

A statute authorising the issuing of a regulation on quotas that strictly apply to even those (rare) cases of foreigners who have a right to family reunion is contrary to Article 8 ECHR.

The rule of law requires that a statute that regulates the conditions for granting settlement permits within the quota system must be sufficiently clear. A statute that neither clearly defines how the quota is to be distributed among applications, nor sets out a transparent ranking system for applications on the waiting list violates the rule of law.

Summary:

Two Turkish citizens, applied for a first settlement permit (*Erstniederlassungsbewilligung*) for the purpose of family formation with their husbands who have both lived in Austria since 1997 on the basis of unlimited permits to stay. Both received a letter stating that the maximum number of permits under the obligatory quota had already been reached for 2001 and 2002 and that their applications would therefore not be dealt with at the time but rather the decisions on them postponed. After six months, both women applied to the higher authority to take jurisdiction over and decide the matters. Those applications were rejected on the ground that the waiting time resulting from the “closed quota” suspended the running of the (lower) authority's time-limit for decision. Both women lodged complaints with the Court alleging the unconstitutionality of the relevant statutes of the Alien Act (§ 18.1.3 and § 22; *Fremdengesetz*).

The Court shared the complainants' doubts and started an *ex officio* review of the statutes applied.

In accordance with the established case-law of the European Court of Human Rights as well as with its own case-law, the Court stated that Article 8 ECHR did not impose on a state a general obligation to respect the choice by married couples of the country

of their matrimonial residence and to authorise family reunion in its territory (see the *Abdulaziz, Cabales and Balkandali* Judgment of 28 May 1985, the *Gül* Judgment of 19 February 1996, and the *Ahmut* Judgment of 28 November 1996).

Referring to the *Sen* Judgment of 21 December 2001, Appl. no. 31465/96, the Court pointed out that there were cases in which a refusal to grant a residence or settlement permit violated Article 8 ECHR. The legislator has a broad margin of appreciation when laying down the requirements for immigration, but is nevertheless bound to consider respect for family life.

The Court noted that aliens having a right to family reunion could not be regarded as being a few exceptional cases. On the contrary, it is the general case that first one family member enters the country, and after settling down, wishes to reunite with his close relatives. Due to the perennial waiting-time caused by the quota system, wives who have applied for a permit – but still live abroad – give birth to children. Because such cases are also subject to the quota system, the Court declared that the impugned statute (§ 18.1.3 Alien Act, which had been amended in the meantime) was not in compliance with Article 8 ECHR.

Moreover, the Court ruled that the statute regulating the administration of the quota system (§ 22 Alien Act) was so poorly drafted that it clearly did not meet the requirements of the rule of law. For that reason, it was also declared unconstitutional.

Supplementary information:

According to the law as amended, in cases where persons have a right to family reunion, settlement permits are granted on humanitarian grounds outside the quota system.

Languages:

German.



Identification: AUT-2003-3-004

a) Austria / b) Constitutional Court / c) / d) 28.11.2003 / e) KR 1/00 / f) / g) / h) CODICES (German).

Keywords of the systematic thesaurus:

1.4.10.7 **Constitutional Justice** – Procedure – Interlocutory proceedings – Request for a preliminary ruling by the Court of Justice of the European Communities.

2.2.1.6.3 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Secondary Community legislation and constitutions.

3.16 **General Principles** – Proportionality.

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

3.18 **General Principles** – General interest.

4.10.6 **Institutions** – Public finances – Auditing bodies.

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

5.3.31.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.

Keywords of the alphabetical index:

Court of Audit, competences / Officer, salary, data, publication.

Headnotes:

The Court of Audit (*Rechnungshof*) has the power to inspect all documents concerning salaries and pensions paid by the Austrian Broadcasting Corporation (*Österreichischer Rundfunk*, ORF) in the years 1998 and 1999 for audit purposes. The ORF must allow this inspection.

The *Rechnungshof* is not allowed to exercise this supervision for the purpose of preparing a widely published report that lists the names of ORF-employees and their annual income (no application of § 8 of the Constitutional Law on Limiting the Salaries of Public Officials – *BezügebegrenzungsBVG* 1997).

Summary:

A dispute concerning jurisdiction arose between the Court of Audit and some bodies subject to its control (among them, the ORF) about the interpretation of § 8 of the Constitutional Law on Limiting the Salaries of Public Officials. The Court of Audit regarded itself obliged to prepare a report and to list the names of

the bodies' employees as well as their annual remuneration exceeding a certain amount. The report was to be made available to the general public. The bodies concerned refused to allow access to the relevant documents and communicated no personal but only anonymous data. They based their refusal on Community law (Directive 95/46/EC – on data protection) and on Article 8 ECHR.

Having doubts on the interpretation of the Directive, the Court referred two questions for a preliminary ruling to the European Court of Justice (see [AUT-2000-3-009]), which were answered in a judgment of 20 May 2003, C-465/00 *et. al.*

Being bound by that preliminary ruling, the Court settled the dispute as follows.

It first found that it fell within the regular audit power of the Court of Audit to inspect also private and confidential documents (e.g. salary accounts); however, no obligation to provide the general public with comprehensive information derived from that power. The Court of Audit is always bound to weigh the interests of the individual's right to private life and the public interest when reporting on activities (Article 126d of the Constitution). According to Article 8 ECHR, the Court of Audit must not give names of persons and their income in its regular report to the National Council or to other parliamentary bodies.

As to the application of § 8 of the Constitutional Law on Limiting the Salaries of Public Officials, the Court followed the ECJ's ruling stating expressly that it was for the national courts to ascertain (by applying Article 8 ECHR as part of Community law) whether such publication of the data was both necessary and proportionate to the aim of keeping salaries within reasonable limits and to examine, in particular, whether such an objective could not have been attained by measures affecting the right to private life of the persons concerned in a less serious way (see § 88 of the judgment).

The Court pointed out that the supervision of the proper use of public funds was beyond dispute and that such supervision included also data on the expenditure of personnel costs. That objective is, however, already attained by the regular audit and the respective reports to the parliamentary bodies. The publication of a report on the names of persons in relation to their annual income is a serious interference with the right safeguarded by Article 8 ECHR. As the government failed to justify that interference for reaching its aim, that interference was neither necessary nor proportionate.

Due to ruling of the ECJ on the directly applicable provisions of Directive 95/46, the relevant national constitutional law, § 8 of the Constitutional Law on Limiting the Salaries of Public Officials, could not be applied. The Court therefore dismissed that part of the Court of Audit's application.

Supplementary information:

This is the leading case on several jurisdictional disputes on the same question.

Languages:

German.



Identification: AUT-2003-3-005

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

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

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

Headnotes:

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

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

Summary:

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

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

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

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

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

Supplementary information:

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

Cross-references:

Court of Justice of the European Communities:

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

Languages:

German.



Azerbaijan Constitutional Court

Important decisions

Identification: AZE-2003-3-006

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 29.12.2003 / **e)** 1/10 / **f)** / **g)** *Azerbaycan* (Official Gazette); *Konstitusiya Mehkemesinin Melumatı* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
3.12 **General Principles** – Clarity and precision of legal provisions.
4.5.2 **Institutions** – Legislative bodies – Powers.

Keywords of the alphabetical index:

Weapon, illegal circulation / Criminal Code / Weapon, throwing, definition / Weapon, shooting cold steel, definition.

Headnotes:

The *Milli Majlis* (Parliament) is competent for establishing the general rules on interpretation of crime and other violations of law, as well as establishing the responsibility for these acts (Article 94.1.17 of the Constitution).

Correct and clear determination of statutory provisions, including those of the Criminal Code, is of significant importance. The certainty of legal provisions, their clarity and distinctness enable the bodies that apply the law to determine correctly the crime committed and enable them to respect the principal of legality in their activities.

Summary:

The meaning of the term “the throwing weapon” used by Article 228.4 of the Criminal Code is equal to that of the term “the shooting cold steel” weapon (“cold steel” refers to cutting or thrusting weapons) used in Article 2 of the Law on the Use and Possession of Weapons by Civilians. Both terms “the throwing weapon” and “the shooting weapon” mean the same:

i.e. a weapon, which is aimed by the use of human muscle or mechanical installation and designed to damage objects from a certain distance (Article 2).

The term “the throwing weapon” in Article 228.4 of the Criminal Code is equivalent to the term “the shooting cold steel” weapon in Article 2 of the Law.

Article 228 of the Criminal Code prohibits the illegal circulation of shooting cold steel weapons (“cold steel” refers to cutting or thrusting weapons). The title of Article 228 is “Illegal purchase, transfer, selling, storage, transportation and carrying of firearms, firearm accessories, ammunition and explosives”. Article 228.4 provides for criminal liability for the illegal purchase, selling or carrying of gas weapons and cold steel weapons, including throwing weapons.

The title and the provisions of the Article 228 of Criminal Code should be considered.

Article 229 of Criminal Code, which is entitled “Illegal manufacture of a weapon”, provides for criminal liability for the manufacture a weapon and for the illegal manufacture of devices that have been clearly defined as weapons.

The Law on the Use and Possession of Weapons by Civilians uses the term “the shooting cold steel” weapon. By using a different term for the same concept, that Law creates uncertainty in investigation and judicial practice.

A “firearm” and a “cold steel” weapon are not the same: their construction, principle of operation and the method of use differ considerably, as does their degree of danger to society. Liability for illegal circulation is prescribed for both firearms and cold steel weapons (Article 228 of the Criminal Code). Thus, the inclusion of only firearms in the title of the article contradicts the logical order of that article.

The term “throwing weapon” in Article 228.4 of the Criminal Code covers the same concept as a “shooting cold steel” weapon mentioned in the Law on the Use and Possession of Weapons by Civilians.

Neither that Law nor Article 228.4 of the Criminal Code provide for the inclusion of cold steel weapons, air weapons or other weapons in the term “the throwing weapon”. As regards the inclusion of air weapons in the term of cold steel weapons, the Constitutional Court noted that the concept of air weapons has been defined in Article 2 of the Law on the Use and Possession of Weapons by Civilians. Criminal responsibility for the illegal circulation of air weapons is not provided for in the legislation in force.

The Constitutional Court decided that the term “the throwing weapon” in Article 228.4 of the Criminal Code means the same as the term “the shooting cold steel” weapon used in the Law on the Use and Possession of Weapons by Civilians.

Languages:

Azeri (original), English (translation by the Court).



Identification: AZE-2003-3-007

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 25.03.2004 / **e)** 08/15-71 / **f)** / **g)** *Azerbaijan, Respublika, Khalg gazetesi, Bakinski rabochiy* (Official Newspapers) and *Azerbaycan* (Official Gazette); *Konstitusiyaya Mehkemesinin Melumatı* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Proceedings, suspension, obligatory / Civil procedure, Code.

Headnotes:

A stay of proceedings may be ordered on the grounds established by legislation and on the basis of circumstances emerging during the trial impeding the continuation of judicial proceedings. In such a situation, the proceedings in the case shall be stayed until the temporary obstacles to a resolution of the dispute are removed.

The provision “where it is impossible to examine a case by way of constitutional proceedings before the

examination of a case by way of civil, criminal or administrative proceedings is completed” (Article 254.1.4 of the Civil Procedure Code) covers sentences, resolutions, decisions and rulings adopted by the courts on the relevant types of proceedings and that have entered into legal force.

Summary:

Article 254.1.4 of the Code of Civil Procedure provides that proceedings in a case shall be stayed, where it is impossible to examine the case by way of constitutional proceedings before completion of another case being examined by way of civil, criminal or administrative proceedings.

When staying proceedings in civil cases, some courts refer only to relevant cases that are being examined in the courts, while others also refer to cases that are at the initial stage of investigation. Taking into account that that practice hinders the establishment of a single judicial practice, the Supreme Court asked the Constitutional Court for an interpretation of the article.

The Constitutional Court noted that legal protection of the rights and freedoms of every citizen had to be ensured (Article 60 of the Constitution). The right to legal protection is also reflected in international instruments.

All are equal before the law and are entitled without any discrimination to equal protection of the law (Article 7 of the Universal Declaration of Human Rights). Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him (Article 10 of the Universal Declaration of Human Rights). This provision is also found in Article 14 of the International Covenant on Civil and Political Rights.

Once proceedings have been commenced, they shall be continued without postponement until the dispute in the case has been settled. However, the speedy completion of proceedings is not always possible.

During a trial, circumstances may emerge that impede an effective and objective resolution of the matter. One of the obligatory grounds for staying proceedings is the impossibility of the court’s hearing a case prior to the completion of another case, which is being heard before the Constitutional Court or proceedings being heard before a civil, a criminal or an administrative court or tribunal, as set out in Article 254.1.4.

Staying proceedings on the ground that it is impossible for a court or an administrative body to examine the case at that time must be based on a finding that facts of a binding nature must first be determined in another case. The facts established by a final judicial decision or sentence shall be, without further verification, recognised as proof by all courts examining other cases arising from those facts.

For instance, where a final court decision finds a person who possesses an object of great danger liable for the damage caused by that thing, then in a case where another claim arising from those same facts is brought against that person, the facts that have been established by a first court decision shall be binding on the subsequent case and cannot be rejected. The facts upon which a person has been convicted of theft of property may form the basis for the delivery of a court decision on a claim for reimbursement of damage caused by that theft. The facts, as well as legal relations established by a final court decision or sentence, cannot be challenged in other proceedings.

Facts and relationships established by a final court resolution are binding on the parties to the proceedings and shall be binding on a court considering another case (Article 82.2 of the Code of Civil Procedure). Facts and relationships established by a final court resolution of a civil case shall not be subsequently proved again in the course of a hearing on another case in which the parties to the proceedings are the same as those in the first case (Article 82.3). The final court decision on a criminal case shall be binding on a court or a judge considering the matter, or one considering otherwise relevant matters and seeking to establish the personality of the person who has carried out such actions (Article 82.4 of the Code of Civil Procedure).

The decisions adopted in criminal cases by authorities of preliminary investigation are not binding on pending civil cases and cannot, therefore, be a reason for staying proceedings in a civil case.

Languages:

Azeri (original), English (translation by the Court).



Belgium Court of Arbitration

Important decisions

Identification: BEL-2003-3-010

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 24.09.2003 / **e)** 125/2003 / **f)** / **g)** *Moniteur belge*, (Official Gazette), 28.11.2003 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
 3.19 **General Principles** – Margin of appreciation.
 3.20 **General Principles** – Reasonableness.
 4.6.2 **Institutions** – Executive bodies – Powers.
 4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Effective remedy.
 5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.

Keywords of the alphabetical index:

Foreigner, illegal, transport, penalty / Judge, jurisdiction, scope / Administrative sanction, class of penalty.

Headnotes:

While the administration has its own power to exercise discretion when imposing an administrative sanction, nothing within the scope of its discretion must elude judicial review where a party incurring an administrative sanction classed as criminal within the meaning of Article 6 ECHR appeals against it in court.

Summary:

A shipping company received an administrative fine after a number of undeclared passengers escaped from one of its vessels and entered Belgium illegally. The company filed an appeal in court against this administrative sanction. On the ground that it did not have full jurisdiction to adjust the magnitude of the penalty, the court asked the Court of Arbitration to

determine whether the case disclosed a breach of the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), interpreted in conjunction with Article 6 ECHR and with the general principles of law including those of reasonableness and proportionality.

Under the terms of Article 74.4bis of the law of 15 December 1980 on foreigners' entry into the territory, residence, settlement and removal, the Minister or his official representative may impose penalties including an administrative fine of 3.750 EUR on a shipping company for each individual not in possession of the prescribed documents who is given passage to Belgium.

The Court observed firstly that the measure, in view of its nature (heavy fine) and purpose (preventing and punishing offences) was essentially punitive and to be classed as criminal within the meaning of Article 6 ECHR.

The Court moreover inferred from the "*travaux préparatoires*" relating to the provision at issue that the court hearing an appeal against a decision to impose an administrative fine would not be able to determine whether the carrier bore any guilt, as the administrative fine would be payable by law immediately as soon as an alien was brought to Belgium without valid travel documents. In the Court's view, this was contrary to the general principle that a court must always be able to determine whether any guilt was borne by any party.

The Court held that where it is possible for the administration to adjust the magnitude of the penalty, nothing within the scope of its discretion must elude judicial review. In the case in point, the administration could not impose a less severe penalty but could be deemed to have limited discretion either to refrain from imposing the administrative fine, for example on the ground that the carrier bore no guilt, or to impose the fine at the non-adjustable standard rate prescribed by the legislator. Within the same discretionary limits as the Minister or his official representative, the judge must therefore either uphold or quash the administrative fine imposed, without being able to adjust the amount thereof. According to this interpretation, the Court did not find the impugned provision incompatible with Articles 10 and 11 of the Constitution, read in conjunction with Article 6 ECHR.

The Court held that, since the administration could neither allow for mitigating circumstances nor adjust the amount of the administrative fine accordingly, there was no requirement that the judge be able to do so.

The Court added in conclusion that reasonableness and the principle of proportionality precluded any other finding.

Cross-references:

- In the same vein, see Decision no. 22/99 of 24.02.1999, *Bulletin* 1999/1 [BEL-1999-1-003].

Languages:

French, Dutch, German.



Identification: BEL-2003-3-011

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 08.10.2003 / **e)** 131/2003 / **f)** / **g)** *Moniteur belge* (Official Gazette), 22.10.2003 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

- 1.2.1.2 **Constitutional Justice** – Types of claim – Claim by a public body – Legislative bodies.
- 1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
- 1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
- 3.16 **General Principles** – Proportionality.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.4.1 **Fundamental Rights** – Economic, social and cultural rights – Freedom to teach.
- 5.4.2 **Fundamental Rights** – Economic, social and cultural rights – Right to education.

Keywords of the alphabetical index:

School, enrolment, possibility of refusal / School, subsidy, reduction / Education, parents' free choice / Interest, member of a parliamentary assembly / Education, equal opportunity.

Headnotes:

Natural persons who introduce an application to set aside before the Court must prove their interest in so doing, that is to say, must show in the petition that

they are liable to be directly and adversely affected by the provisions challenged. The status of member of a parliamentary assembly does not suffice to validly claim an interest unless the measure interferes with prerogatives specific to the exercise of parliamentary office. The Court may determine such interest while examining the substance of the case.

Parents' right to enrol their children in the school of their choice is not to be dissociated from the right to set up teaching establishments and the right of the latter to subsidisation. The impugned provisions, which secure each pupil's right to be enrolled and prescribe a deduction from the school's financial resources as a penalty for unjustified refusal of enrolment, do not constitute disproportionate interference with freedom of education, having regard to the provisions of the impugned decree which, taken together, imply that a school may exclude a pupil subject to certain conditions.

Summary:

Two persons brought an application to the Court of Arbitration to set aside certain provisions of the Flemish Community decree of 28 June 2002 on "Equal opportunity in education-I". They complained that freedom of education (Article 24 of the Constitution) was infringed by conferring on all pupils a right to enrol in whichever school, independent or state, the parents might choose. In the event of refusal to enrol a pupil, the person concerned may bring a complaint before the Pupils' Rights Commission, which may advise the Government to withhold part of the school's funding.

The Flemish Government and the Government of the French Community, both appearing as parties before the Court in defence of the impugned provisions, submitted that, failing any interest on the applicants' part, the applications were inadmissible.

Private individuals may bring an application before the Court on condition of having a proven interest, that is they must show that they are liable to be directly and adversely affected in some capacity by the provision challenged.

The first applicant claimed to have an interest as a member of the Flemish Parliament. The Court recalled that under the special law on the Court of Arbitration it was henceforth permissible for the presidents of the legislative assemblies to bring actions before the Court at the request of two-thirds of their members. In the Court's view, an individual member of a legislative assembly could not validly claim the requisite interest in that sole capacity. A member of a legislative assembly might claim an

interest in respect of official functions if the impugned provisions interfered with the prerogatives attaching to the personal discharge of his/her mandate, but that was not so in the instant case.

The second applicant submitted that the school that he had chosen for his children risked losing its identity as a result of the right freely to enrol, and that his own right to free choice of education was thereby affected. The Court decided to proceed with the determination of the applicant's interest while examining the substance of the case.

Regarding the substance, the Court firstly recalled the fundamental principles governing freedom of education (Article 24 of the Constitution), which comprise not only parents' right to choose freely but also the freedom to organise schools. Freedom of education is subject to limitations, and need not prevent the promulgator of the decree from laying down conditions of financing and subsidisation such as would restrict the exercise of that freedom, provided that it is not fundamentally prejudiced. Freedom of education does not prevent the competent legislator from seeking to ensure the quality and equivalence of publicly funded education provision through measures generally applicable to teaching establishments, regardless of the specificity of the education delivered by them.

The Court had to consider whether or not there was a disproportionate limitation to freedom of education in that the right to enrolment limited the freedom of the organising authorities to accept or refuse pupils in accordance with the fundamental principles of the teaching organised by them.

In considering this point, the Court observed that the right to enrolment was not absolute. Parents must firstly agree to the educational scheme and the school rules of the establishment. The (independent) school itself was to determine which principles it deemed fundamental, subject to their compatibility with the principles of international and constitutional law relating to human rights and particularly the rights of the child. Secondly, the school might refuse any enrolment that would place the pupils' safety at risk. Thirdly, the school might take the pupil's language proficiency into account and, fourthly, the penalty for an unjustified refusal of enrolment was not obligatory enrolment but reduction of financial resources. Lastly, a pupil might be excluded for non-compliance with the terms of the agreement concluded with the school or for breach of the rules of good order and discipline.

The Court concluded that in the light of all the foregoing circumstances there was no disproportionate restriction on the freedom of education, and that

the second applicant's petition was inadmissible even were his interest established.

A second plea founded on a misreading of the impugned provision was also dismissed.

Languages:

French, Dutch, German.



Identification: BEL-2003-3-012

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 08.10.2003 / **e)** 134/2003 / **f)** / **g)** *Moniteur belge* (Official Gazette), 19.01.2003 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

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

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

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

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

Keywords of the alphabetical index:

Child, parental authority / Child, right to bring up / Child, best interests / Homosexuality, couple, child, care.

Headnotes:

In Belgium, parental authority is granted solely to persons to whom the child is related by descent. Children having only one parent from whom descent is proven but who have lived in a settled fashion in the household formed by that parent and a non-relation, both assuming responsibility for the child's maintenance, are thus subject to different treatment without acceptable justification. However, it is for the legislator to specify the form, the conditions and the procedure according to which parental authority might be extended in the child's interests to other persons not having this blood kinship with the child.

Summary:

Two women who cohabited as a couple for ten years, during which one of them bore a child through recourse to artificial insemination by donor, requested the Court of first instance of Antwerp, after their separation, to be allowed to exercise parental authority jointly. The court found that the Civil Code assigned the exercise of parental authority over a child solely to persons to whom it was related by descent, and decided to question the Court of Arbitration about the conformity of these provisions of the Civil Code with the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution).

The Court of Arbitration began by placing a general construction on the specific case before it, namely where a child has only one parent from whom its descent is proven but has lived in a settled fashion in the household formed by that parent and a non-relation who both assume responsibility for its maintenance.

The Court went on to observe that parental authority was an institution primarily intended to provide protection for an underage child who, being vulnerable and physically and mentally immature, must receive personalised care and special protection. In Belgium, the legislator had assigned this authority to the child's parents before all others.

In reply to the Council of Ministers' contention that there was no possible comparison between persons related to the child as its biological parents and persons not so related, the Court held that in view of the need to assign responsibility for children's protection and social training to persons fit to assume it, all children's legal relationships with the persons bringing them up allowed of comparison.

The Court then invoked as the basis for its reasoning Article 3.1 of the Convention on the Rights of the Child providing that the child's best interests shall be a primary consideration, and Article 3.2 of the Convention requiring the State to afford the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her. Next, the Court observed that the legislator had taken many steps in that direction particularly in providing for joint exercise of parental authority (principle of "co-parenthood").

The Court nevertheless found that the present legislation did not allow a child placed in the circumstances defined above to have its right to

protection and welfare given force of law, even in the event that the persons bringing up the child undertake to ensure them lastingly.

Parental authority cannot in fact be granted to the person forming a household with the child's parent, because there is no relationship by descent. Article 365bis of the Civil Code permitting the formation of personal bonds between a child and a non-relation does not allow this bond to be given such effects as would give legal effect on any undertakings which that person might offer to make in respect of the child. The child could therefore suddenly forfeit all entitlement to receive care, which includes the right to maintenance and to protection, from the person who has brought up the child where the couple separates and specifically where the parent from whom the child is descended has died.

The Court accordingly concluded that the category of children in question was treated differently without acceptable justification. However, it is up to the legislator to specify the form, the conditions and the procedure whereby parental authority might, in the child's interests, be extended to other persons to whom it is not related by descent. It follows that the provisions of the Civil Code concerning parental authority, as they stand, are not capable of being applied to this situation and cannot be considered discriminatory.

Languages:

French, Dutch, German.



Identification: BEL-2003-3-013

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 17.12.2003 / **e)** 169/2003 / **f)** / **g)** *Moniteur belge* (Official Gazette) / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
 5.2.2.1 **Fundamental Rights** – Equality – Criteria of distinction – Gender.
 5.3.32.1 **Fundamental Rights** – Civil and political rights – Right to family life – Descent.

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

Keywords of the alphabetical index:

Father, right to acknowledge paternity / Marriage, impediment / Incest / Child, best interests.

Headnotes:

Without it being necessary in the instant case to determine whether the interests of the child or of the social order may be prejudiced by disclosure of the “incestuous” nature of the union in which the child was conceived, even when the impediment to it was that the partners were related by affinity (by marriage) and not by consanguinity, the prohibition at issue is disproportionate when the bond of kinship by affinity is dissolved. While it may be injurious to certain persons that an acknowledgement of paternity at such a moment retrospectively discloses that they are the issue of a reputedly scandalous union, it need not follow that they forfeit all interest in asserting the fundamental right secured to children by Article 7.1 of the Convention on the Rights of the Child to be brought up by their (natural) parents.

Summary:

After his divorce, a man acknowledged paternity of the children born to him by his wife's own daughter from a previous marriage. The Crown Prosecutor asked the Mechelen court of first instance to annul the aforesaid acknowledgements on the ground that Article 321 of the Civil Code forbade a father to acknowledge paternity of a child where the acknowledgement would disclose an impediment to marriage, admitting of no royal dispensation, between the mother and himself. Article 161 of the Civil Code prohibits marriage between all direct-line relations in the ascending or descending line and relations by affinity in the same line of kinship. This impediment to marriage still stands even in the event of divorce.

The two parents asked the Court to put a preliminary question to the Court of Arbitration, because they considered that Article 321 of the Civil Code denied their children the possibility of claiming descent from both parents, which would constitute discrimination.

The Court had to determine whether or not Article 321 of the Civil Code infringed the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) in conjunction with Article 7.1 of the Convention on the Rights of the Child.

Basing its examination on the case in point, the Court narrowed the preliminary question down to the legal question of a child born of two persons related by affinity within the prohibited degree of kinship. The Court also considered that it was not to rule on the admissibility of impediments to marriage but on the “entirely different” issue of acknowledgement.

The Court then identified the aim pursued by the legislator in amending the provisions relating to parentage in 1987. It observed that, notwithstanding the prime objectives of this law, namely to ensure equality in matters of parentage and to reflect the true facts of biological parentage as closely as possible, the legislator had taken the view that in the case of “incestuous” parentage, “the child’s interests should outweigh all other interests” and “it could be presumed that acknowledgement would seldom advance the interests of the children in question”.

The Court went on to note that in the case before it there was no need to determine whether the interests of the child or of the social order could be prejudiced by disclosure of the “incestuous” nature of the relationship of the union in which the child was conceived, even where the impediment to it was a bond of kinship by affinity and not one of consanguinity, because the prohibition at issue was disproportionate in the event of the bond being dissolved. “While it may be injurious to certain persons that an acknowledgement of paternity at such a moment retrospectively discloses that they are the issue of a reputedly scandalous union, it need not follow that they forfeit all interest in asserting the fundamental right secured to children by Article 7.1 of the Convention on the Rights of the Child to be brought up by their (natural) parents”.

The Court therefore concluded that in so far as Article 321 of the Civil Code did not permit the father to acknowledge paternity of a child where recognition thereof would bring to light an impediment to marriage, admitting of no royal dispensation, due to his kinship by affinity with the mother, this provision was contrary to Articles 10 and 11 of the Constitution where such kinship had ceased to exist.

In this case, the Court was also to answer a second preliminary question which, assuming descent from the mother to be proven as is usually the case in Belgium because *mater semper certa est* according to the legal maxim, there is an alleged inequality between parentage on the mother’s side and parentage on the father’s side. The Court replied that the difference in the rules on proof of descent from the mother as against the father was largely due to the actual nature of things, and therefore held that the second question need not be answered.

Languages:

French, Dutch, German.



Bosnia and Herzegovina Constitutional Court

Important decisions

Identification: BIH-2003-3-001

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 26.09.2003 / **e)** U 64/01 / **f)** / **g)** *Službeni glasnik Bosne i Hercegovine* (Official Gazette), 41/03 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.

5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.

Keywords of the alphabetical index:

Education, school, public, primary, teacher, vacancy / Teacher, post, vacancy.

Headnotes:

Different treatment of individuals in similar positions is discriminatory where there is no reasonable and objective justification for such treatment.

Summary:

On 22 August 1994 the appellant started to work as a Serb and German language teacher in the Public Primary School in Banja Luka. Although the Law on Primary Schools and the Law on Labour Relations provide that a teacher is to be employed only after a vacancy of the post has been advertised, the school headmaster assigned her to the vacant post of Serb and German language teacher without prior advertisement of the vacancy. The headmaster failed to issue a decision on employment. However, the school registered the appellant as its employee in the Health, Pension and Disability Insurance Fund, which was the school's obligation under the Law on Labour Relations. On 30 June 1997 the school headmaster, referring to Article 53 of the Labour Relations Law, issued a decision terminating the applicant's

temporary employment. The decision stated that her employment would be terminated as of 31 July 1997 due to the end of the term of her temporary employment. The appellant received the decision informing her of the termination on 21 October 1997.

At the staff meeting on 29 September 1997, in the presence of the headmaster, a decision was taken to advertise the vacancies for the posts of Serb language teacher, Biology teacher, Chemistry teacher and Arts teacher, all of which would be filled through the mediation of the Employment Office. However, all vacancies were advertised except that of Serb language teacher. The teachers who worked at the school during the 1996/97 academic year teaching the subjects of the advertised posts applied for the posts. The headmaster recommended that those teachers be employed, as he was of the opinion that they were good teachers and complied with all the requirements.

In November 1997 the school employed, without prior advertisement of a vacancy, N.S. as a permanent teacher of the Serb language.

On 19 November 1997 the appellant brought an action before the Basic Court (a court with jurisdiction similar to that of a municipal court) of Banja Luka for the protection of her rights deriving from employment. The Basic Court delivered a judgment annulling the decision of 30 June 1997 terminating the appellant's employment and ordered the school to reinstate the appellant to her position of Serb and German language teacher. The County Court of Banja Luka considered the school's appeal, dismissed it as unfounded and upheld the judgment of the Basic Court. The school lodged an application for revision (appeal on points of law) with the Supreme Court of the Republika Srpska. The Supreme Court allowed the revision, reversed both lower instance judgments and dismissed the appellant's action.

On 5 December 2000, the appellant filed an appeal with the Constitutional Court against the judgment of the Supreme Court. She, *inter alia*, claimed that her right to work, as protected by the Constitution of Bosnia and Herzegovina, had been violated by the discriminatory behaviour of the headmaster of the school.

The Constitutional Court is competent to examine whether a judgment of any other court in Bosnia and Herzegovina violated rights or freedoms safeguarded by the Constitution. The Constitutional Court has noted that the prohibition of discrimination is a central objective of the Constitution to which a particular importance must be attached. Article II.4 of the Constitution provides that the enjoyment of the rights

and freedoms set out in the Constitution and international agreements listed in Annex I to the Constitution shall be secured to all persons without discrimination on any grounds. Annex I to the Constitution incorporates, *inter alia*, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as well as additional agreements on human rights that are to be applied in Bosnia and Herzegovina.

The Constitutional Court found that the school had no objective and reasonable justification for such different treatment of its teachers. Moreover, there was no basis for such different treatment in the provisions of the Law on Primary Schools and the Law on Labour Relations. First of all, under the provisions of those laws, the School was obliged to advertise each and every vacancy for the post of teacher. The Constitutional Court found that the school's actions of advertising vacancies of the posts of only some of the teachers who already taught at the school could not be justified when at the same time that advertisement did not include the Serb language teaching post.

Moreover, there was no reasonable justification for the actions taken by the school towards the appellant. The evidence in the case-file showed that the appellant's performance was considered good and professional. That evaluation was made by the School's Trade Union based on the minutes of both the Staff meetings and the Departmental Board meetings as well as on the notes by the headmaster and the school's expert on pedagogy. That evaluation stated that the appellant as a teacher realised the educational goals and tasks (Article 70 of Law on Primary Schools). Consequently, through the appellant's work, the school as an institution for elementary education realised a part of its goals and tasks in relation to elementary education (Articles 1.1 and 2 of Law on Primary Schools).

The fact that the appellant had worked for 3 full years and 9 days gave the appellant the right to consider herself a permanent employee. Article 4 of the Labour Relations Law indeed provides that temporary employment is employment lasting up to 6 months at the most.

The Constitutional Court stated that the school had made a distinction between the appellant and other teachers by advertising the vacancies for permanent posts of only some of the teachers. The school had not taken into consideration all the needs, and it had not provided the same opportunity for all the teachers of all the vacant teaching posts. Considering that there was no objective and reasonable justification for

such actions, it followed that the appellant had been discriminated against. The Constitutional Court found that the appellant should have received the same treatment as the other teachers. By not advertising the vacancy for the post of Serb language teacher, the School had prevented the appellant from applying for a post that had not been filled.

The Constitutional Court found that it did not have sufficient evidence before it to make a finding that the appellant had, as she alleged, been discriminated against on the grounds of her age and lack of political affiliation.

Consequently, the Constitutional Court annulled the judgment of the Supreme Court and upheld the judgment of the County Court.

Languages:

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



Identification: BIH-2003-3-002

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 28.11.2003 / **e)** U 28/00 / **f)** / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

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 – Access to courts.

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

Keywords of the alphabetical index:

United Nations, peace-keeping force, immunity from jurisdiction / Treaty, international, direct applicability / Real estate, damage.

Headnotes:

The state cannot be exonerated from responsibility for damage caused to individuals by the implementation of international agreements to which it is a party.

According to the Constitution, the rights and freedoms set forth in the European Convention on Human Rights shall apply directly in Bosnia and Herzegovina and shall have priority over all other laws. Consequently, the rights and laws applied by the ordinary courts must be in accordance with the Convention, regardless of the literal meaning of certain provisions of the law of the domestic legal system.

The individual must be protected from the arbitrary actions of the state. Every failure to do so may have consequences for the direct application of Article 6.1 ECHR, whose sole purpose, like that of the Convention in general, is to protect the individual from the arbitrary actions of the state.

Summary:

The appellant filed an appeal with the Constitutional Court of Bosnia and Herzegovina against the ruling of the Municipal Court II Sarajevo, the ruling of the Cantonal Court of Sarajevo and the ruling of the Supreme Court of the Federation of Bosnia and Herzegovina.

The appellant is the owner of real property with an area of 2,255 m². During the armed conflict in Bosnia and Herzegovina, from July 1994 until the end of 1995 UNPROFOR occupied the appellant's real property, removed the topsoil, spread gravel and destroyed the existing fence.

In June 1996 the appellant submitted a claim to UNPROFOR for compensation for damage caused to her property but did not receive a response. Subsequently, in December 1998 the appellant filed a complaint with the Municipal Court against UNPROFOR and against Bosnia and Herzegovina. The appellant claimed either full restoration of her property to its state before UNPROFOR occupied it or monetary compensation for the damage caused to her property.

In a ruling, the Municipal Court dismissed the complaint due to lack of competence.

In February 1999 the appellant filed an appeal with the Cantonal Court against the ruling of the Municipal Court.

On appeal, the Cantonal Court upheld the Municipal Court ruling and dismissed the appeal stating that the UN Convention on Privileges and Immunities of 13 February 1946 grants immunity to the UN from every form of judicial proceedings, unless it is an extraordinary case to which immunity does not apply. Moreover, the Cantonal Court concluded that the Agreement entered into by the Government of Bosnia and Herzegovina and the UN on the status of UNPROFOR (15 May 1993) was based upon the said UN Convention. The Cantonal Court held that that Agreement did not exempt the UN from all forms of judicial proceedings. It provides for ways and procedures for resolving disputes, which are to be adjudicated by a Standing Claims Commission or by a tribunal of three arbitrators under the prescribed conditions. The Cantonal Court consequently held that it was not competent to deal with the claim.

The appellant lodged an application for revision (an appeal on points of law) with the Supreme Court. The Supreme Court dismissed the revision on the ground that the lower courts had correctly applied Article 16.1 of the Law on Contentious Procedure, which provides for the rejection of a case due to lack of jurisdiction.

The appellant did not challenge the decisions of the Municipal, Cantonal and Supreme Court with regard to her claim against the UN; however, she did challenge the rejection of her claim against the Republic of Bosnia and Herzegovina. The appellant contended that the lower courts by refusing to decide on her claim for compensation, violated her right of access to a court as protected by Article II.3.e of the Constitution and Article 6.1 ECHR, which, according to the Constitution, is to have priority over all other law.

The appellant argued that since the Standing Claims Commission provided for under the Agreement of 15 May 1993 had never been set up, she was compelled to file a claim with the courts. Due to the immunity granted to the UN through the Convention, the appellant only pursued her claim against Bosnia and Herzegovina, the legal successor to the Republic of Bosnia and Herzegovina. She argued that the authorities of the Republic of Bosnia and Herzegovina by assigning the use of her real property to UNPROFOR without her consent were responsible for the damage caused to that property by UNPROFOR's occupation of it.

Considering that the right invoked by the appellant is of a civil nature, the Constitutional Court established that Article II.3.e of the Constitution and Article 6.1 ECHR were applicable in the case under consideration.

The right of access to a court is an inherent element of the Article 6.1 ECHR, which secures to everyone the right to have any claim relating to his civil rights and obligations brought before an independent and impartial tribunal established by law.

In the instant case, both the Municipal and the Cantonal Court had dismissed the complaint on grounds of immunity, referring to the UN Convention and the Agreement. However, neither the Municipal nor the Cantonal Court had stated any grounds for which the complaint against Bosnia and Herzegovina was inadmissible. The Cantonal Court had recognised that the court would have been competent had the Agreement not provided otherwise. However, the Constitutional Court found no provision in the said Agreement that would grant immunity to Bosnia and Herzegovina. None of the lower courts had given any other reason for which the complaint against Bosnia and Herzegovina was inadmissible. Therefore the Constitutional Court could not find any grounds barring a lawsuit against Bosnia and Herzegovina.

The Constitutional Court noted that by refusing to decide on the merits of the appellant's complaints, the courts had denied the appellant access to the court, which was in violation of Article II.3.e of the Constitution and Article 6.1 ECHR. Those actions by the courts had led to the decision not to hear the matter on the appellant's "civil rights and obligations" within the meaning of Article 6.1 ECHR.

Consequently, the Constitutional Court annulled the ruling of the Supreme Court.

Languages:

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



Identification: BIH-2003-3-003

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** / **d)** 28.11.2003 / **e)** U 148/03 / **f)** / **g)** *Službeni glasnik Bosne i Hercegovine* (Official Gazette), 1/04 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to a hearing.

Keywords of the alphabetical index:

Supreme Court, proceedings, fair / Tax, retroactive collection.

Headnotes:

Although the nature of the appellant's obligation towards the state does not fall within the scope of the protection of Article 6.1 ECHR, the domestic legal system must be organised in such a manner as to guarantee a minimum of procedural protection within the domestic framework. Considering that the obligation to pay tax to the state most often has a great influence over the property rights of private persons, the purpose of the direct application of Article 6.1 ECHR, like the purpose of the whole Convention, is to protect a person from arbitrary actions of the state.

Summary:

The appellant, a meat-processing company, lodged a number of appeals with the Constitutional Court of Bosnia and Herzegovina seeking the annulment of ten judgments of the Supreme Court of the Federation of Bosnia and Herzegovina. Having regard to Article 25 of the Constitutional Court's Rules of Procedure and finding that the appeals referred to the same matter, the Constitutional Court decided that one set of proceedings was to be conducted and that one decision was to be delivered.

On 1 April 2002 the appellant declared the importation of goods into Bosnia and Herzegovina to a customs office at a border crossing. As per the unified customs documents, the Tomislavgrad Branch of the

Customs Office calculated the customs fee. The appellant paid the customs fee of 10% and the amount of 1% for entry of the matter into customs records. The Customs Office did not calculate the special tax (levy), and accordingly the appellant did not pay that tax.

On 29 July 2002 the Tomislavgrad Branch of the Customs Office initiated, *ex officio*, proceedings for the retroactive collection of the special tax (levy) on the goods imported on 1 April 2002. The Tomislavgrad Branch of the Customs Office issued a ruling and ordered the appellant to pay the previously uncalculated and unpaid special tax (levy) for the goods imported and cleared through customs on 1 April 2002.

The appellant filed appeals with the Federal Ministry of Finance against the rulings of the Tomislavgrad Branch of the Customs Office challenging the legality of the rulings and seeking their annulment.

The Federal Ministry of Finance dismissed the appellant's appeals as unfounded and upheld the rulings of the Tomislavgrad Branch of the Customs Office.

The appellant filed complaints with the Supreme Court against the rulings of the Federal Ministry of Finance. The Supreme Court, without hearing the appellant, delivered judgments dismissing the complaints and upheld the rulings of the Federal Ministry of Finance.

In its appeals to the Constitutional Court, the appellant challenged the judgments of the Supreme Court, the rulings of the Federal Ministry of Finance and the rulings of the Tomislavgrad Branch of the Customs Office stating that at the time of the import of the goods in question, there had been no obligation to pay the special tax (levy). The appellant stated that in every set of proceedings it had not been given an opportunity to make an oral statement on the facts and evidence that were decisive for the adoption of the impugned rulings and judgments. The appellant believed that that violated its right to a fair trial, as protected by the Constitution and Article 6 ECHR.

The Constitutional Court reiterated that it was not a "fourth instance" court but that its basic task was to protect the Constitution and the rights contained therein. In this respect, the Constitutional Court may examine the manner in which regular courts interpret and apply the domestic laws in cases where the domestic laws have been applied and interpreted in such a way that they violate the rights protected under the Constitution and the European Convention on Human Rights, which according to the Constitution

has priority over all other laws. Therefore, in respect to the dispute in question, the Constitutional Court limited itself to the examination of the appellant's right to a fair trial.

The dispute concerned the additional calculation and collection of the special customs tax (levy).

The obligation to pay the levy would, in essence, amount to an obligation under the area of public law established by the state to protect domestic producers. It followed that the dispute on the obligation to pay the levy in question could belong to a field of law falling outside the scope of the protection of Article 6 ECHR. However, the Constitutional Court noted that, although the nature of the obligation did not fall within the scope of the protection of Article 6 ECHR, the legal system of the state must be organised in such a way as to guarantee a minimum of procedural protection under Article 6 ECHR.

Moreover, in cases where a decision has been adopted by an administrative body, there must be an opportunity to challenge the decision in a court that acts in accordance with Article 6 ECHR. Considering that the administrative dispute before the Supreme Court had been in the case at instance conducted as the first-instance proceedings, that opportunity did indeed exist. The proceedings before the Supreme Court are generally conducted in the absence of the parties. The Constitutional Court found that that did not provide the minimum of the procedural guarantees prescribed by Article II.3.e of the Constitution and Article 6 ECHR.

In accordance with the above, the Constitutional Court found that even if some rights could clearly be classified as belonging to the field of public law, which falls outside the scope of the Article 6 ECHR, it would be necessary to secure the minimum of procedural requirements for a fair trial within the national framework. In that respect, the greatest obligation falls precisely on the judicial bodies that are under the constitutional obligation, regardless of the character of the dispute, to secure full respect for the request for a fair trial.

The proceedings before the Supreme Court had been conducted in the absence of the parties, even though the appellant's written statements had constantly pointed to the customs bodies' practice of deciding in the absence of the parties and not granting the parties an opportunity to contest in person the statements in the impugned rulings. The customs bodies had followed that practice in the case of the appellant. The appellant had not explicitly requested to be present at the hearing before the Supreme

Court. Nevertheless, that had been the appellant's basic objection to the practice of the customs bodies, as expressed in its complaints. Even so, the Supreme Court had not found it necessary to summon the parties to the session in which the appellant's complaints had been decided.

The parties must have the opportunity to be present personally at a session of the court. This primarily refers to the trial in the first instance court. In the case in question, the administrative dispute before the Supreme Court was the first instance proceeding. Therefore, those proceedings had to be held in a manner that satisfied the requirements of a "public hearing" and the requirements of the right of the public to transparency in judicial proceedings.

However, neither the appellant's proceedings before the Customs administration nor those before the Supreme Court had been public. Nor had the appellant been given the opportunity to examine personally the statements from the claims against it or to personally give the reasons for filing the complaints in the administrative dispute.

Consequently, the Constitutional Court annulled the judgment and referred the case back to the Supreme Court.

Languages:

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



Canada Supreme Court

Important decisions

Identification: CAN-2003-3-002

a) Canada / **b)** Supreme Court / **c)** / **d)** 19.09.2003 / **e)** 28533 / **f)** R. v. Powley / **g)** *Canada Supreme Court Reports* (Official Digest), [2003] 2 S.C.R. 207 / **h)** Internet: <http://www.lexum.umontreal.ca/csc-scc/en/index.html>; CODICES (English, French).

Keywords of the systematic thesaurus:

5.5.5 **Fundamental Rights** – Collective rights – Rights of aboriginal peoples, ancestral rights.

Keywords of the alphabetical index:

Métis, community, definition / Hunting, right.

Headnotes:

The term "Métis" in Section 35 of the Constitution Act, 1982 does not encompass all individuals with mixed Indian or Inuit and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, and recognizable group identity separate from their Indian or Inuit and European forebears. A Métis community is a group of Métis with a distinctive collective identity, living together in the same geographical area and sharing a common way of life.

Individuals are only entitled to exercise Métis aboriginal rights by virtue of their ancestral connection to, and current membership in, a Métis community. Self-identification, ancestral connection, and community acceptance are factors, which define Métis identity for the purpose of claiming Métis rights under Section 35 of the Constitution.

Summary:

Two members of a Métis community were acquitted of unlawfully hunting a moose without a hunting licence and with possessing game hunted in contravention of Ontario game and fish legislation. The trial judge found that the members of the Métis

community in and around Sault Ste Marie have, under Section 35 of the Constitution Act, 1982, an aboriginal right to hunt for food that is infringed without justification by the Ontario hunting legislation. The Superior Court of Justice, the Court of Appeal and the Supreme Court of Canada were unanimous in confirming the acquittals.

The purpose of Section 35 is to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture. The view that Métis rights must find their origin in the pre-contact practices of their aboriginal ancestors would deny to Métis their full status as distinctive rights-bearing peoples whose own integral practices are entitled to constitutional protection. A pre-control test establishing when Europeans achieved political and legal control in an area and focusing on the period after a particular Métis community arose and before it came under the control of European laws and customs is therefore necessary to accommodate the Métis history.

The aboriginal right claimed in this case is the right to hunt for food in and around Sault Ste Marie. To support a site-specific aboriginal rights claim, an identifiable Métis community with some degree of continuity and stability must be established through evidence of shared customs, traditions, and collective identity, as well as demographic evidence.

Residency on a reserve for a period of time by the accused's ancestors did not, in the circumstances of this case, negate their Métis identity. An individual decision by a Métis person's ancestors to take treaty benefits does not necessarily extinguish that person's claim to Métis rights, absent collective adhesion by the Métis community to the treaty.

In this case, the historical record demonstrates that the period immediately prior to 1850 is the appropriate date for determining effective European control in the Sault Ste Marie area. Hunting for food was integral to the Métis way of life at Sault Ste Marie in this period. The practice has been continuous to the present. Ontario's lack of recognition of any Métis right to hunt for food and the application of the challenged provisions infringes the Métis aboriginal right and conservation concerns did not justify the infringement. Even if the moose population in that part of Ontario were under threat, the Métis would still be entitled to a priority allocation to satisfy their subsistence needs.

Supplementary information:

In the companion case *R. v. Blais*, [2003] 2 S.C.R. 236, the accused, a Manitoba Métis, was convicted of hunting deer out of season. He had been hunting for food on unoccupied Crown land. His appeals to the Court of Queen's Bench and the Court of Appeal were based solely on the defence that, as a Métis, he was immune from conviction under the Wildlife Act regulations in so far as they infringed on his right to hunt for food under paragraph 13 of the 1930 Manitoba Natural Resources Transfer Agreement. Both appeals were unsuccessful. The Supreme Court of Canada unanimously affirmed the conviction and found that Manitoba Métis are not entitled to benefit from the constitutional protection awarded to "Indians" in paragraph 13 of the Agreement since the term "Indian" in that paragraph does not encompass the Métis. Indians and Métis of Manitoba are separate and distinguishable groups.

Languages:

English, French (translation by the Court).



Identification: CAN-2003-3-003

a) Canada / **b)** Supreme Court / **c)** / **d)** 06.11.2003 / **e)** 28807 / **f)** Doucet-Boudreau v. Nova Scotia / **g)** *Canada Supreme Court Reports* (Official Digest) [2003] 3 S.C.R. 3 / **h)** Internet: <http://www.lexum.umontreal.ca/csc-scc/en/index.html>; CODICES (English, French).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.
 1.6.6 **Constitutional Justice** – Effects – Execution.
 3.4 **General Principles** – Separation of powers.
 3.17 **General Principles** – Weighing of interests.
 4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
 5.2.2.10 **Fundamental Rights** – Equality – Criteria of distinction – Language.
 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
 5.3.39 **Fundamental Rights** – Civil and political rights – Linguistic freedom.

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

Keywords of the alphabetical index:

Language, minority, education / Education, secondary school / Province, education, competence, obligation to exercise / Court, judgment, execution, jurisdiction to oversee / Court, order to report / *Functus officio*, doctrine.

Headnotes:

Courts have the obligation under Section 24.1 of the Canadian Charter of Rights and Freedoms to issue effective, responsive remedies that guarantee full and meaningful protection of Charter rights and freedoms. The obligation imposed on the Province and the *Conseil* by the trial judge to report to him on the status of their efforts to comply with his order to use their “best efforts” to provide French-language school facilities and programs by specific dates is a remedy that is “appropriate and just in the circumstances”.

Summary:

Francophone parents living in five school districts in Nova Scotia applied for an order directing the Province and the *Conseil scolaire acadien provincial* to provide, out of public funds, homogeneous French-language facilities and programs at the secondary school level. Nova Scotia did not deny the existence or content of the parents’ rights under Section 23 of the Canadian Charter of Rights and Freedoms but it failed to prioritize those rights and delayed fulfilling its obligations, despite clear reports showing that assimilation was reaching critical levels. The trial judge ordered the Province and the *Conseil* to use their “best efforts” to provide school facilities and programs by specific dates and retained jurisdiction to hear reports from Nova Scotia on the status of these efforts. The Province appealed from the judgment to the extent that the trial judge had retained jurisdiction to hear these reports. The Court of Appeal held that the trial court did not have jurisdiction to order reports on the execution of his order. The Supreme Court of Canada set aside the judgment of the Court of Appeal and restored the trial court’s order.

A majority of 5 judges found that the remedy ordered by the trial judge was appropriate. Under Section 24.1 of the Canadian Charter of Rights and Freedoms, a superior court may craft any remedy that it considers appropriate and just in the circumstances. In doing so, it must exercise a discretion based on its careful perception of the nature of the right and of the infringement, the facts of the case, and the applica-

tion of the relevant legal principles. The Court must also be sensitive to its role as judicial arbiter and not fashion remedies which usurp the role of the other branches of government. An appropriate and just remedy in the circumstances of a Charter claim is one that meaningfully vindicates the rights and freedoms of the claimants and employs means that are legitimate within the framework of our constitutional democracy. It is a judicial one which vindicates the right while invoking the function and powers of a court. An appropriate and just remedy is also fair to the party against whom the order is made. The meaningful protection of Charter rights, and in particular the enforcement rights of Section 23 of the Canadian Charter of Rights and Freedoms, may in some cases require the introduction of novel remedies. The remedial power in Section 24.1 of the Canadian Charter of Rights and Freedoms cannot be strictly limited by statutes or rules of the common law, which, however, might be relevant to determining what is “appropriate and just in the circumstances”.

Given the critical rate of assimilation, it was appropriate to grant a remedy that would lead to prompt compliance. The remedy took into account and did not depart unduly or unnecessarily from, the role of the courts in Canadian constitutional democracy. The remedy vindicated the rights of the parents while leaving the detailed choices of means largely to the executive. The reporting order was judicial in the sense that it called on the functions and powers known to courts. Although the common law doctrine of *functus officio* cannot strictly pre-empt the remedial discretion in Section 24.1 of the Canadian Charter of Rights and Freedoms, an examination of the *functus* question indicates that the trial judge issued an order that is appropriately judicial. The reporting order was not unfair to the government.

The four dissenting judges found the order inappropriate under Section 24.1 of the Canadian Charter of Rights and Freedoms because the order gave the parties no clear notice of their obligations, the nature of the reports or even the purpose of the reporting hearings. The uncertainty engendered by the order amounted to a breach of procedural fairness. In this case, the trial judge assumed jurisdiction over a sphere traditionally outside the province of the judiciary, and also acted beyond the jurisdiction with which he was legitimately charged as a trial judge, thereby breaching the constitutional principle of separation of powers and the *functus officio* doctrine.

Languages:

English, French (translation by the Court).



Identification: CAN-2003-3-004

a) Canada / **b)** Supreme Court / **c)** / **d)** 23.12.2003 / **e)** 28026, 28148 / **f)** R. v. Marmo-Levine / **g)** *Canada Supreme Court Reports* (Official Digest) [2003] 3 SCC 74 / **h)** Internet: <http://www.lexum.umontreal.ca/csc-scc/en/index.html>; CODICES (English, French).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
 3.18 **General Principles** – General interest.
 3.19 **General Principles** – Margin of appreciation.
 4.5.2 **Institutions** – Legislative bodies – Powers.
 5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.
 5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.

Keywords of the alphabetical index:

Drug, prohibition, criminal law / Marihuana, possession, criminalization, imprisonment / Public health, drug, consumption.

Headnotes:

The use of marihuana is a proper subject matter for the exercise of Parliament's criminal law power. The prohibition to have in one's possession marihuana, including the availability of imprisonment, does not violate the right to liberty or the right to equality guaranteed by the Constitution.

Summary:

M. was charged with possession of marihuana for the purpose of trafficking, and C. with simple possession of marihuana. The Criminal Code provides for a maximum fine of \$ 1,000 or imprisonment for up to six months or both for a first offence of marihuana possession and a maximum fine of \$ 2,000 or imprisonment for up to one year or both for a subsequent offence. The accused argued that the prohibition, including the availability of imprisonment for simple possession, is not valid legislation, either because it does not properly fall within Parliament's legislative competence, or because the prohibition, and in particular the availability of imprisonment, violate the guarantees of the Canadian Charter of

Rights and Freedoms. At trial, the accused were convicted and both the Court of Appeal and the Supreme Court of Canada affirmed the convictions.

A majority of six judges found that parliament has the power to prohibit possession of marihuana and that this prohibition does not violate the Charter. Advancing the protection of vulnerable individuals is a policy choice that falls within the broad legislative scope conferred on Parliament. Control of a psychoactive drug that causes alteration in mental functions raises issues of public health and safety, both for the user and for those in the broader society affected by his or her conduct. The use of marihuana is therefore a proper subject matter for the exercise of the criminal law power.

While the availability of imprisonment for the offence of simple possession is sufficient to trigger scrutiny under Section 7 of the Canadian Charter of Rights and Freedoms, M's desire to build a lifestyle around the recreational use of marihuana does not attract Charter protection. For a rule or principle to constitute a principle of fundamental justice for the purposes of Section 7 of the Canadian Charter of Rights and Freedoms, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. Even if the "harm principle" could be characterized as a legal principle, it does not meet the other requirements.

A criminal law that is shown to be arbitrary or irrational will infringe Section 7 of the Canadian Charter of Rights and Freedoms. However, in light of the state interest in the avoidance of harm to its citizens, the prohibition on marihuana possession is neither arbitrary nor irrational. The effects on the accused of enforcement of the prohibition are not so grossly disproportionate that they render the prohibition on marihuana possession contrary to Section 7 of the Canadian Charter of Rights and Freedoms.

Prohibiting possession of marihuana for the purpose of trafficking does not infringe Section 15 of the Canadian Charter of Rights and Freedoms. A taste for marihuana is not a personal characteristic in the sense required triggering the equality protection, but is a lifestyle choice that bears no analogy with the personal characteristics listed.

In separate opinions the three dissenting judges found that the legislation violates a person's right to liberty under Section 7 of the Canadian Charter of

Rights and Freedoms and is not saved under Section 1 of the Canadian Charter of Rights and Freedoms. One of the minority judges was of the opinion that the state cannot prevent the general population, under threat of imprisonment, from engaging in conduct that is harmless to them, on the basis that other, more vulnerable persons may harm themselves if they engage in it. Having the potential to imprison a person whose conduct causes little or no reasoned risk of harm to others, the law offends the principles of fundamental justice. The two other dissenting judges concluded that the law, as it stands, is an arbitrary response to social problems resulting from the use of marihuana. In view of the availability of more tailored methods, the choice of the criminal law for controlling conduct that causes little harm to moderate users or to control high-risk groups for whom the effectiveness of deterrence or correction is highly dubious is out of keeping with Canadian society's standards of justice. The harm caused by prohibiting marihuana is fundamentally disproportionate to the problems that the state seeks to suppress.

Languages:

English, French (translation by the Court).



Croatia Constitutional Court

Important decisions

Identification: CRO-2003-3-013

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 14.08.2003 / **e)** U-IX-2534/2003 / **f)** / **g)** *Narodne novine* (Official Gazette), 133/03 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Judge, disciplinary measure / Traffic, accident, alcohol.

Headnotes:

A judge must act in a manner that does not diminish his own reputation or that of the judiciary, regardless of time and place.

Summary:

A judge of the County Court in Š., the complainant, applied to the Constitutional Court seeking a review of a decision delivered by the National Judicial Council on disciplinary proceedings against him. Those proceedings had been initiated at the request of the County Court in Š. (the applicant).

The impugned decision found the complainant guilty of breach of discipline on the basis of Article 20.2.6 of the National Judicial Council Act and imposed a fine of 1/3 of his salary for the six (6) months preceding April 2003, in accordance with the provision of Article 21.1.2 of the same Act.

The complainant considered that by imposing the maximum fine despite the existence of mitigating circumstances, the first instance body had infringed the general rules on the choice of the type and severity of the penalty, and asked the Court to allow

the appeal and mitigate the penalty of the first-instance decision to a reprimand or a reduced fine.

The National Judicial Council's case file indicated that the complainant was involved in a car accident on a road in the B. housing estate on 13 November 2002. After the accident, the complainant refused to comply with the request of an authorised official to take a breathalyser test, i.e. he refused to submit to an expert examination by providing blood and urine samples, and thus acted contrary to Article 289 of the Road Traffic Safety Act. The official made an entry in the Alcohol Intoxication Record that the complainant was visibly intoxicated.

Moreover, it was clear that the applicant had reclassified the breach of discipline from a serious breach of discipline to a simple breach of discipline. According to Article 28.3 of the National Judicial Council Act, a decision determining a judge's breach of discipline and ordering disciplinary measures may only relate to the breach of discipline itself and the person named by the applicant in the request.

Article 20 of the National Judicial Council Act provides as follows:

"A judge is liable for breach of discipline. The following shall be considered breach of discipline:
[...]
6. causing damage to the reputation of the court or judicial service in some other way."

Article 289 of the Road Traffic Safety Act provides as follows:

"1. An authorised official may subject a driver, a motorcycle passenger or a passenger on the front seat of a car to an official check by appropriate means and devices (breathalyser etc.), and may do the same with other participants in traffic where their conduct is disruptive to or endangers traffic, or the official may ask that person to submit to expert examination in order to determine whether that person has alcohol in his or her body, or shows signs of being under the influence of alcohol, narcotics or medication labelled as being prohibited prior to or during driving.

2. Traffic participants in paragraph 1 of this article shall submit to the police check and/or to the expert examination.

3. The blood and urine of a participant in traffic shall be analysed if he/she denies being under the influence of alcohol or having alcohol in the body, or denies being under the influence of narcotics or

medication labelled as being prohibited prior to or during driving, unless the analysis would have detrimental consequences on his/her health.

4. If the examination carried out in accordance with the provisions of this article shows that the participant in traffic was under the influence of alcohol, narcotics or medication labelled as being prohibited prior to or during driving, that person shall pay for the examination."

The Constitutional Court examined the complainant's defence. The Court found that the strict legal provisions of Article 289 of the Road Traffic Safety Act prescribe that the obligation is independent of the will of the participants in traffic. The Court, therefore, considered the complainant's refusal to submit to a breathalyser test as neither acceptable nor logical, because his argument of alleged non-intoxication could have been quickly and incontestably verified at the scene. By behaving in a serious unprofessional manner, as described in the first-instance judgment, the complainant had committed the essence of the breach of discipline described in Article 20.2.6 of the National Judicial Council Act, and there were no mitigating circumstances in the case.

The Constitutional Court found that the complainant did not partly admit the breach of discipline, i.e. that he had damaged the reputation of the Court and the judicial service. During the proceedings the complainant did not show any awareness that his conduct had damaged the reputation of the Court in which he was performing the duties of investigating judge, nor any awareness of damage to the reputation of the judicial service in general, nor did he show any regret for his extremely unprofessional conduct. The complainant admitted to committing only one act, namely his actual refusal to take a breathalyser test, as had already been established by the record on the breathalyser test made at the site.

Article 58 of the Judiciary Act provides as follows:

"A judge shall act so as to not to diminish his own reputation and the reputation of the judiciary, and so as not to cast doubt on his impartiality and independence in adjudication, or on the independence of the judiciary."

The foregoing statutory provision, which is *ius cogens* by its legal nature, lays down the obligation of judges to act in a manner that does not diminish the reputation of a judge or the judiciary, regardless of time and place. In the opinion of the Court, the judge's conduct, which was contrary to the statutory obligation, could not be deemed to amount to mitigating circumstances in the disciplinary proceed-

ings. Therefore, in the reasons for the impugned decision, the part reading, "...[t]he lack of any previous penalties in his disciplinary record...was taken into account as mitigating circumstances", was not acceptable.

Languages:

Croatian, English.



Identification: CRO-2003-3-014

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 12.09.2003 / **e)** U-III A-1165/2003 / **f)** / **g)** *Narodne novine* (Official Gazette), 156/03 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

1.2.2.1 **Constitutional Justice** – Types of claim – Claim by a private body or individual – Natural person.

1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.

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

Keywords of the alphabetical index:

Complaint, constitutional, admissibility / Execution, sentence, proceedings, reasonable time.

Headnotes:

The Constitutional Court is not competent to examine a complaint where a court of justice has not delivered a decision in a reasonable time in the case of execution proceedings relating to a final court judgment.

Summary:

The Constitutional Court rejected a constitutional complaint concerning a court of justice's failure to deliver a decision in a reasonable time in the case of execution proceedings relating to a court settlement.

After examining the case, the Constitutional Court found that the preconditions enabling the Court to act under Article 63 of the Constitutional Act on the Constitutional Court (hereinafter: the Constitutional Act) were not fulfilled.

In accordance with Article 63.1 of the Constitutional Act on the Constitutional Court (hereinafter: the Constitutional Act), the Constitutional Court shall initiate proceedings in response to a constitutional complaint even before all legal remedies have been exhausted in cases where the court of justice has not taken a decision within a reasonable time on the rights and obligations of a party, or on the suspicion or accusation for a criminal offence, or in cases where the impugned act grossly violates constitutional rights and it is completely clear that grave and irreparable consequences may arise for the applicant if Constitutional Court proceedings are not initiated. In accordance with Article 63 of the Constitutional Act, in a decision allowing a constitutional complaint for failure to take a decision in a reasonable time in paragraph 1 of this article, the Constitutional Court shall set a deadline for the competent court of justice to take a decision on the merits as to the applicant's rights and obligations. It follows from the aforementioned that the Constitutional Court shall initiate proceedings in response to a constitutional complaint in accordance with the provisions of Article 63 of the Constitutional Act for failure to decide in a reasonable time only in a case where the court of justice has not taken a decision on the merits as to the applicant's rights and obligations in a reasonable time, i.e. where it has not delivered a decision on the substance of the case.

In the particular case, the constitutional complaint was brought because execution proceedings were not effected as to the final act that decided the parties' rights and obligations. Consequently, the Constitutional Court was not called upon in the particular case to evaluate the acts of the court concerning the merits of the case.

Languages:

Croatian, English.



Identification: CRO-2003-3-015

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 17.09.2003 / **e)** U-I-1267/2002 / **f)** / **g)** *Narodne novine* (Official Gazette), 159/03 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

3.16 **General Principles** – Proportionality.

3.18 **General Principles** – General interest.

3.25 **General Principles** – Market economy.

4.10 **Institutions** – Public finances.

Keywords of the alphabetical index:

Financial control / Monopoly, state / Competition, economic, protection.

Headnotes:

Pursuant to the provisions of Article 49.1 and 49.2 of the Constitution, a favoured position is only allowed where provided for by law and where the restrictions are proportionate to the legitimate goal that is to be achieved by them. While prohibiting certain kinds of behaviour by enterprises in a monopoly position based on the particular law, the constitutional provision on the prohibition of monopolies does not prohibit monopolies as such.

The potential abuse of a monopoly position by an enterprise may not be the subject of constitutional court proceedings to review the constitutionality of the law.

Summary:

The Constitutional Court did not accept the proposal to institute proceedings to review the constitutionality of the Financial Agency Act (*Narodne novine*, no. 117/01, hereinafter: the Act).

The complainants considered that impugned Act put the Financial Agency (hereinafter: FINA) in a better position in relation to other business entities engaged in operations identical to those of FINA. The complainants argued that the impugned Act denied them the necessary updated financial indicators and data on the business operations of legal entities. They invoked, in particular, the provisions of Articles 3 and 17.1 of the Act. They alleged that the Act allowed the FINA to develop a monopoly position on the financial information market and that Article 3 of the Act was contrary to Articles 14.2, 49.1 and 49.2

of the Constitution, as well as to the Act on the Protection of Market Competition.

After obtaining an expert opinion from the Ministry of Finance, the Constitutional Court reviewed the impugned provisions of the Act, starting with those of Articles 14.2, 49.1 and 49.2 of the Constitution.

The impugned Act defines FINA as a legal person founded by the state and whose organisation and functioning are regulated by this Act and related subordinate legislation. According to Article 3, the Agency performs the operations of:

- “1. - IT support for the work of the state treasury system;
- IT support for the system of collecting public revenues;
- IT support for the REGOS (accepting and controlling payment orders related to the RS form; matching data, together with REGOS, with data on public pension contributions, delivery of payment orders for enforcement after verification and harmonisation to the authorised organisation for payment transaction services with which the taxpayer has an account);
- IT support to other registries of insured persons; and
- collecting, processing, publishing and delivering the data from various sources, and ensuring the linking of and multipurpose use of data from the register for further evidentiary, analytic and informational use by ministries and government services for the needs of state statistics and the public.

2. The Agency prepares the statistics of financial flows (that have been reported to authorised organisations), analyses, business interim reports and other information, as well as performing other tasks prescribed by regulations and based on contracts, and for this purpose, the Agency:

- collects, processes, publishes and delivers data from the prescribed statistical reports;
- collects and processes data from the tax balance sheets of business entities and delivers them to the bodies in charge of tax supervision; and
- collects, processes and delivers data on incorporated companies and large enterprises in compliance with the Securities Act;
- collects and consolidates data on income and expenditures of business entities; and
- collects and consolidates data on outstanding due obligations recorded in the bank accounts of business entities.

3. The Agency collects, processes and publishes data established by the program of statistical research of the Republic of Croatia.

4. The Agency collects, prepares and consolidates data on business entities, and keeps the appropriate registries.

5. The Agency also keeps other registries, records and data for the needs of the state and other entities.

6. The Agency participates in more extensive statistical activities and prepares lists, as well as performing other activities foreseen in the relevant regulations.

7. It performs other tasks to meet the needs of the Republic of Croatia and the units of local and regional self-government, as determined by special laws or other regulations.”

Article 14.2. guarantees the equality of all before the law. The equal position of all users and clients of the Agency's services is guaranteed by the impugned provisions, and no category of users is favoured. In that respect, special importance is attached to Article 6 of the Act, which sets out that relations between the Agency and all users and clients under Articles 3, 4 and 5 of the Act shall be established and governed by contract.

Pursuant to the provision of Article 49.1 of the Constitution, entrepreneurial and market freedoms are the foundations of the economic system of the Republic of Croatia. The constitutional guarantee of the equal legal position of all entrepreneurs on the market and the prohibition of abuse of a monopoly position (prohibition of monopoly pursuant to the former provision of Article 49.2 of the Constitution) serve to promote this economic system.

As to the compatibility of the impugned provisions with the provisions of the Act on the Protection of Market Competition, the Constitutional Court declared itself not competent to review the conformity of laws with other laws.

The Constitutional Court held that the provisions of the Financial Agency Act regulating FINA's operations were not contrary to the constitutional provision on the ban of abuse of a monopoly position established by law, for the reason that the legislator's authority to regulate that activity, as set out in the impugned provisions of the Act, derives from the above-mentioned constitutional provisions. The potential abuse of its position by FINA may not be the subject of constitutional court proceedings for review of the constitutionality of the law. The Constitutional Court has taken the same position in Ruling no. U-I-881/1999 *et alia* of 6 February 2002 (not published).

Languages:

Croatian, English.



Identification: CRO-2003-3-016

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 17.09.2003 / **e)** U-I-1681/2003 / **f)** / **g)** *Narodne novine* (Official Gazette), 152/03 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

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

5.3.40.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.

Keywords of the alphabetical index:

Constitutional Court, jurisdiction, laws, equal rank, conflict / Minority, representation in Parliament / Vote, double.

Headnotes:

1. The principle of one vote and the number of votes recognised by the legislator in elections are two different institutes of electoral law that are not interdependent or interlinked in any way.

2. The Constitutional Court is not competent to assess the conformity of organic laws of equal legal force with each other.

Summary:

Two political parties representing Italian and Serb national minorities submitted a proposal to institute proceedings to review the conformity of the provision of Article 3.2 of the Law on the Election of Representatives in the Croatian Parliament; hereinafter: the Election Law) with the provisions of Articles 15.3 and 45.1 of the Constitution and with the provision of Article 19.1 of the Constitutional Act on the Rights of National Minorities.

The applicants stated that in the constitutional changes of 2000, the provision of Article 3.2 of the Election Law, which regulates the right and obligation of voters to vote only once, prevented members of national minorities from exercising general and special suffrage because it laid down that a voter had only one vote in an election. That, in the applicant's opinion, meant that members of national minorities could vote for representatives in the Croatian Parliament either on the basis of general suffrage (like all other Croatian citizens) or on the basis of special suffrage (as members of national minorities), that is to say, the same way as before the enactment of the constitutional changes of 2000.

That procedure, in their opinion, was not in accordance with the provisions of Article 15.3 of the Constitution and Article 19 of the Constitutional Act on the Rights of National Minorities, which preclude reducing national minority suffrage to an alternative right ("either/or" – either general suffrage or special suffrage). The applicants considered that members of national minorities enjoyed, on the basis of those provisions of the Constitution or of the Constitutional Act on the Rights of National Minorities, both general and special suffrage ("and/and" – special suffrage in addition to general suffrage).

The Constitutional Court found the proposal unfounded. It recalled Article 3 of the Election Law, which reads: "Voters are guaranteed free choice and secret ballot. Voters have the right and duty to vote only once. No one may demand voters to reveal whom they voted for. No one may be held liable for voting or for not voting."

The Constitutional Court noted that that provision regulates the fundamental principles underlying the right to vote enjoyed by Croatian citizens who have reached the age of majority. The provision of Article 3.2 of the Law on Elections stipulates that every voter has the right and duty to vote only once, and it thereby expresses the rule in the electoral legislation of the Republic of Croatia that a voter, having voted once in an election, does not have the right to vote again in the same election.

A voter who votes more than once in the same election violates the legal duty of voting only once and commits the crime of abusing his/her electoral right under Article 118 of the Criminal Code.

The Court held that the principle of one vote and the number of votes recognised by the legislator in elections are two different institutes of electoral law that are not, as the applicants wrongly argued, interdependent or interlinked in any way. Consequently, there were no grounds for the applicants'

proposal to institute proceedings to review the conformity of Article 3.2 of the Election Law with the provisions of Article 15.3 of the Constitution and Article 19 of the Constitutional Act on the Rights of National Minorities.

The Court found that the applicants wrongly linked the impugned provision of Article 3.2 of the Election Law with the exercise of suffrage by members of national minorities. The exercise of suffrage, including that of members of national minorities, is regulated in other legal provisions referring to the relevant provisions of the Constitution.

Furthermore, the Court found the proposal to review the conformity of the Election Law with the Constitutional Act on the Rights of National Minorities as unfounded since the applicants wrongly argued that the Constitutional Act on the Rights of National Minorities was of higher legal rank than the Election Law. Both laws are organic laws of equal legal rank, and the Constitutional Court is not competent to assess their conformity with one another.

Languages:

Croatian, English.



Identification: CRO-2003-3-017

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 01.10.2003 / **e)** U-I-1199/2003 / **f)** / **g)** *Narodne novine* (Official Gazette), 175/03 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

4.5.10 **Institutions** – Legislative bodies – Political parties.

4.8.6 **Institutions** – Federalism, regionalism and local self-government – Institutional aspects.

4.9 **Institutions** – Elections and instruments of direct democracy.

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

Keywords of the alphabetical index:

Election, electoral list, non-party / Local self-government body, representative, deputy.

Headnotes:

The different statutory regulation of the status and powers of political parties and of voters in certain issues (independent lists) related to the elections or the office of elected members of representative bodies is not subject to review either from the point of view of one group being discriminated against in relation to the other, or from the point of view of their equality in the sense of requesting identical rules for both subjects.

Voters who put forward an independent list by collecting signatures, however, are persons who have come together *ad hoc* with the exclusive purpose of putting forward their own list of candidates in a particular election. This group of voters has no legal capacity but only the legal status of an authorised electoral subject for the purpose of participating once in an election.

Summary:

The Constitutional Court rejected the proposal to institute proceedings for review of the constitutionality of Article 2 of the Law on the Revision of and Amendments to the Law on the Election of Members of the Representative Bodies of the Units of Local and Regional Self-Government (*Narodne novine* no. 45/03; hereinafter: "the ZID ZI").

The impugned provision reads:

A new paragraph shall be added after paragraph 3 of Article 8, reading:

"The deputy to the member of the representative body elected on an independent list shall be the first non-elected candidate on that list."

The applicant, who is the head of an independent list, argued that the impugned provision was not in accordance with the principle of the rule of law laid down by Article 3 of the Constitution. He also argued that the impugned provision was not in accordance with the principle of prohibiting discrimination on any basis, guaranteed by Article 14.1 of the Constitution, because, in his opinion, the impugned provision put the independent lists in an unequal, discriminated position in relation to the party and the coalition lists as to the deputies to members of representative

bodies of the units of local and regional self-government (hereinafter: the local representative bodies).

After reviewing the applicant's arguments and the relevant statutory provisions, the Constitutional Court found that the impugned provision was not contrary to the principle of the rule of law as the highest value of the constitutional order of the Republic of Croatia, prescribed in Article 3 of the Constitution, or to the principle of prohibiting discrimination, guaranteed in Article 14.1 of the Constitution.

As there was a legal lacuna in the institute of deputies to members of local representative bodies elected on independent lists, Article 2 ZID ZI supplemented (in the new paragraph 4) the former Article 8 ZI, which now reads:

"Article 8

Members of representative bodies have deputies who shall perform their duty if the office of the member of representative body is either suspended or has terminated prior to the expiration of the term for which he/she was elected.

A deputy to a member of a representative body elected from a party list shall be a non-elected candidate from the list on which the member was elected, and he/she shall be appointed by the political party that put forward the list.

A deputy to the member of a representative body elected from a coalition list of two or more political parties shall be a non-elected candidate from the list on which the member was elected, and he/she shall be appointed by the political party to which the member of the representative body whose office ceased belonged to at the moment of election.

A deputy to a member of a representative body elected on an independent list shall be the first non-elected candidate on the list."

It follows from the above that the provisions of Article 8.2 and 8.3 of the ZI regulate the institute of deputy to the members of local representative bodies elected on party and coalition lists. On the other hand, the new Article 8.4 (which amended the former Article 8 of the ZI, and which is in fact the impugned provision of Article 2 ZID ZI) regulates the institute of deputy to the members of local representative bodies elected on independent lists.

According to the provision of Article 11.1 of the ZI, political parties registered in the Republic of Croatia as well as voters may put forward lists for the election of members of representative bodies. Therefore, there are two different electoral subjects who are authorised by law to put forward lists of candidates at elections for members of local representative bodies.

The Constitutional Court found, in its ruling no. U-I-2057/2003 of 17 September 2003 (*Narodne novine*, no. 152/03), in which it gave reasons, that the nominators of an independent list of candidates were all the voters who had signed it. Therefore, it is not correct to identify the nominators of an independent list of candidates as the first three signatories of the independent list (as does Article 12.2 of the ZI) or the majority of candidates put forward on the independent list. The nominator of the independent list is the group of all the voters who signed the list, and not an individual or a certain number of individuals from that group, regardless of whether they submitted the independent list, or are the candidates on the independent list, or head the independent list.

Unlike a group of voters, political parties as authorised nominators of lists of candidates exist and operate independently of electoral procedures. They are legal entities entered in the register of political parties with the competent ministry, and whose aims, founding and operation, including decision-making procedures, are regulated by special law and statutes passed in accordance with the law.

Therefore, although the legislator may set out that a political party nominating a list may determine the deputy to the member of the representative body elected from that list, the same is not applicable to an *ad hoc* group of voters to which the status of a legal person is explicitly denied the after the conclusion of the elections.

For the reasons stated above, the different statutory regulation of the status and powers of political parties and voters in certain issues connected with elections or the office of elected members of the representative bodies are not subject to review from the point of view of one group being discriminated against in relation to the other. For the same reasons, the mutual relationship of these two different electoral subjects may not be reduced to the issue of their equality, in the sense of requesting identical rules for both subjects, as the applicant wrongly argued.

Languages:

Croatian, English.



Identification: CRO-2003-3-018

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 01.10.2003 / **e)** U-I-2058/2003 / **f)** / **g)** *Narodne novine* (Official Gazette), 175/03 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

4.5.10 **Institutions** – Legislative bodies – Political parties.

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

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

Keywords of the alphabetical index:

Election, electoral list, non-party / Election, candidate list, minimum support.

Headnotes:

Unlike political parties, voters who nominate the lists of candidates form a group that does not have the status of a legal person. That group is created *ad hoc* for the sole purpose of participating once in an election by putting forward its independent list of candidates. The law provides for these voters to be recognised as a group of individuals nominating an independent list of candidates, only if they collect the number of signatures required for the legislator to grant them the status of an authorised member of the electorate.

Summary:

The Constitutional Court rejected a proposal to institute proceedings for review of the conformity of Articles 11 and 12 of the Law on Election of Members of the Representative Bodies of the Units of Local and Regional Self-Government (hereinafter: “the Law”, *Narodne novine*, nos. 33/01, 10/02, Decision of the Constitutional Court no. U-I-39/2002 of 23 January 2002, 155/02 – Article 43.2 of the Constitutional Act on the Rights of National Minorities, and 45/03).

The impugned provisions read as follows:

“Article 11

Political parties registered in the Republic of Croatia shall have the right to nominate lists of candidates for the election of members of representative bodies.

Political parties determine and nominate lists of candidates for the election of members of representative bodies in the manner foreseen by their statutes, or in compliance with special statutory decisions.

When drawing up a list, the nominator is obliged to bear in mind the principle of the equality of genders.

Two or more political parties registered in the Republic of Croatia may propose a coalition list for the election of members of representative bodies.

Article 12

When voters, as authorised nominators, nominate an independent list of candidates, in order for that list to be legally valid list they must collect:

- 100 voters' signatures for a municipality list;
- 150 voters' signatures for a city list; and
- 500 voters' signatures for a county list, i.e. for the list for the election of members of the City Assembly of the Town of Zagreb.

The submitters of a proposal of an independent list of candidates are the first three persons signing the independent list, in the order of their signatures.”

The proponent claimed that the above-mentioned legal provisions were not in conformity with the provision of Article 14.2 of the Constitution, which guarantees the equality of all before the law. The proponent argued that the impugned legal provisions unequally regulated the position of citizens in the nomination procedure, depending on whether or not they were members of political parties.

He substantiated his claims by indicating that political parties had the right to nominate a list of candidates for the election of members of representative bodies, without having to collect a certain number of voters' signatures, whereas voters nominating an independent

list of candidates for such an election had to collect a certain number of voters' signatures before their list of candidates would be considered legally valid.

Starting with Articles 45.1 and 132.1 of the Constitution, the Croatian Parliament passed the law governing election procedure and the manner of realising and protecting the electoral right of Croatian citizens in direct elections for members of representative bodies of local and regional self-government units. According to the relevant provisions of the Election Law, political parties and voters have the right to nominate lists of candidates for the election of members of local representative bodies.

Political parties, acting either alone or in coalition with other political parties, may nominate lists of candidates, while voters may nominate lists of candidates on the basis of duly collected signatures. Therefore, there are two different kinds of members of the electorate that are authorised by law to nominate lists of candidates for elections of members of the representative bodies of local and regional self-government units.

Political parties become legal persons (and acquire legal capacity) when they are entered in the register of political parties kept by the competent ministry. Thus, the applicant erred when he stated that party lists of candidates were nominated by “citizens organised in a political party”. The authorised nominator of a party list of candidates is exclusively the political party as a legal person, which is a single and separate member of the electorate under electoral procedure, regardless of how many members it has at the time of elections. For the same reasons, there were no grounds for the proponent's claim that “citizens organised in a political party” were privileged in relation to other voters because only 100 voters (i.e. Croatian citizens who have reached the age of majority and have legal capacity) were necessary to found a political party, while 100, 150 or 500 voters' signatures had to be collected in order to nominate an independent list, depending on whether it was municipal, city or county list or one for the City Assembly of the Town of Zagreb. Unlike political parties, voters- as individuals – appear as a group when they nominate lists of candidates, and that group is not a legal person and does not have legal capacity. That group is created *ad hoc* for the sole purpose of participating in one election by putting forward its independent list of candidates. The law sets out that these voters are to be legally recognised as a group of individuals nominating an independent list of candidates, only if they collect the number of signatures required for the legislator to recognise their status as an authorised member of the electorate.

In accordance with the above, the Constitutional Court found the proposal unfounded.

Languages:

Croatian, English.



Identification: CRO-2003-3-019

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 03.10.2003 / **e)** U-III-2034/2001 / **f)** / **g)** *Narodne novine* (Official Gazette), 156/03 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

5.2 **Fundamental Rights** – Equality.

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

Keywords of the alphabetical index:

Appeal, time-limit / Criminal procedure, Code.

Headnotes:

The provision of Article 362.2 of the Code of Criminal Procedure provides that in cases where a judgment is delivered to the defendant and his attorney on different days, the time-limit for lodging an appeal starts running on the later date.

Summary:

The Constitutional Court accepted the constitutional complaint brought against the judgment and ruling of the County Court in V., whereby the appeal lodged by the applicant's attorney had been dismissed for being lodged after the expiry of the time-limit.

In the constitutional complaint, the applicant claimed that his attorney's appeal had been wrongfully dismissed because Article 362.2 of the Code of Criminal Procedure (hereinafter: the ZKP) provides that in cases where the judgment has been delivered to the defendant and his attorney on different days, the deadline for appeal starts running on the later date.

After examining the case, the Constitutional Court found that the court judgment had been delivered to the applicant's attorney on 27 April 2001, and to the applicant on 6 June 2001. The applicant's attorney lodged an appeal on 11 May 2001, and the defendant/applicant lodged an appeal on 14 June 2001. Because it was a summary procedure, the deadline for the appeal, in accordance with Article 442.4 of the ZKP, was eight days.

It follows from the above that the impugned ruling was legally unfounded, as the last day of the time-limit for lodging an appeal was 14 June 2001, and the applicant's attorney lodged an appeal on 11 May 2001.

Therefore, the Constitutional Court found that the impugned decision infringed the applicant's right to the equality of all before the law provided in Article 14.2 and the right to appeal guaranteed in Article 18.1 of the Constitution.

Languages:

Croatian, English.



Identification: CRO-2003-3-020

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 23.10.2003 / **e)** U-I-1441/2001 / **f)** / **g)** *Narodne novine* (Official Gazette), 177/03 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

University, autonomy / Education, professional / Education, institution, differences in organisation and management / Education, higher, polytechnic institute, university level education.

Headnotes:

Under the Constitution, the legislator may freely regulate relationships connected with the foundation, organisation, organs, competences as well as rights, obligations and responsibilities of polytechnics, without being bound by the limitations arising from the constitutional guarantee of the autonomy of universities.

Summary:

The Constitutional Court examined a proposal to institute proceedings to review compliance with the Constitution of the provision of Article 120.2 of the Law on Higher Education (hereinafter: "the Law": *Narodne novine*, nos. 96/1993, 34/1994, 21/1995, 48/1995, 29/1996, 54/1996, 59/1996 – consolidated text, 14/2000 and 26/2000, 67/2000, 94/2000, 129/2000 and 78/2003).

The impugned provision reads:

"A polytechnic is run by the management board appointed by the founder for a term of four years in the manner of and in accordance with the founding act and the statute."

The proponent argued that the impugned statutory provision was not in accordance with the provision of Article 67 of the Constitution because it prescribed the existence of the management board of a polytechnic, which was to be appointed by its founder. According to the proponent, a polytechnic was one of the organisational forms of higher education, and it was higher education as such that was protected by the constitutional guarantee of the autonomy of universities in Article 67 of the Constitution, regardless of the organisational form of higher education. The proponent argued: "although the writer of the Constitution did not include the polytechnic, as an institution, in the constitutional provisions either explicitly or sufficiently, there is no doubt that the constitutional provision on the autonomy of universities applies to polytechnics as well".

Pursuant to Article 47.1 of the Law, institutions of higher education are universities, with their incorporated faculties and art academy, the polytechnics and the schools of higher professional education (*visoka škola*).

Under the title "Management of the Polytechnic", the impugned Article 120.2 of the Law stipulates that the management board is the managing body of the polytechnic (while the same article of the Institutions

of Higher Education Act provides, in addition to the management board, that the rector is the head of the polytechnic, and that the professional council of the polytechnic decides on professional matters in the polytechnic). The impugned provision is still valid and applicable even after the enactment of the Scientific Activities and Higher Education Act until the specific set deadline, pursuant to Articles 114.1 and 114.2 in conjunction with Article 124 of that Act.

Article 67 of the Constitution sets out:

"The autonomy of universities shall be guaranteed.
Universities shall independently decide on their organisation and work in conformity with the law."

The Constitutional Court found, in its decision and ruling no. U-I-902/1999 of 26 January 2000, published in *Narodne novine* no. 14/2000 (hereinafter: "the decision"), that the constitutional guarantee of the autonomy of universities related to statutorily founded universities and their constituent units on the ground that only universities (and their constituent units) were involved in university-level and scientific education, as a special kind of higher education. On the other hand, polytechnics were involved in professional and vocational education as a kind of higher education (the applicant called it higher educational activity) that differed from university-level or scientific education. In that sense, point 3.1. of the decision held:

"Universities and the higher educational institutions included in universities are constitutionally different from other institutions of higher education inasmuch as only the former are included in the constitutional guarantee of freedom of scientific creativity in Article 68.1 of the Constitution, which leads to their statutory difference, because only universities and institutions of higher education included in universities perform studies that are also a preparatory stage for scientific work."

In accordance with this, Article 10 of the Higher Education Act stipulates that public universities are founded by law, whereas public polytechnics are established by decree of the Government of the Republic of Croatia. Bearing that in mind, the statutory provision setting out that a polytechnic has a management board that is appointed by its founder for a four-year term is not subject to review from an aspect of the constitutional guarantee of the autonomy of universities, prescribed by Article 67 of the Constitution, on the ground that this constitutional guarantee does not apply to polytechnics.

The Constitutional Court concluded that Article 2.4.1 of the Constitution enabled the legislator to freely regulate relationships relating to the foundation, organisation, organs, competences as well as the rights, obligations and responsibilities of polytechnics, without being bound by the limitations arising from the constitutional guarantee of the autonomy of the universities. Therefore the proposal was rejected.

Languages:

Croatian, English.



Cyprus Supreme Court

Important decisions

Identification: CYP-2003-3-002

a) Cyprus / **b)** Supreme Court / **c)** / **d)** 04.12.2003 / **e)** 137 / **f)** Stejaru v. Ioannou / **g)** *Cyprus Law Reports* (Official Digest) / **h)**.

Keywords of the systematic thesaurus:

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

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

5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to a hearing.

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

Keywords of the alphabetical index:

Divorce, proceedings, foreigner, deportation / Deportation, foreigner, before the hearing.

Headnotes:

Violation of the right to a fair trial and the right to present one's case before the Court, and the right to adduce or caused to be adduced one's evidence renders the trial void in its entirety.

Summary:

Article 30.2 of the Constitution safeguards the right to a fair trial. Under Article 30.3.b and 30.3.c of the Constitution every person has the right to present his case before the court, to have sufficient time necessary for its preparation and to adduce or cause to be adduced his evidence and to examine witnesses according to law.

Article 35 of the Constitution imposes upon the legislative, executive and judicial authorities of the Republic the obligation to secure, within the limits of

their respective competence, the efficient application of the above provisions of the Constitution.

The appellant was a citizen of Romania. On 14 August 1997 she entered into a civil marriage with the respondent, a citizen of the Republic of Cyprus. After the marriage, the couple settled permanently in Cyprus. On 28 September 1998 the husband filed with the Family Court a petition for divorce. He alleged that the marriage has been irretrievably broken down due to the behaviour of the appellant. In her defence, the appellant denied all the allegations of her husband.

In support of the divorce petition oral evidence was given by the husband. On the day of hearing of the petition counsel for the appellant informed the Court that she had been deported from Cyprus 5 days before the day of hearing. He further informed the Court, that he had requested the immigration authorities to permit the appellant to remain in Cyprus only for the purpose of the hearing of the divorce petition but his request was refused. In the circumstances appellant's counsel stated that he will handle the case in her absence. He did not call any other evidence because he did not know the address of the only witness who was named by appellant. Thereupon, the Family Court pronounced its judgment whereby the marriage was dissolved due to its irretrievable break-down emanating from the behaviour of the appellant.

Upon appeal to the Family Court Appeal Division of the Supreme Court the appellant complained that, in breach of Article 30.2 of the Constitution, the trial was not fair. She also complained that she was deprived of the right to present her case before the Court and of the right to adduce evidence for her defence, which are safeguarded by the above Article 30.3.b and 30.3.c of the Constitution.

The Appeal Court allowed the appeal and ordered a re-trial of the case before a court of different composition. It held:

“Violation of the rights safeguarded by Article 30.2, 30.3.b and 30.3.c renders the trial void in its entirety. In this case we find that there was a violation of the right of the appellant to a fair trial under Article 30.2 of the Constitution since she was deprived of the right to present her case before the Court and/or to adduce evidence in support of her defence in accordance with Article 30.3.b and 30.3.c of the Constitution. The deprivation of this right was brought about by the way in which the executive dealt with her case, that is the Department of Immigration, as well as by the way in which the trial court dealt with the case after it had been informed by her counsel that she had been

deported 5 days before the hearing, in spite of his representations to the Immigration Department to allow her to remain in Cyprus until the hearing so as to be enabled to be present at the trial, in order to give evidence and call a witness in support of her defence. Within the framework of its obligations under Article 35 of the Constitution, the Department of Immigration, on the one hand, had to arrange the stay of appellant in Cyprus so as to be afforded the opportunity to appear before the Court, at the hearing of her case, and on the other hand the trial court, upon being informed of the manner in which the Department of Immigration acted, notwithstanding that it was aware of the hearing, instead of proceeding with the hearing, it ought to have adjourned the hearing on a future date and, at the same time, to indicate to the Department of Immigration that, in accordance with Article 35 of the Constitution it had to allow the return of the appellant to Cyprus for a few days, so as to be enabled to appear before the Court and defend her case.”

Languages:

Greek.



Czech Republic

Constitutional Court

Important decisions

Identification: CZE-2003-3-011

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 15.04.2003 / **e)** I ÚS 125/99 / **f)** Damages caused by decisions of Government Agencies / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

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

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

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

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

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

Keywords of the alphabetical index:

Damages, claim, access to courts / Law, least harsh, application, principle / Material law-based state / Justice, principle.

Headnotes:

Due to the social and political changes after 1989, in particular in connection with the adoption of the Charter of Fundamental Rights and Basic Freedoms “the Charter” which was incorporated into the constitutional order of the Czech Republic, the Act on Liability for Damage Caused by Decisions of Government Agencies or Incorrect Official Procedure needs to be interpreted in accordance with the applicable provisions of the Charter.

Summary:

In 1982, the complainant was sentenced to a prison sentence and a part of her assets was confiscated. In 1992, at the complainant’s request, the Attorney General filed a complaint for a violation of the law. The Supreme Court repealed the sentencing decision of 1982 and ordered that the case be reviewed. The public prosecutor dismissed the case because the criminal act came under the statute of limitations.

The complainant thus brought a claim for compensation against the Ministry of Justice. The Ministry of Justice referred the complainant to civil-law procedure. Ordinary courts dismissed her complaint and the Supreme Court dismissed her extraordinary appeal as well.

The complainant argued that her right to fair trial had been violated.

The constitutional complaint was found substantiated and admissible.

The complainant sought financial and substantive compensation pursuant to the Act on Liability for Damage Caused by Decisions of Government Agencies or Incorrect Official Procedure. Ordinary courts concluded that there was no basis for the complainant’s claim for compensation for damage. According to the courts, a decision on the dismissal of a matter prior to the initiation of criminal proceedings cannot be viewed analogously to a decision on the termination of criminal proceedings.

However, after the public prosecutor ruled that the matter be dismissed, a situation occurred where the complainant served a prison sentence and had a part of her assets confiscated, although there was no decision that would provide a legal basis for such a criminal sanction. The fact that no such decision existed cannot be imputed to the complainant.

Ordinary courts decided on the complainant’s claim pursuant to the Act on Liability for Damage Caused by Decisions of Government Agencies or Incorrect Official Procedure. Due to social and political changes after 1989, the said law needs to be interpreted in accordance with the applicable provisions of the Charter. When reviewing the complainant’s claim, ordinary courts failed to act in accordance with the Charter. This resulted in a breach of the complainant’s right guaranteed by the Constitution, namely, an overly narrow interpretation of the provision of Article 36.3 of the Charter of Fundamental Rights and Basic Freedoms and the Act on Liability for Damage Caused by Decisions of Government Agencies or Incorrect Official Procedure.

The purpose of the said provision is to provide compensation to those who were injured through illegal or incorrect action on the part of government agencies. This provision generally stems from the fact that the state exists in order to protect its citizens and persons legally sojourning in its territory, and to guarantee that their rights set out in the Constitution and laws of the Czech Republic are guaranteed, and that they are able to seek recourse in the event that their rights are violated. Article 36.4 of the Charter of Fundamental Rights and Basic Freedoms refers to a separate act regulating such conditions. At the time when the injury occurred, the separate act was the Act on Liability for Damage Caused by Decisions of Government Agencies or Incorrect Official Procedure, which granted the right to compensation for damage caused by a sentencing decision only in those cases where an acquittal was granted or where the criminal proceeding was terminated. This provision thus restricted the possibility of granting the right to compensation for damage to two strictly defined cases.

The Constitutional Court took into account the fact that the complainant was injured due to an unlawful court decision. At the level of general law, the Czech legal order provided no effective means for the complainant to exercise her right to compensation, although she was not at fault in any way. The principle to be applied is the fundamental principle of protection of rights of everyone injured through unlawful action on the part of government agencies, whereby the complainant needs to be afforded protection. The specific provision of law applied by ordinary courts was unable to afford such protection. A restrictive interpretation of the aforesaid law is not appropriate, also with a view to Article 13 ECHR, as it creates an environment of absence of liability for states measures injurious to the rights and property of the citizens.

In the present matter, an interpretation of the act on liability which not only does not conform to the Charter, is moreover contrary to the principles of a material law-based state and the concept of justice as an aim of court proceedings (see I. ÚS 245/98).

The Constitutional Court established that the complainant's right to compensation for damage caused by an unlawful court decision had been violated, and that the courts had failed to afford the complainant's rights lawful protection. The Constitutional Court thus repealed the contested decision.

Languages:

Czech.



Identification: CZE-2003-3-012

a) Czech Republic / **b)** Constitutional Court / **c)** Second Chamber / **d)** 02.10.2003 / **e)** II. ÚS 142/03 / **f)** Custody prior extradition / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to a hearing.

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

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

Keywords of the alphabetical index:

Expulsion, prior detention.

Headnotes:

Pursuant to the Criminal Code, before a decision is made on custody prior to extradition, the sentenced person needs to be heard, possibly through a court approached for this specific purpose.

The judicial body reviewing the remedy against a decision on custody or deciding on custody needs to provide guarantees inherent in an instance of judicial nature. The proceeding needs to be contradictory and guarantee the "equality of arms" between the parties, the public prosecutor and the detainee. Such guarantees are not met if the complainant is not allowed to be heard in the matter.

A person whose personal freedom is restricted is unable to fully and effectively avail him/herself of his/her rights as guaranteed by Article 5 ECHR, if such person is not acquainted with the underlying reasons of such restriction. The Court is obliged to ensure that the complainant be advised of grounds for custody forthwith. It is not the complainant's fault that the Criminal Code currently does not expressly provide that the complainant should be advised of the

facts at issue. The state is obliged to ensure that fundamental human rights and freedoms are preserved.

Summary:

The complainant was found guilty of the criminal act of forgery of money, and was sentenced to a prison sentence and expulsion from the Czech Republic for an indefinite term.

The complainant was taken into custody prior to expulsion on the grounds of substantiated concern that upon release from the correctional facility, he might frustrate the expulsion order. The Court decided against setting bail. The complainant appealed the court decision. The appeal was rejected by the High Court. A constitutional complaint against the decision was filed. The complainant contested that he was not advised of the grounds for restriction of his personal freedom, and was not provided with information in a language comprehensible to him. The custody proceeding was not in accordance with the Criminal Act.

The municipal Court referred to the rationale in its decision. The High Court proposed that the complaint be dismissed because it failed to find the contended defects in the decision.

The constitutional complaint is founded.

No amendment to the Constitution may be interpreted to mean a restriction of the procedural level of protection of fundamental rights and freedoms already achieved (Pl. ÚS 36/01, no. 403/2002 Coll., Pl. ÚS 44/02, no. 210/2003 Coll.). The scope of the notion of constitutional order cannot be interpreted solely with a view to the provisions of Article 112.1 of the Constitution, but, in light of the provisions of Articles 1.1 and 2 of the Constitution, needs to include ratified and promulgated international treaties on human rights and fundamental freedoms.

The complainant contended that the Court decided on custody non-publicly, without hearing the complainant. The Constitutional Court assessed whether the decision on custody was "in accordance with the proceeding stipulated by law" and "lawful" within the meaning of the Constitution. The European Convention on Human Rights refers to national law in this matter and stipulates that its substantive and procedural provisions need to be respected. Further, it requires that the deprivation of freedom be compatible with the aim of protecting an individual against arbitrary action. Failure to comply with national law standards constitutes a violation of the Convention.

According to the Criminal Act, a sentenced person may be taken into custody only in where there is a risk that the sentenced may not be served and that the Court does not elect to use a different measure instead. According to the contested decisions, this reason was satisfied.

There are no specific provisions governing the procedure for imposing custody prior to extradition, and the general provisions on the procedure for custody are thus applied.

The judge before whom the accused is brought needs to question the accused, decide on custody and advise the accused of his/her decision within 24 hours of the accused being presented. This provision relates to persons arrested pursuant to a warrant or detained.

The Constitutional Court noted in IV. ÚS 57/99 and I. ÚS 315/99 that "a decision imposing custody on a person serving a prison sentence, where such custody is to take place in the future, is clearly in conflict with the Constitution. If a person who is released from a correctional facility and against whom another criminal proceeding is pending at that time is to be taken into custody, such action can only be taken subject to the conditions set out in the Criminal Code being satisfied. Any other approach would be discriminatory and in violation of such person's rights guaranteed by the Constitution. Such conclusions are applied in this particular case as well, although the matter at issue is different. According to the Criminal Code, before a decision on custody prior to extradition is made, the sentenced person needs to be heard, possibly through a court approached for this specific purpose. If the ordinary court fails to do so, it not only breaches the Criminal Code but also Article 5.1 ECHR and Article 8.2 of the Charter of Fundamental Rights and Basic Freedoms.

The approach of ordinary courts in this matter breached Article 14 ECHR. The European Court of Human Rights noted in its established case law that differential treatment of persons in analogous or comparable situations was discriminatory in the absence of objective or reasonable reasons therefor, i.e., if there is no legitimate aim or if the means employed are not in proportion to the aim pursued (*Mazurek v. France*, 2000).

Differential treatment of persons deprived of their personal freedom for a variety of reasons needs to be particularly justified. What is most important is whether it was objective and reasonable to place persons deprived of their freedom in accordance with the provisions of Article 5.1.f ECHR in a different procedural status, with fewer rights, than persons deprived of their freedom for other reasons approved by the Constitution.

If dual interpretation of the provision in question is possible, the one whose interpretation is as compliant as possible with the constitutional order is to be given preference (IV. ÚS 613/01). Even if the Constitutional Court admitted an interpretation to the effect that the sentenced person need not be heard, such interpretation would compete with an interpretation “more favorable” in the light of the constitutional order. This interpretation is based on the provision of Article 5 ECHR which refers to several different types of deprivation of freedom, without differentiating between them. Rights stemming from the provisions of Article 5.2 ECHR through Article 5.5 ECHR are thus guaranteed to all persons deprived of their freedom. The approach chosen by the ordinary court cannot be deemed “reasonable” within the spirit of the case law of the European Court of Human Rights.

Any arrested person must be advised without delay and in a comprehensible language of the reasons for arrest and the charges made. This provision must be applied even where the grounds for deprivation of freedom cease to exist and there is a new reason, i.e., custody prior to extradition. A person whose personal freedom is restricted is unable to avail him/herself of his/her rights fully and effectively if no reason for such restriction is provided to that person. Compliance with this provision is of key importance. The Constitutional Court is convinced that the complainant was not informed within a reasonable time. The decision on custody was made on 7 October 2002, and only delivered to the complainant, together with a translation, on 5 November 2002. The Court was obliged to ensure that the complainant was advised of grounds for custody forthwith. The Court of first instance further breached the provisions of Article 5.2 ECHR.

The Constitutional Court repealed the contested decision, as well as decisions following on from the decision imposing custody, as in the absence of a due and proper decision on custody, the latter have no legal basis and cannot be upheld in isolation.

Cross-references:

European Court of Human Rights:

- Judgment of 04.08.1999 in case of *Douiyeb v. the Netherlands* (not published);
- Judgment of 01.02.2000 in case of *Mazurek v. France*, *Reports of Judgments and Decisions* 2000-II.

Languages:

Czech.



Identification: CZE-2003-3-013

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 09.10.2003 / **e)** IV. ÚS 150/01 / **f)** Public power / **g)** / **h)**.

Keywords of the systematic thesaurus:

- 1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
- 1.3.4.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of fundamental rights and freedoms.
- 1.3.5.13 **Constitutional Justice** – Jurisdiction – The subject of review – Administrative acts.
- 1.4.4 **Constitutional Justice** – Procedure – Exhaustion of remedies.
- 1.5.4.4 **Constitutional Justice** – Decisions – Types – Annulment.
- 3.9 **General Principles** – Rule of law.
- 3.10 **General Principles** – Certainty of the law.
- 4.6.2 **Institutions** – Executive bodies – Powers.
- 5.3.14 **Fundamental Rights** – Civil and political rights – *Ne bis in idem*.
- 5.3.37 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law.

Keywords of the alphabetical index:

Powers, transfer, public law contract / Administrative act, constitutional review / Executive body, competence, transfer / Good faith, protection / Administrative act, presumption of correctness.

Headnotes:

One of the elements on which the exercise of public power in a democratic state governed by the rule of law is based is the principle of an individual's good faith in the correctness of acts of public authorities and the protection of good faith in rights acquired through acts of public authorities. The principle of good faith operates directly at the level of a subjective fundamental right as the protection of that right. At the objective level, it operates as the principle of the presumption of correctness of acts of public authorities.

The powers vested in a government agency are to be viewed as an expression of state power. Competences are specific delineations of issues in the exercise

of powers. The competences of bodies exercising public power are set out by law. Where a body exercises competences delegated by way of an agreement over a matter concerning an individual and resolves the matter by way of an individual act, and where that individual acts in good faith on the correctness of that legal act and on the rights acquired, it is of primary importance to protect the individual's good faith in the correctness of acts through which public power is exercised vis-à-vis that individual.

Summary:

In 1993, the Social Security Department of the Ministry of the Interior ("SSD MI") delivered a decision on the service benefit of the complainant. The director of the Security Intelligence Service ("SIS") ruled in two decisions in 2000 that the complainant was not entitled to that benefit. The complainant filed a constitutional complaint against the decisions of the SIS director, alleging a failure to respect the principles of the presumption of correctness of a legal act and *ne bis in idem*.

The SIS director sought dismissal of the complaint on the ground that he had acted in compliance with the law.

The SSD MI claimed that it had taken a decision on the complainant's request pursuant to an agreement between the SIS and SSD MI.

The Constitutional Court held that Section 75.2 of the Constitutional Court Act applied even though the complainant had not exhausted all remedies available under law to protect his rights. The complaint contained general issues that went beyond the interests of the complainant in the particular case (differences in case-law, multiple categories of persons involved) and had been filed within the statutory limitation period.

One of the elements on which the exercise of public power in a democratic state governed by the rule of law is based is the principle of an individual's good faith in the correctness of the acts of public authorities. Consequently, the nature of the original decision on the service benefit and its impact on the complainant's legal rights were relevant.

Administrative law theory does not strictly differentiate between invalidity caused by lack of jurisdiction on the part of the administrative body issuing the defective act and non-existence of such an act caused by a lack of powers on the part of the issuing body. Concerning non-existent acts, they need to be annulled in the interest of legal certainty, and the

principle of protection of rights acquired in good faith must be taken into consideration.

The Constitutional Court heard and determined a similar constitutional complaint on the service benefit in Resolution II. ÚS 164/01. The Court held that state power may only be exercised in cases and within boundaries set by law, and in a manner prescribed by law. No "agreement" is relevant because such an agreement cannot establish by law the powers of the Ministry of Interior over the matter. In the particular case, a body that had not been authorised to do so by law delivered the first decision. From a legal perspective, such a decision is non-existent, as it has been delivered by a body without authorisation to do so. Such a defect is so serious that no decision is deemed to exist.

The same body that had delivered the decision in the above-mentioned resolution delivered the original decision in the constitutional complaint before the Court. The fourth senate stated that strict differentiation between powers and competences had to be insisted on. Powers of state bodies are deemed to mean the very exercise of the state power in the relevant form (i.e., laying down rules or making individual decisions), while competences are specifically and substantively defined issues involved in the process of the exercise of powers. According to the fourth senate, the agreement made between the SIS and the Ministry of Interior concerned a transfer of competences. The act under review was defective because a body lacking the requisite competences had issued it, even though it was not a body lacking powers. Before such an act is annulled, it must first be subjected to the requisite review governed by the rules of due process. Otherwise, that act may still have consequences for the legal rights of the entity concerned. At the objective level, that conclusion is based on the principle of the presumption of correctness of the acts of public authorities, while at the subjective level, that conclusion is based on the protection of the good faith of individuals in that correctness and the protection of rights acquired in good faith.

The SIS had entered into an agreement with the SSD MI on the handling and processing of service benefit issues, thereby transferring its statutory competence to the SSD MI. The competences of bodies exercising public power are defined by law, and no deviation is possible by way of an agreement between bodies, unless the law expressly provides for the conclusion of such a public law contract. It was inadmissible for the SIS to transfer competences entrusted to it by law to another public authority. However, where a body of state exercises competences that have been transferred in such a way over a matter concerning

an individual, and that matter is resolved by an individual legal act, and that individual acts with good faith on the correctness of that legal act and on the rights acquired, the situation must be viewed differently. In such cases, the protection of an individual's good faith in the correctness of acts of public authorities becomes primary, provided that the public authorities have the requisite democratic legitimacy.

Given the requirement that acquired rights be interfered with as little as possible, decisions with *ex tunc* effect are not always appropriate. In some cases, it may place the person involved in an impossible position, especially where the decision or the decision that has been varied is in that person's favour and he/she has used the authority conferred by the decision in other relations as well. The damage (material and other) may be disproportionate, and a decision remedying one instance of unlawfulness may result in another where the decision-making body fails to ensure that rights acquired in good faith are affected as little as possible. Therefore, if the circumstances and the applicable provisions of law permit, it is sometimes better to use the method of varying a decision with *ex nunc* effect.

The Constitutional Court is not a higher instance vis-à-vis administrative bodies. It does not examine the overall lawfulness or correctness of impugned administrative decisions, and the Court may only interfere with those bodies' decision-making by way of a cassation decision where it finds a violation of a fundamental right of the complainant.

The impugned decisions interfered with the complainant's fundamental rights. The body taking the decisions breached the provisions of the Charter at the objective level.

The Constitutional Court did not examine the case from the point of view of substantive law. It noted that the criteria expressed in the European Court of Human Rights decision of 26 November 2002 in application no. 36541/97 in *Bucheň v. ČR* could not be disregarded.

The Constitutional Court therefore annulled the impugned decisions of the SIS director.

Cross-references:

European Court of Human Rights:

- Judgment of 26.11.2002 in case of *Bucheň v. ČR* (not published).

Languages:

Czech.



Identification: CZE-2003-3-014

a) Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 11.11.2003 / **e)** IV 525/02 / **f)** Proceedings before a body of public power / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Legitimate expectation, protection / Decision, judicial, modification.

Headnotes:

In proceedings before a body of public power, each applicant has a legitimate expectation that if he/she acts in accordance with the law, follows the specific instructions issued by that body, and is successful, that body will deliver a decision with a real prospect of being enforced.

Courts in a state governed by the rule of law and in one protecting individual human rights and freedoms are obliged under the Constitution to consider the consequences of their decisions, to take prior actions into account and not to assess the matter solely on the basis of an isolated interpretation of a particular provision. Confidence in court decisions and real enforceability of the law are the fundamental non-legal characteristics of the rule of law.

Summary:

The constitutional complaint concerned a decision by a regional court annulling a district court decision dealing with an agreement on the transfer of real estate.

According to the regional court, the complaint was not substantiated, and the issue raised was not one that could be the subject of a constitutional complaint.

The third party contended that the attorney who had represented the complaint should have drawn her attention to the discrepancy.

The constitutional complaint was allowed.

An assessment of the constitutional legitimacy of an interference with fundamental rights and freedoms by a body exercising public powers consists of the following elements. First, the Constitutional Court must assess the constitutional legitimacy of the legal rule applied. Then, the Court must assess whether the interference complies with an interpretation that conforms to the Constitution and constitutional procedural law. Finally, the Court must assess the application of substantive law.

The Constitutional Court's task is to protect constitutional legitimacy. The Constitutional Court does not examine the correctness of the application of "simple" law, and may do so only if it also finds a breach of a fundamental right or freedom. Arbitrariness in the application of a law or an interpretation that seriously conflicts with the principles of justice constitutes a violation of a fundamental right or freedom.

In the particular case, the Constitutional Court examined whether the interpretation used in the impugned decision of the ordinary court interfered with the fundamental rights and freedoms guaranteed by the Constitution.

In order to decide whether the annulment of the court decision that had been varied would conflict with the complainant's interests, the history of the proceedings had to be considered. The complainant had sought a transfer of real estate and had taken all the steps available to her to support her claim. The third party had raised no objection as to the identification and description of the real property in question. An extract from the property register had used the same identification, description and acreage, and there had been no reason to doubt its accuracy.

The complainant had identified and described the object of the dispute in accordance with the information provided to her by the state. During the proceedings before the district court, she had acted in accordance with the instructions issued by that court. The court had decided on the object of the dispute in accordance with the information provided by the Land Registry Office, which subsequently declined to enter the agreement that had been concluded in accordance with the court's instructions in the land register

due to a discrepancy between the actual object of the dispute and its identification number which is a part of the description of the land. At the complainant's request, the district court then varied the decision, which was subsequently quashed by the regional court.

According to the European Court of Human Rights, the concept of "possessions" in Article 1 Protocol 1 ECHR has an autonomous meaning. Therefore, it had to be determined whether the overall circumstances of the case made the complainant the bearer of a substantive interest protected by Article 1 Protocol 1 ECHR, given the relevant legal issues and facts, and regardless of the formal classification of the claim under national legislation (*Zwierzynski v. Poland*).

When delivering the impugned decision, the regional court had not adequately reflected on the fact that the complainant had a legitimate expectation that the court always conducts its proceedings in such a way that where the complainant is successful, the decision is one with a real prospect of being enforced. Whoever acts in reliance of the information provided by the state is entitled not to have his/her rights injured solely because the state may have changed (and perhaps clarified or adopted a more desirable form of) the system of the identification of data it provides to the public. With the entry into force of the decision, the complainant's claim acquired the nature of property.

The Constitutional Court further examined whether there was an interference with the rights of the third party, which, contrary to the statutory prohibition, had had himself registered as the owner of the real property in question during the dispute. The third party had used the same description and identification of the land as the complainant. To be weighed against the freedom of choice of procedural strategy is the risk that a court might be manoeuvred into delivering an unenforceable decision. If in the case in question the third party had known the correct description and identification and had relied on the decision being unenforceable, the threat to legal certainty would not have been disproportionate.

In proceedings before a body of public power, each applicant has a legitimate expectation that if he/she acts in accordance with the law, follows the specific instructions issued by that body, and is successful, that body will deliver a decision that has a real prospect of being enforced.

The case dealt with what was perceived as a general problem of the circumstances under which a court, which wishes to enforce a right, may correct its written decision in such a way so as to express the court's will (based on established facts) without jeopardising the principle of legal certainty and the principle of not substituting other judicial decisions for final judicial decisions that have come into effect. The Constitutional Court concluded by noting that constitutional complaint proceedings might concern any decision of a body of public power that might have interfered with a fundamental right or freedom.

The Constitutional Court annulled the impugned decision of the regional court.

Cross-references:

European Court of Human Rights:

- Judgment of 19.06.2001 in case of *Zwierzynski v. Poland*, *Reports of Judgments and Decisions* 2001-VI.

Languages:

Czech.



Denmark Supreme Court

Important decisions

Identification: DEN-2003-3-002

a) Denmark / **b)** Supreme Court / **c)** / **d)** 12.06.2003 / **e)** 550/2002 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen* 2003.2031H; CODICES (Danish).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Sentence, mitigation / Company, asset stripping / Tax, fraud / Good, stolen, handling.

Headnotes:

In prosecution of a defendant who was accused of handling stolen goods in a particularly aggravated way, the length of the proceedings was deemed to be a violation of Article 6.1 ECHR, which states that everyone is entitled to a fair trial within a reasonable time. The Supreme Court mitigated the sentence to repair the violation.

Summary:

Together with two other persons the defendant had bought ten companies. In each of the deals the liquid assets in the companies – intended for payment of due corporation tax – were transferred either to the seller, the first acquirer or the defendants. Hereby the government either suffered a capital loss or the government's possibility of satisfaction was severely diminished, because the companies' liquid assets were stripped.

In this case the defendant was sentenced to 1 year and 6 months imprisonment for 10 counts of handling stolen goods in a particularly aggravated way.

The District Court found that the defendant had taken part in an arrangement where 10 companies were

bought and the assets were stripped, and the defendant had personally received some of the money that had been removed from the companies. However the court found that because of the statute of limitations, the court could only convict the defendant if his actions constituted handling stolen goods in a particularly aggravated way. The Court did not find that the defendant had received sufficient amounts of money to justify this claim. The actions were hereby statute-barred and the defendant was therefore acquitted.

The High Court found that the defendant was aware of the nature of the acquisition deals and the way the liquid assets in the companies – intended for payment of due corporation tax – were divided between the defendants. The court found that the defendant had transferred the money to an attorney, who divided the money between the involved parties, and the defendant had personally received a share of the money. The defendant was hereby guilty of handling stolen goods.

As to whether or not the actions constituted handling of stolen goods in a particularly aggravated way, the High Court found that an overall assessment of the events, including the defendants knowledge of the asset stripping, indicated that his actions constituted handling of stolen goods in a particularly aggravated way. The actions were hereby not statute-barred.

A majority (4 judges) voted to fix the sentence at 1 year and 6 months imprisonment. A minority of 2 judges voted to fix the sentence at 1 year and 9 months imprisonment. All judges had taken into account the length of the proceedings when fixing the sentence.

The Supreme Court found for the reasons that the High Court stated that the defendant was guilty of handling stolen goods in a particularly aggravated way. Furthermore the Supreme Court found that the sentence given by the High Court was adequate.

The Supreme Court noted that this punishment was substantially lower than the normal punishment for a crime of this magnitude. However given the length of the proceedings and the fact that the case was not proceeded for two years from September 1996, the Supreme Court considered this a violation of Article 6.1 ECHR. To repair this violation the Supreme Court mitigated the sentence.

Languages:

Danish.



France

Constitutional Council

Important decisions

Identification: FRA-2003-3-017

a) France / **b)** Constitutional Council / **c)** / **d)** 20.11.2003 / **e)** 2003-484 DC / **f)** Act to control immigration, foreign nationals' residence in France and nationality / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 27.11.2003, 20154 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

- 3.17 **General Principles** – Weighing of interests.
- 5.1.1.3.1 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
- 5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
- 5.2.2.3 **Fundamental Rights** – Equality – Criteria of distinction – National or ethnic origin.
- 5.3.5.1.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Non-penal measures.
- 5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.
- 5.3.11 **Fundamental Rights** – Civil and political rights – Right of asylum.
- 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Effective remedy.
- 5.3.13.27 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel.
- 5.3.32 **Fundamental Rights** – Civil and political rights – Right to family life.
- 5.3.33 **Fundamental Rights** – Civil and political rights – Right to marriage.

Keywords of the alphabetical index:

Foreigner, immigration, legislation / Administrative detention / Foreigner, accommodation provider, repatriation of, expenses / Deportation.

Headnotes:

Making accommodation providers liable for any repatriation costs of foreign nationals in the country for a short stay, without reference to the cost of the return journey, the good faith of the accommodation provider or the conduct of the visitor, is in gross breach of equality in respect of public burdens.

It is not a breach of the right to an effective remedy, within the meaning of Article 16 of the Declaration of the Rights of Man and of the Citizen, to make recourse to the courts in the event of refusal to certify a statement of accommodation inadmissible, unless its is preceded by an administrative appeal.

There are no constitutional principles or rules granting foreign nationals general and absolute rights of access to and residence in the national territory. Parliament is responsible for reconciling the need to protect public order with the right to lead a normal family life.

It is not an infringement of the freedom to marry, a right embodied in the Constitution, to impede persons wishing to marry if this is solely for the purpose of securing a residence permit or acquiring or arranging the acquisition of French nationality. However, in accordance with the freedom to marry, unlawful residence cannot by itself be an impediment to marriage.

Given the need to expel foreign nationals unlawfully resident in France, extending by five days the period of administrative detention of foreign nationals whose expulsion order cannot be put into effect despite the care exercised by the authorities is not an excessive infringement of individual freedom if the individuals concerned have been informed of their rights as soon as possible and have access to their lawyer, and the judicial authorities retain their powers of guardian of individual liberty embodied in Article 66 of the Constitution.

Making applications for asylum submitted more than five days after placement in detention inadmissible is not in breach of the right of asylum if the foreign nationals concerned have been fully informed of their rights and the measure is intended to avoid applications for delaying purposes.

Summary:

The Act to control immigration, foreign nationals' residence in France and nationality, which was finally enacted on 28 October 2003, was referred to the Constitutional Council in identical terms by a group of more than sixty deputies and another group of more

than sixty senators. The Act further modified Order no. 45-2658 of 2 November 1945 on the conditions of entry and residence of foreign nationals in France. About fifteen provisions were challenged. The Constitutional Council quashed three provisions and issued two reservations as regards interpretation.

Languages:

French.

*Identification:* FRA-2003-3-018

a) France / **b)** Constitutional Council / **c)** / **d)** 04.12.2003 / **e)** 2003-485 DC / **f)** Act amending Act no. 52-893 of 25 July 1952 on the right of asylum / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 11.12.2003, 21085 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

5.1.1.3.1 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.

5.3.11 **Fundamental Rights** – Civil and political rights – Right of asylum.

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:

Asylum, foreigner, subsidiary protection / Asylum, internal / Asylum, safe countries of origin, list / Geneva Convention of 1949.

Headnotes:

The introduction of “subsidiary protection” for foreign nationals who cannot be recognised as “freedom fighters” within the terms of the Preamble to the 1946 Constitution, or be entitled to asylum under the Geneva Convention, but who can persuade OFPRA (the public body responsible for granting refugee status) that they are exposed to serious threats in their own country is not incompatible with the Constitution.

The availability of protection in a geographical area of the country of origin, known as “internal asylum”, can only be grounds for refusing to grant refugee status or subsidiary protection if the geographical area concerned represents a substantial part of their country of origin and the individual can settle there in safety and lead a normal life. OFPRA is responsible for deciding whether these conditions have been met, on a case by case basis.

It is not incompatible with the Constitution to delegate responsibility for drawing up a list of “safe countries” to OFPRA, pending the adoption of relevant Community provisions. This list does not infringe the right of each asylum seeker to have his personal situation examined on an individual basis.

Summary:

The Act in question amended Act no. 52-893 of 25 July 1952 on the right of asylum, for the purposes of Community harmonisation.

It replaced the notion of territorial asylum, established in 1998, with that of “subsidiary protection” and extended the notion of agent of persecution to “non-state agents”.

The purpose of the new act was to counter abuse of the right of asylum by rationalising procedures and introducing new notions such as “the list of safe countries” and “internal asylum”.

The legislation was finally enacted on 18 November 2003 and was referred to the Constitutional Council by two separate groups of more than sixty deputies and a similar number of senators. The applications were dismissed.

Languages:

French.



Identification: FRA-2003-3-019

a) France / **b)** Constitutional Council / **c)** / **d)** 11.12.2003 / **e)** 2003-486 DC / **f)** Social Security Finance Act 2004 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 19.12.2003, 21679 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

- 1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
- 3.10 **General Principles** – Certainty of the law.
- 3.18 **General Principles** – General interest.
- 4.5.2 **Institutions** – Legislative bodies – Powers.
- 5.3.37.1 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Criminal law.

Keywords of the alphabetical index:

Act, good faith / Administrative decision, validation / Social security, deficit / Pharmaceutical laboratories, marketing costs / Welfare rider.

Headnotes:

Estimated income from and the expenditure objectives of sickness insurance have to be based on the information available when the challenged legislation was tabled and enacted, having due regard to the inherent uncertainties involved. Under these circumstances, and since they were not subject to any manifest errors, the complaint that the legislation was not enacted in good faith has to be dismissed.

Although parliament, which alone has this power, can validate an administrative decision if this is sufficiently in the public interest, it still has to comply with the decisions of the courts and the principle that penalties and sanctions may not be applied retrospectively. In addition, the validated decision must not be in breach of any constitutional principles and the scope of the validation must be strictly circumscribed.

Summary:

The Social Security Finance Act 2004 was enacted on 27 November 2003 against a background of a worrying deficit (Eur 8.9 billion in 2003) in the general social security scheme. Like all the previous finance acts, it was referred to the Constitutional Council.

Its critics questioned the good faith of the legislation, over which the Constitutional Council had only limited powers of review.

Various welfare riders (measures that should not be included in a social security finance act because they are not financial measures) were struck out by the Constitutional Council on its own initiative.

It ruled that the legal validation, backdated to 1 January 1995, of the decision to include marketing costs incurred with regard to non-prescribing

hospital staff in the basis for assessing the contribution owed by pharmaceutical laboratories under the heading of promotion of patent medicines was unconstitutional, because it was not sufficiently in the public interest.

Languages:

French.



Identification: FRA-2003-3-020

a) France / **b)** Constitutional Council / **c)** / **d)** 18.12.2003 / **e)** 2003-487 DC / **f)** The Act of 2004 decentralising the Minimum Integration Income (RMI) and introducing the Minimum Occupational Income (RMA) / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 19.12.2003, 21686 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.21 **General Principles** – Equality.

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

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

4.8.7.2 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects – Arrangements for distributing the financial resources of the State.

4.8.7.4 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects – Mutual support arrangements.

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

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

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

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

Keywords of the alphabetical index:

Minimum integration income / Minimum occupational income, employment integration contract / Unemployment, exclusion.

Headnotes:

National legislation authorises parliament to make *départements* (counties) responsible for administering the minimum integration income (RMI) scheme. This transfer of responsibility does not breach the principle of administrative autonomy of local and regional authorities or the rule requiring transfers of responsibilities to be accompanied by the allocation of sufficient resources.

The introduction of employment integration contracts giving entitlement to a minimum occupational income (the CIRMA scheme) does not breach the principle of equality of employees. It is consistent with government's and parliament's objective of reducing unemployment and exclusion and as such is in the public interest.

The CIRMA does not infringe the personal freedom of the benefit recipient or freedom of contract, since it is freely entered into by the parties and is based on mutual undertakings.

Summary:

Parliament approved the draft legislation to decentralise the minimum integration income (RMI) scheme and establish a minimum occupational income (RMA) scheme on 10 December 2003. The legislation was referred to the Constitutional Council by more than sixty deputies.

The Constitutional Council dismissed the application.

The legislation in question reflected a general trend towards what might be termed the “activation” of welfare state spending.

The minimum integration income was established in 1988 and is paid to persons in difficulty according to a scale based on age, resources and family responsibilities.

It was hitherto a state responsibility but its administration has now been transferred to the *départements*. The complainants argued that this transfer breached the principle of equality. They also maintained that the provision for financial compensation did not satisfy the requirements of the March 2003 Constitutional Act on the Decentralisation of the Republic.

The new legislation also instituted a minimum occupational income (RMA) to enable employers to enter into exceptional employment contracts with RMI recipients. The complainants argued that this was a breach of equality of employees, personal freedom and freedom of contract.

The Constitutional Council approved all the provisions of the Act.

Languages:

French.



Identification: FRA-2003-3-021

a) France / **b)** Constitutional Council / **c)** / **d)** 29.12.2003 / **e)** 2003-488 DC / **f)** Finance Amendments Act 2003 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 31.12.2003, 22652 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
 3.21 **General Principles** – Equality.
 5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
 5.4.19 **Fundamental Rights** – Economic, social and cultural rights – Right to health.
 5.5.1 **Fundamental Rights** – Collective rights – Right to the environment.

Keywords of the alphabetical index:

Taxation / Publication, free / Foreigner, medical assistance, urgent care / Welfare rider / Law, good faith.

Headnotes:

Granting a tax exemption to publications distributed to named recipients but not to free publications placed unsolicited in all letter boxes breaches the principle of equality because it establishes a difference of treatment that is not justified by the objective pursued, namely protection of the environment.

In making the eligibility for free medical assistance of foreign nationals unlawfully in France conditional on three months' uninterrupted residence in the country, while ensuring that they can receive urgent medical care before the expiry of this period, parliament was not in breach of the eleventh sub-paragraph of the Preamble to the 1946 Constitution.

Summary:

The Finance Amendments Act 2003 was approved on 18 December 2003 and referred to the Constitutional Council by more than sixty deputies. The Council struck out one of the provisions, as breaching the principle of equality, and several others because they did not belong in a finance amendments act.

The complaint that the Act was not in good faith was dismissed because although it was approved very late it did not present the state's overall 2003 income and expenditure situation dishonestly, having regard to the information available when it was tabled and enacted.

As part of its environmental protection activities, parliament had introduced a levy on the producers and distributors of free and unsolicited publicity material placed in individuals' letter boxes. The Constitutional Council considered that drawing a distinction between material delivered anonymously and material distributed to named subscribers constituted a breach of equality.

The challenged legislation amended the Social Action and Families Code by making eligibility for free medical assistance of foreign nationals unlawfully in France conditional on three months' uninterrupted residence in the country. They would still be entitled to urgent medical care, that is care whose absence could be life threatening or lead to a permanent change in persons' health. The Constitutional Council found that these provisions did not breach the 11th sub-paragraph of the Preamble to the Constitution of 27 October 1946, which guarantees health coverage for all.

Various "welfare riders" (measures that should not be included in a social security finance act because they are not financial measures) were struck out by the Constitutional Council on its own initiative.

Languages:

French.



Identification: FRA-2003-3-022

a) France / **b)** Constitutional Council / **c)** / **d)** 29.12.2003 / **e)** 2003-489 DC / **f)** Finance Act 2004 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 31.12.2003, 22636 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

4.8.7.2 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects – Arrangements for distributing the financial resources of the State.

Keywords of the alphabetical index:

Budget, balance / Government, total appropriation / Public funds, proper use.

Headnotes:

In its finance acts, parliament lays down total levels of expenditure and appropriations for the main areas of spending for each minister, but this does not oblige the latter to spend the total appropriation available. It is desirable for government to set aside a small fraction of the available appropriations at the start of the financial year, to prevent any deterioration in the financial situation. Since the government informed parliament of its intention, it did not infringe the principle of good faith.

The financial compensation for a competence transferred to a local or regional authority must not decline over time. The rules governing such authorities' own resources must be laid down precisely in the institutional legislation prescribed in Article 72 of the Constitution (as revised on 28 March 2003).

Under the Finance Acts Institutional Act of 1 August 2001, "local and regional authorities and their associated public bodies are required to deposit all their liquid assets with the state". By requiring these authorities to provide prior information on any operation affecting the Treasury account, the challenged legislation is promoting the proper use of public money, which is a constitutional requirement.

Summary:

The initial Finance Act 2004 was referred to the Constitutional Council by more than 60 deputies.

The complaint concerning the lack of good faith of the budget was found to be unfounded. The Constitutional Council issued a reservation concerning the interpretation of the level of funding to be transferred, in the event of a transfer of responsibilities to local and regional authorities.

Languages:

French.



Georgia Constitutional Court

Important decisions

Identification: GEO-2003-3-002

a) Georgia / **b)** Constitutional Court / **c)** First Chamber / **d)** 26.02.2003 / **e)** 1/1/138, 171, 179, 209 / **f)** "Citizens of Georgia Irakli Lekveishvili, Koba Gotsiridze, Koba Kobakhidze and Public Defender of Georgia v. Parliament of Georgia and President of Georgia" / **g)** *Adamiani da Konstitutsia* (Official Gazette) / **h)** CODICES (Georgian, English).

Keywords of the systematic thesaurus:

4.4.1.3 **Institutions** – Head of State – Powers – Relations with judicial bodies.

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

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

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

Keywords of the alphabetical index:

Judge, independence / Judge, temporary.

Headnotes:

The possibility of conferring judicial authority on a person for a limited period of time by way of an order of the President in accordance with Article 852.1 of the Organic Law on the Courts of Ordinary Jurisdiction has negative affect on that person's independence. Appointment of a judge for a long period of time or indefinitely is significant for the prevention of illegal interference in his/her activities. A person "administering judicial authority" enjoys less social protection guarantees than a judge appointed for a term of 10 years.

The obligation of the State to ensure just conditions of work is strengthened by the Constitution, which provides that every citizen of Georgia "shall have the right to hold any state position if he/she meets the requirements established by legislation". This right may not be infringed by regulations or any other piece of legislation.

Summary:

The subject of the dispute was the constitutionality of Article 852.1 of the Organic Law on the Courts of Ordinary Jurisdiction and the Law on the Competition for the Selection of Judges approved by an order of the President of Georgia.

The claimants are citizens of Georgia and the Public Defender of Georgia. In accordance with the impugned provisions of that organic law, the President of Georgia may confer "judicial authority" for a term of 18 months on a person who has passed the qualification exam for judge or whose qualifications have been certified by decree of the President in accordance with a procedure and requirements laid down by legislation. In accordance with the Constitution, a term of office of any judge of Georgia is 10 years. The claimants argued that a person exercising judicial authority for a term of 18 months and a judge appointed for a term of 10 years had nearly the same functions; the difference between them was basically the term of office.

Where a person exercising judicial authority for a term of 18 months is not appointed as a judge after the expiration of this term, he/she loses that position. The claimants argued that such a condition violated the rights and freedoms of a person as citizen and judge.

The representative of the respondent pointed out that the Organic Law on the Courts of Ordinary Jurisdiction did not establish the appointment of a judge for 18 months as an imperative. Exercise of that right by the President was to take place in cases laid down by legislation and not as a general rule. Furthermore, appointment for a term of only 18 months was not a basis on which a judge's independence could be restricted, as long as in exercising his/her duties he/she respected only the Constitution and the law.

As regards the impugned provision of the Law on the Competition for the Selection of Judges approved by an order of the President of Georgia, the claimants alleged that it was unconstitutional on the ground that it did not allow the decisions of the Council of Justice to be challenged. A participant of the competition who was not successful had no right to be told the reason for his or her lack of success. In the claimants' opinion, that law did not give a candidate the opportunity to know the reasons for his or her lack of success or receive any relevant information.

Since that impugned provision had been annulled by an order of the President, the First Chamber decided to dismiss the constitutional legal proceedings concerning that provision.

The First Chamber considered that a person envisaged by the Organic Law on the Courts of Ordinary Jurisdiction on whom “judicial authority” was conferred by the order of the President was a judge due to his/her legal position. As long the Constitution of Georgia provides that “justice shall be administered by the courts of ordinary jurisdiction”, such a court is not able to function without a judge. The impugned Article 852.1 created for no valid reason the concept of a person “exercising judicial authority” in the sphere of administration of justice whose status was, for no reason, deemed not to be that of judge. The Chamber also considered that a judge and a person “exercising judicial authority” were functionally the same subjects. Both administer justice. There was an artificial duality due to creation of a person “exercising judicial authority” in the impugned law. Relying on the content of Article 852.1 of the organic law, the Chamber found that there was an office of judge- nevertheless that a person who was successful in the competition should hold an office of judge in accordance with the Organic Law on the Courts of Ordinary Jurisdiction. The impugned law grants the right to be a judge to a person who has passed the qualification exam or who has had his/her qualifications certified in accordance with that law and as well as to a person who has not.

Judges appointed on the basis of Article 852.1 may not be deemed to be judges on a probationary trial period. Neither the Constitution of Georgia nor the Organic Law on the Courts of Ordinary Jurisdiction provides a basis on which such a conclusion may be drawn.

The time limit is a factor that strengthens a judge's belief in his/her independence due to the inviolability of his/her activity over a long period of time. A solid basis for that independence is that a judge nominated for a constitutional term of office is not only an officer with judicial rights and duties but he/she enjoys the social protection guarantees as well. A person “administering judicial authority” enjoys less social protection guarantees than a judge designated for a term of 10 years.

Considering all of the above, the Board allowed the constitutional claim and declared unconstitutional Article 852.1 of the Organic Law on the Courts of Ordinary Jurisdiction in terms of Article 29.1 of the Constitution, which provides “every citizen of Georgia shall have the right to hold any state position if he/she meets the requirements established by legislation”.

Languages:

English.



Germany

Federal Constitutional Court

Important decisions

Identification: GER-2003-3-013

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 18.12.2002 / **e)** 1 BvR 108/96 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift* 2003, 1656-1657; CODICES (German).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Discrimination, married / Divorce, applicable law / Marriage contract / Rule, conflict of laws / *Lex patriæ*.

Headnotes:

The precedence given to the husband's *lex patriæ* by the conflict of laws rules leads to a discrimination against the wife, irrespective of the content of the proper law.

A married couple's conduct consisting simply of their assumption that they were subject to the previous legal order that violated the principle of equality (i.e. their belief that it applied to them) cannot be used to justify the maintenance of the violation against them permanently.

Summary:

I. The complainant is German and her ex-husband is an Austrian national. The parties were married in Canada in 1973. Soon after the wedding the parties took up residence in the Federal Republic of Germany. In November 1975 they concluded a contract before a notary, which contained, *inter alia*, the following clause:

“Pursuant to this contract, our marriage shall be governed by the Austrian statutory matrimonial

property regime. We hereby agree that the husband shall not be entitled to administer or use the wife's assets."

In 1983 the Federal Constitutional Court declared the conflict of laws rule in Article 15.1 and 15.2 of the Introductory Act to the Civil Code unconstitutional on the ground that in violation of Article 3.2 of the Basic Law, the provisions use the husband's nationality as a nexus for selecting the applicable matrimonial property law (see Order of 22 February 1983, Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts*, BVerfGE 63, p. 181 *et seq.*).

The marriage was dissolved in 1992. Following the divorce, the complainant sued her ex-husband for equalisation of their accrued gains during the marriage. The court of first instance rejected her statement of claim. The court applied German law as the governing matrimonial property law. It was, however, of the opinion that the complainant was not entitled to equalisation because her accrued gains during the marriage exceeded those of her ex-husband.

The appeal against the court of first instance's judgment was rejected as being unfounded by the Higher Regional Court (*Oberlandesgericht*). The Higher Regional Court was of the view that Austrian law was the applicable matrimonial property law. It found that Article 220.3.1.2 of the Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*, EGBGB) applied to the matrimonial property aspects of the marriage in the period up until 8 April 1983 since the parties to the marriage, as was apparent from the content of the notarised contract, assumed that Austrian law was applicable. Article 220.3.1.2 of the Introductory Act to the Civil Code contains an alternative means of deciding the proper law. In the particular case, the parties assumed that it applied after 8 April 1983. Furthermore, the Higher Regional Court held that the claim for a division of the marital assets was nonetheless extinguished according to the applicable Austrian law since the claimant had not filed her statement of claim within the one-year time limit of the divorce decree's becoming final.

In the constitutional complaint, the complainant alleged a violation of her rights under Article 3.2 of the Basic Law. She claimed that both she and her husband assumed that Austrian matrimonial property law applied to them due to the previous Article 15 of the Introductory Act to the Civil Code. In concluding the notarised agreement she and her husband had simply wanted to modify the matrimonial law that was applicable to them. They had not intended to make a

choice of law. The complainant alleged that pursuant to the previous Article 15 of the Introductory Act to the Civil Code, which the Federal Constitutional Court had declared null and void, the *lex patriæ* of the husband initially applied to the marriage of the parties. The complainant argued that the purpose of the agreement was simply to remove by means of a marriage contract what was for her the most intolerable consequence of Austrian matrimonial property law, namely, the power of a husband to administer his wife's assets.

II. The Third Chamber of the First Panel admitted the constitutional complaint for decision, overturned the challenged judgment of the Higher Regional Court and referred the matter for a new decision to the court of first instance. The Chamber's reasoning was essentially as follows.

The decision of the Higher Regional Court violated the complainant's rights under Article 3.2 of the Basic Law because it was based on the previous, unconstitutional provision and thus upheld the use of the husband's *lex patriæ* as the connecting factor. The principle of gender equality between men and women in Article 3.2 of the Basic Law is indicative of a value judgment that is binding for the whole of the family law area and the law pertaining to marriage. Gender differences are not significant reasons for making legal distinctions. Admittedly, the case-law of the Federal Constitutional Court allows logical and functional distinctions that depend on the nature of the respective circumstances. The use of the husband's *lex patriæ* as a nexus, as was provided for in the previous Article 15.1 of the Introductory Act to the Civil Code, cannot, however, be based on such distinctions. It thus violates the general principle of equality before the law in Article 3.1 of the Basic Law. In that context the question of whether the husband's *lex patriæ* is more advantageous or comparable in its legal consequences to the wife's *lex patriæ* is also not significant.

In that sense, the interpretation of the transitional provision in Article 220.3 of the Introductory Act to the Civil Code by the Higher Regional Court violated the gender equality between men and women since it adopted and perpetuated the previous unconstitutional conflict of laws rule, which used the husband's *lex patriæ* as the nexus for determining the law governing matrimonial property.

Languages:

German.



Identification: GER-2003-3-014

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 12.03.2003 / **e)** 1 BvR 484/01 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Education, university, financing / Good faith, principle / Student, university committee, involvement.

Headnotes:

A student who receives educational financing and exceeds the standard maximum period for which financing is available because of his participation in university committees and bodies may not be disadvantaged by subsequent restrictions on financing (here: a change of educational financing to the form of a bank loan).

Summary:

I. The complainant studied law from 1992 to 2000. Between 1993 and 1997 he was a member of some university committees. He initially received educational financing pursuant to the Federal Act Concerning the Promotion of Education (*Bundesausbildungsförderungsgesetz*, BaföG). One-half of the financing was a subsidy and the other half was an interest-free loan. During that time, the legislature made several changes to the financing of education and, *inter alia*, changed the financing available at the expiry of the standard maximum financing period to an interest-bearing bank loan (see the Eighteenth Act to Amend the Federal Act Concerning the Promotion of Education, (*Achtzehntes Gesetz zur Änderung des Bundesausbildungsförderungsgesetzes*).

After the length of the complainant's studies had exceeded the standard maximum period for which financing is available, he received educational financing in the form of a bank loan. The complainant's attempts to continue to receive financing for his

education, half in the form of a subsidy and half in the form of an interest-free loan, through recourse to the administrative courts were unsuccessful. He argued that he should not be disadvantaged for his participation in university committees and bodies, which had affected the length of his studies. He alleged a violation of his fundamental rights under Articles 12.1, 2.1 and 3.1 of the Basic Law as well as a violation of the principle of good faith.

II. The Third Chamber of the First Panel granted the relief sought by way of the constitutional complaint and gave the following reasons.

The case-law of the Federal Constitutional Court on the constitutional protection of persons relying on the principle of good faith is sufficiently clear with regard to the extent to which students who are entitled on the merits pursuant to § 15.3 number 3 of the Federal Act Concerning the Promotion of Education to educational financing beyond the standard maximum period for which financing is available may legitimately expect not to have their type of educational financing changed to the form of a bank loan.

The judgment of the administrative court challenged by the complainant in his constitutional complaint violated the complainant's fundamental rights under Article 12.1 of the Basic Law in conjunction with Article 20.3 of the Basic Law. The administrative court failed to interpret Article 6.2.1 of the Eighteenth Act to Amend the Federal Act Concerning the Promotion of Education in conformity with the Basic Law. The complainant was entitled to plead greater protection because of his reliance on the principle of good faith. That was so, particularly because of the prohibition of discrimination on account of committee work contained in § 37.3 of the Post-Secondary Education Framework Act (*Hochschulrahmengesetz*) and § 66.3 of the Post-Secondary Education Act of the Land of Saxony (*Sächsisches Hochschulgesetz*).

Languages:

German.



Identification: GER-2003-3-015

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the First Panel / **d)** 01.04.2003 / **e)** 1 BvR 539/03 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift* 2003, 3046 DÖV 2003, 855-856 NVwZ 2003, 855-856; CODICES (German).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
 3.17 **General Principles** – Weighing of interests.
 3.18 **General Principles** – General interest.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.26 **Fundamental Rights** – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

Arm, firearms law / Association, shooting sport / Association, obligatory recognition / Association, organisational autonomy / Association, member, proof of a need to hold a firearms licence.

Headnotes:

The fact that the legislature imposes restrictions on shooting sports clubs and tightens the requirements on their members' legal possession of arms in order to confront the risk of abuse does not infringe the freedom of association (Article 9.1 of the Basic Law).

Summary:

I. The complainant is a shooting sports association. It directly challenged the new firearms law in a constitutional complaint. Sporting riflemen and riflemen and shooting sports associations are subjected as from 1 April 2003 by the Revised Firearms Act to a series of restrictions, which were not contained in the previous law. For example, § 15.7.1 of the Firearms Act (*Waffengesetz*, WaffG) introduces the necessity for approval by administrative authorities of the shooting sport regulations enacted by associations. Approval is a prerequisite for the recognition of the association. § 15.7 (sentence 2) of the Firearms Act empowers administrative authorities to issue decrees, in particular, in respect of the requirements and contents of sports regulations. § 15.1 to § 15.4 of the Firearms Act regulate the recognition of nationwide mergers of shooting sports clubs into single shooting sports associations. Other provisions in the Firearms Act grant privileges regarding the requisite proof of a genuine need to hold a firearms licence to members

of clubs that belong to a recognised shooting sports association.

The complainant alleged a violation of its rights under Articles 9.1, 2.1 and 19.3 in conjunction with Article 80.1 (sentence 2) of the Basic Law. It claimed that it became subject to a duty to obtain state recognition. In its view, the duty affected the exercise of its function as a club. In the complainant's opinion, if it were not recognised, its members would not enjoy the relaxed requirements for proving their need to hold a firearms licence. The existence of the duty would serve to reduce its attractiveness as a club and cause it to suffer a considerable drop in its number of members. Furthermore, the complainant alleged a violation of its organisational autonomy, which is protected by Article 9.1 of the Basic Law. It believed that it should be entitled to determine its own competition rules and the types of sports activities it wished to offer.

II. The Second Chamber of the First Panel did not admit the constitutional complaint for decision since it did not in principle have any constitutional significance and, in particular, did not have a chance of success.

The Chamber's reasoning was essentially as follows. It was true that the complainant was an association whose fundamental rights within the meaning of Article 9.1 of the Basic Law were protected, since in addition to its right to formation and existence, its right to determine its own organisation, its right to decide on and manage its own affairs as well as specific types of association activities were protected. Nevertheless, limits are set on the freedom of association in the area that is not covered by Article 9.2 of the Basic Law. The legislature may not be prevented from imposing restrictions on the activities of associations which are necessary on the merits for the protection of other legal interests.

The challenged provisions affected the complainant's freedom of association. It argued with sufficient credibility that its attractiveness for members was affected by the shooting sports regulations. Nonetheless, the challenged provisions were constitutionally unobjectionable. It is permissible to restrict the privilege of proving one's need to hold a firearms licence to the members of those associations whose size and organisation guarantee the proper conduct of shooting sports. It was the legislature's goal to deal with any potential abuses of the privilege. Groups who use shooting sports as an excuse for obtaining firearms ought to be hindered from doing so. That parliamentary objective is legitimate and is implemented in § 15.1 to § 15.4 of the Firearms Act in accordance with the principle of

proportionality. The recognition regulation is appropriate and necessary for pursuing that goal. If a provision were to contain merely a duty for the associations to be entered in the Register of Associations, that provision would be far more prone to enforcement shortcomings. In addition, the limits on achieving a reasonable balance between the complainant's interest in freedom, which is protected by Article 9.1 of the Basic Law, and the state's interest in averting danger, was not exceeded. The recognition regulation wishes to steer the shooting sports association and club system using preventive control measures towards channels compatible with the state interest's in averting danger. It does so by linking on the one hand, a relaxation in the requirements for proving a need to hold a firearms licence (in the case of sporting riflemen and riflewomen) with the laying down of certain requirements to be fulfilled by the association, on the other hand.

In the light of the dangers that the misuse of firearms poses for the general public, the principle of need in relation to the possession of firearms serves to ensure that no more firearms than are necessary end up in private hands. However, the legislature by relaxing the conditions for sporting riflemen and riflewomen takes into account the interests of professional sports and allows the necessary scope for the effective exercise of fundamental rights.

The regulation could not be objected to on the basis that it unjustifiably required clubs to check their members. Persons who wish to use firearms for private purposes pose an increased danger for the general public. Where a shooting sports club claims for its members the privilege of relaxed requirements for licensing guns and munitions, it can be expected to submit itself to the requirements that are designed to counter the danger of abuse and intended to compensate for the withdrawal of state control attached to the privilege.

The constitutional objections relating to the necessity set out in § 15.7.1 of the Firearms Act for approval of shooting regulations by administrative authorities could also not be allowed. Through that provision and its connection to an association's ability to obtain recognition, the state assumes control over whether associations comply in their sports regulations with the limits laid down by the Firearms Act. In view of the considerable danger of abuse emanating from firearms and the tendency towards abuse under the previous firearms law, the legislature was entitled to find a method of regulating access to firearms that is less prone to enforcement shortcomings. Furthermore, the provision respects the autonomy of associations by limiting approval to

the parts of the sports regulations that are relevant for firearms law. It is possible to subject associations to preventive controls as to the relevant parts of the sports regulations without thereby unreasonably encroaching upon their guaranteed freedom of association.

Languages:

German.



Identification: GER-2003-3-016

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 09.04.2003 / **e)** 1 BvR 1493/96 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift* 2003, 2151-2158; CODICES (German).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Paternity, biological father / Child, close personal relationship / Child, born out of wedlock / Child, right of access / Child, best interests.

Headnotes:

Where there is a close relationship between them, a biological father and his child are also a family protected by Article 6.1 of the Basic Law. The protection of fundamental rights also covers the interest in maintaining this relationship. It is a violation of Article 6.1 of the Basic Law to deny a biological father who has such a bond to his child access where such access would promote the welfare of the child.

Summary:

I. A blood test in 1990 proved that the complainant is the natural father of a child born in 1989. He had a relationship with the child's married mother that continued after the birth of the child, and he looked after the child for a while. Due to the fact that the child was born into an existing marriage, the complainant is its natural father, but not its legal father (i.e. he is its biological father). Before the Child Law Reform Act (*Kindschaftsrechtsreformgesetz*) entered into force, it was in principle the mother who determined a father's access to his illegitimate child. Nonetheless, the Guardianship Court (*Vormundschaftsgericht*) had the power to grant the father a right of access (see § 1711 of the German Civil Code, *Bürgerliches Gesetzbuch*, BGB, old version).

The legislature restructured the entire law on access in the Child Law Reform Act, and it also granted in § 1685 of the German Civil Code a right of access to persons who are not the child's legal parents but with whom a child has a close relationship. However, a child's biological father was not granted a right of access. Although the complainant attempted to maintain contact with his child after separating from the mother, his claim for access to his child on the basis of the legal position prior to the coming into force of the Child Law Reform Act was unsuccessful before the competent courts.

II. The First Panel granted the relief sought by way of a constitutional complaint and gave the following reasons for its decision.

A man who is the natural but not legal father of a child does not have the parental right set out in Article 6.2.1 of the Basic Law and cannot rely on that article for a right of access. Nonetheless, the father and his child also form a family that is subject to the protection of Article 6.1 of the Basic Law where there is a social tie between them arising from the father's having borne actual responsibility for the child for at least a while. Article 6.1 of the Basic Law protects the natural father and the child's interest in maintaining this close personal relationship and thereby their access to one another. The refusal to allow a natural father with such a bond to his child access to that child such where such access would promote the child's welfare violates Article 6.1 of the Basic Law.

The interest of a biological father who has previously had a close personal bond with his child, as well as the interest of the child in maintaining the relationship, is protected by Article 6.1 of the Basic Law. This is a continuation of the previous protection accorded to the parent-child relationship. A biological father's right of access to his child derives from this continuing

protection in cases where this promotes the welfare of the child.

Measured against the above, § 1711.2 of the German Civil Code (old version) is compatible with Article 6.1 of the Basic Law. In the light of the protection that this fundamental right also grants to the close personal relationship between the biological father and his child, it is possible to interpret § 1711.2 of the German Civil Code (old version) as allowing a court, in conformity with the Basic Law, the power to grant a right of access to a man who is the natural but not legal father who has had a close relationship with his child, where doing so promotes the welfare of the child. However, the judicial decisions based on § 1711.2 of the German Civil Code (old version) are not in conformity with the Basic Law.

In their decisions, the courts erred as to the complainant's protection under Article 6.1 of the Basic Law. They did not attribute any significance to the fact that the complainant, as the child's natural father, had also taken over the role of the father for his child over a prolonged period of time and had built a relationship with the child. Therefore, the courts did not examine whether § 1711.2 of the German Civil Code (old version) could be interpreted as being in conformity with the Basic Law.

The repeal of § 1711.2 of the German Civil Code (old version) by the Child Law Reform Act made it necessary for the Federal Constitutional Court to undertake a constitutional examination of the new law on access to children, which the courts would apply. Otherwise, there would be no guarantee that the courts in the proceedings in 1 BvR 1493/96 could make decisions on access that would conform to the Basic Law. The version of § 1685 of the German Civil Code, as amended by the Child Law Reform Act, is not entirely compatible with Article 6.1 of the Basic Law. The Child Law Reform Act made fundamental changes to the right of access. In relation to the parental right of access to children, which is regulated in § 1684 of the German Civil Code, there is no longer a distinction between legitimate and illegitimate children. Furthermore, § 1685 of the German Civil Code also allows a right of access to other persons with whom the child has a close relationship. Neither provision expressly includes the natural father of the child in the circle of persons with an access entitlement. It is not possible to interpret either § 1684 or § 1685 of the German Civil Code as granting the natural father of a right of access. The legislature clearly stated that a right of access is limited to the persons expressly specified in the provision (§ 1685) with whom a child has a close relationship and who it assumes are normally particularly close to the child. The legislature justified the limitation on the basis that

it was necessary in order to avoid a large increase in access disputes. This rules out the extension, by way of an interpretation in conformity with the Basic Law, of the circle of persons named in § 1685 of the German Civil Code to include the natural father. To that extent, the Court held that § 1685 of the German Civil Code had to be declared incompatible with Article 6.1 of the Basic Law. The Court imposed an obligation on the legislature to bring the legal position into line with the Basic Law by 30 April 2004. In that respect, the legislature had to ensure when setting deadlines for challenging paternity that also biological fathers who were previously unable to contest paternity would be placed in a position where they would have the right to do so.

Languages:

German.



Identification: GER-2003-3-017

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 09.04.2003 / **e)** 1 BvR 1724/01 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift* 2003, 2151-2158; CODICES (German).

Keywords of the systematic thesaurus:

5.2 **Fundamental Rights** – Equality.
5.3.32.1 **Fundamental Rights** – Civil and political rights – Right to family life – Descent.

Keywords of the alphabetical index:

Paternity, biological father / Child, close personal relationship / Paternity, right to contest / Child, best interests.

Headnotes:

The exclusion of the biological father from the right to contest the paternity of another man (§ 1600 German Civil Code) violates the fundamental right of the biological father under Article 6.2.1 of the Basic Law to have, as the natural father, his paternity legally established.

The rules of procedure must give a natural father the opportunity of acquiring the legal status of father where this is not contrary to the protection of the close personal relationship between the child and its legal parents.

Summary:

I. The complainant initially attempted to obtain recognition of his paternity of a child born in November 1998. Upon being informed that the mother of the child did not wish this, he applied to the Local Court (*Amtsgericht*) for a determination that he was the father of the child. He submitted that he had lived with the mother for a prolonged period of time, had been present at the birth of the child and had cut the umbilical cord. The child had been a planned child. He had taken part in all of the preparations for the birth with the mother and had, for example, decorated the nursery. They had even chosen the name of the child together. The mother had never expressed any doubt of his paternity of the child. The mother of the child disputed the truth of his submissions and asserted that in October 2000 another man had declared himself father of the child. The complainant's application before the competent courts was unsuccessful. Determination of paternity is only permissible when no other recognition of paternity exists. This is no longer the case, however, after another man recognises his paternity with the consent of the mother. Therefore, in the case in question, the determination of a different paternity was impossible. Furthermore, it was found that the complainant could not challenge the paternity of the man who had made a declaration of his paternity, on the ground that paternity may only be challenged by the man who declares his paternity, the mother of the child or the child itself. In the view of the court, the legislature had deliberately denied the biological father the right to contest paternity vis-à-vis the man who has declared paternity.

II. The First Panel granted the relief sought by way of the constitutional complaint and gave the following reasons for its decision.

A man who is the natural but not legal father of a child is subject to the protection of Article 6.2.1 of the Basic Law. However, being the natural father of a child is not by itself enough to be declared a person having the parental right set out in Article 6.2.1 of the Basic Law. This fundamental right does, however, protect the natural father's interest in acquiring the legal status of father in relation to the child. Admittedly, this protection does not grant him a right to be given priority in all cases over the legal father in the position as father. The legislature must, however, give the natural father the opportunity of acquiring the legal

status of father where this is not contrary to the protection of the close relationship between the child and its legal parents.

Thus § 1600 of the German Civil Code (*Bürgerliche Gesetzbuch*) had to be declared incompatible with Article 6.2.1 of the Basic Law to the extent that it denied the biological father the right to contest the legal paternity even in cases where the legal parents do not form a social family that must be protected pursuant to Article 6.1 of the Basic Law. Where a man who is not the natural father of the child has declared his paternity and does not live together with the mother and child, there is no sufficient reason to deny the natural father the right to be also legally recognised as father and be expected to fulfil his duties. This is not even contrary to the interests of the mother and child. Where paternity has been recognised, the risk that the mother and child will be subjected to proceedings in which paternity is challenged can be countered with less drastic measures than a total denial of the natural father's right to contest paternity. For example, it is possible to require the putative natural father to first substantiate his paternity and fulfil other specific prerequisites. Time-limits for contesting a decision may also limit this risk.

The decisions challenged by the complainant in his constitutional complaint violated his fundamental right under Article 6.2.1 of the Basic Law. According to the statements of the complainant, he had (together with the mother of the child) helped choose its name, had lived together with the mother and the child during its first few months of life and had shared in the care of the child. The child reputedly looked similar to the complainant. The mother denied the truth of those statements. After another man with the consent of the mother had recognised his paternity during proceedings to determine paternity, § 1600 of the German Civil Code prevented the complainant from contesting the established legal paternity with a view to having himself recognised as the father of the child. That was the case, even though the man, who claimed to be and was recognised as the father of the child, did not live with the mother and child. The protection of the family pursuant to Article 6.1 of the Basic Law did not justify the exclusion of the complainant from the right pursuant to § 1600 of the German Civil Code to contest the paternity of another man.

Languages:

German.



Identification: GER-2003-3-018

a) Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 03.06.2003 / **e)** 2 BvR 1436/02 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift* 2003, 3111-3118; *Europäische Grundrechte Zeitschrift* 2003, 621-628; CODICES (German).

Keywords of the systematic thesaurus:

3.3 **General Principles** – Democracy.
 3.7 **General Principles** – Relations between the State and bodies of a religious or ideological nature.
 3.9 **General Principles** – Rule of law.
 3.13 **General Principles** – Legality.
 3.19 **General Principles** – Margin of appreciation.
 4.5.2.4 **Institutions** – Legislative bodies – Powers – Negative incompetence.
 4.6.9.1 **Institutions** – Executive bodies – The civil service – Conditions of access.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.2.2.6 **Fundamental Rights** – Equality – Criteria of distinction – Religion.
 5.3.17 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
 5.4.2 **Fundamental Rights** – Economic, social and cultural rights – Right to education.
 5.4.9 **Fundamental Rights** – Economic, social and cultural rights – Right of access to the public service.

Keywords of the alphabetical index:

Education, teacher, headscarf / Islam / Religion, religious plurality / Religion, freedom, positive / Religion, freedom, negative / Right, equivalent to fundamental rights / Civil service, entrance examination / Religion, exercise / Education, duty / Religion, variety of religions / Parliament, prerogative of evaluation / Fundamental right, intrinsic limits / Materiality, theory / Religion, neutrality of the state.

Headnotes:

There is no sufficiently precise statutory basis for a prohibition on teachers wearing a headscarf at school and during classes.

Social change, which is associated with increasing religious plurality, may be the occasion for the

legislature to redefine the admissible degree of religious references permitted at school.

Summary:

The complainant petitioned to be appointed to the teaching profession of the *Land* (state) Baden-Württemberg. In her constitutional complaint she challenged the decision of the administrative authorities responsible for refusing to appoint her, as a teacher, as a civil servant on probation. The grounds were stated as follows: the headscarf is to be interpreted, *inter alia*, as a political symbol of cultural delimitation, and wearing it when teaching is not compatible with the requirement of state neutrality. The complainant submitted that the wearing of the headscarf is not only a feature of her personality, but also the expression of her religious conviction. Under the precepts of Islam, wearing a headscarf is part of her Islamic identity. Although the state has an obligation to preserve neutrality in questions of religion, when it fulfils its duty to provide education under Article 7.1 of the Basic Law it is not obliged to do completely without religious and ideological references, but has to enable a considerate balance between the conflicting interests.

In the remainder of the administrative procedure and at the administrative courts of various instances, the complainant was unsuccessful. Essentially, the courts cited the following as grounds for their decisions: the wearing of a headscarf for religious reasons by a teacher indicated a lack of aptitude in the meaning of the Baden-Württemberg Civil Service Act (*Landesbeamtengesetz Baden-Württemberg*). The complainant's freedom of religion was opposed to the state's duty of neutrality and the rights of the pupils and their parents. The headscarf worn by the complainant demonstrated her profession of Islam. By reason of general compulsory school attendance and the lack of influence of the pupils on the selection of their teachers, the pupils had no possibility of avoidance. This gave rise to the danger of influence – including unintended influence – by the teacher, who was felt to be a person in authority. The teacher's right to conduct herself in accordance with her religious conviction must have lower priority than the conflicting freedom of religion of the pupils and parents during classes. Under Article 33.5 of the Basic Law, teachers were obliged to accept restrictions of their positive freedom of religion; these were necessary in order to guarantee that school lessons took place in an environment of religious neutrality.

In her constitutional complaint, the complainant claimed a violation of Articles 1.1, 2.1, 3.1, 3.3.1, 4.1, 4.2, 33.2 and 33.3 of the Basic Law.

The complainant argued that a Muslim applicant wearing a headscarf also had a constitutional right to be appointed under Article 33.2 of the Basic Law. Admission to public office had to occur independently of a profession of religious belief (Article 33.3.1 of the Basic Law) without permitting the applicant to be disadvantaged for this reason (Article 33.3.2 of the Basic Law). Unlike a secular state, the Federal Republic of Germany, by its Constitution, was open to religious activity even in schools, and in this way it pursued what is known as a comprehensive, open and respectful neutrality. The endangerments set out by the appointing body were merely of an abstract and theoretical nature. If concrete conflicts arose, there were acceptable means of solving them.

The Second Panel granted the relief sought by way of the constitutional complaint. The decisions challenged violate Article 33.2 of the Basic Law in conjunction with Articles 4.1, 4.2 and 33.3 of the Basic Law. The Panel gave the following grounds for the judgment:

The right in Article 33.2 of the Basic Law, which is equivalent to a fundamental right, guarantees the degree of free choice of one's occupation or profession (Article 12.1 of the Basic Law) that is possible in view of the number of positions in the civil service, which is, and is permitted to be, restricted by the public corporation responsible in each case. Article 33.2 of the Basic Law grants no right to be accepted for a public office. Access to an occupation in a public office may be restricted, in particular by subjective admission requirements. This is done in accordance with Section 7 of the Public Service Framework Act (*Beamtenrechtsrahmengesetz*) in the Civil Service Acts of the *Länder* (states) by provisions on the personal requirements necessary to be appointed to the status of a civil servant. Section 11.1 of the Baden-Württemberg Civil Service Act as amended in 1996, which applies in the present case, provides that appointments are to be made on the basis of aptitude, qualifications and professional achievement, without taking into account gender, descent, race, belief, religious or political convictions, origin or connections.

The evaluation by the employer of an applicant's aptitude for the public office applied for relates to the applicant's future occupation in office and at the same time contains a prediction, which requires a concrete assessment of the applicant's whole personality based on the individual case. This also includes a statement with regard to the future as to whether the person in question will fulfil the duties under civil-service law that he or she is subject to in the office applied for. In this predictive assessment, the employer has a broad scope for evaluation.

If a duty is imposed on the civil servant that, at school and when teaching, teachers may not outwardly show their affiliation to a religious group by observing dress rules with a religious basis, this duty encroaches upon the individual freedom of religion guaranteed by Article 4.1 and 4.2 of the Basic Law. It confronts those affected with the choice either of exercising the public office they are applying for or obeying the religious requirements as to dress, which they regard as binding.

Article 4.1 of the Basic Law guarantees freedom of faith, conscience and religious and ideological belief and Article 4.2 guarantees the right of undisturbed practice of religion. Together, Article 4.1 and 4.2 of the Basic Law contain a uniform fundamental right that is to be understood in a broad sense. It extends not only to the inner freedom to believe or not to believe, but also to the outer freedom to express and disseminate the belief.

The freedom of religion guaranteed in Article 4.1 and 4.2 of the Basic Law is guaranteed unconditionally. Restrictions must therefore be based on the Constitution itself. These include the fundamental rights of third parties and social values of constitutional status. Moreover, restricting the freedom of religion, which is unconditionally guaranteed, requires a sufficiently definite statutory basis.

Article 33.3 of the Basic Law is also affected. It provides that admission to public offices is independent of religious belief (sentence 1) and that no-one may suffer a disadvantage by reason of belonging or not belonging to a faith or to an ideology (sentence 2). Consequently, a connection between admission to public offices and religious belief is out of the question.

The assumption that the complainant lacks the necessary aptitude to fulfil the duties of a teacher at the *Grundschule* and *Hauptschule*, and the refusal to admit her to a public office, which was based on this, would be compatible with Article 4.1 and 4.2 of the Basic Law if the intended exercise of freedom of religion conflicted with objects of legal protection of constitutional status and this restriction of the free exercise of religion could be based on a sufficiently definite statutory foundation. Interests that are protected by the Constitution that conflict with freedom of religion here may be the state's duty to educate (Article 7.1 of the Basic Law), which is to be carried out having regard to the duty of ideological and religious neutrality, the parents' right of care and upbringing (Article 6.2 of the Basic Law) and the negative freedom of religion of schoolchildren (Article 4.1 of the Basic Law).

In Articles 4.1, 33.1 and 33.3 of the Basic Law, and in Articles 136.1, 136.4 and 137.1 of the Weimar Constitution (*Weimarer Reichsverfassung*) in conjunction with Article 140 of the Basic Law, the Basic Law lays down for the state as the home of all citizens the duty of religious and ideological neutrality.

However, this is not to be understood as a distancing neutrality in the sense of a strict separation of state and church, but as an open and outreaching one, encouraging freedom of religion equally for all beliefs. Article 4.1 and 4.2 of the Basic Law also contain a positive requirement to safeguard the space for active exercise of religious conviction and the realisation of autonomous personality in the area of ideology and religion. The state is prohibited only from exercising deliberate influence in the service of a particular political or ideological tendency.

The school authority and the non constitutional courts present the view that the complainant's intention to wear a headscarf while teaching at school constitutes a lack of aptitude because preemptive action should be taken against possible influence on the pupils, and conflicts, which cannot be ruled out, between teachers and pupils or their parents should be avoided in advance. At present this view does not justify encroaching upon the complainant's right under Article 33.2 of the Basic Law, which is equivalent to a fundamental right, and the accompanying restriction of her freedom of religion. No tangible evidence could be seen in the proceedings before the non constitutional courts that the complainant's appearance when wearing a headscarf created a concrete danger to the peace at school. The fear that conflicts might arise with parents who object to their children being taught by a teacher wearing a headscarf cannot be substantiated by experience of the complainant's previous teaching as a trainee.

The state of the current civil service and school legislation in the *Land* Baden-Württemberg is not adequate to permit a prohibition on teachers wearing a headscarf at school and when teaching based on the grounds of abstract danger. The mere fact that conflicts cannot be ruled out in future does not, in the absence of a legal basis designed for this purpose, justify deriving from the general civil-service-law requirement of aptitude an official duty on the part of the complainant to give up exercising her religious conviction by wearing a headscarf.

However, the *Land* legislature responsible is at liberty to create the statutory basis that until now has been lacking, for example by laying down the permissible degree of religious references in schools within the limits of the constitutional requirements. In doing this, the legislature must take into reasonable account the

freedom of religion of the teachers and of the pupils affected, the parents' right of care and upbringing and the state's duty of ideological and religious neutrality. Social change, which is associated with increasing religious plurality, may be the occasion for redefining the admissible degree of religious references permitted at school.

It is not the task of the executive to decide what response should be made to the changed circumstances. Rather, it is necessary for the democratically legitimated legislature to make provisions in this respect. Only the legislature has the prerogative of evaluation, which authorities and courts cannot lay claim to for themselves. A headscarf prohibition in state schools as an element of a legislative decision on the relationship between state and religion in education may permissibly restrict freedom of religion. This assumption is in harmony with Article 9 ECHR. The principle of a state under the rule of law and the precept of democracy oblige the legislature itself to lay down the provisions essential to realise fundamental rights.

The decision was passed by five votes to three. The judges in the minority stated that there was a functional restriction of the protection of the fundamental rights of civil servants. Civil servants place themselves by a free act of will on the side of the state and thus participate in the exercise of public authority. A civil servant's particular position of duty takes precedence over the protection of the fundamental rights, which in principle applies to civil servants too, to the extent that the duty and purpose of the public office so require.

Measured against these standards, the uncompromising wearing of the headscarf in class is incompatible with the requirement for a civil servant to be moderate and neutral.

Apart from this, the judges in the minority were also of the opinion that the requirement of the specific enactment of a parliamentary statute in order to create official duties was surprising for the *Land* concerned. The procedural right to a fair hearing that is also due to the state as a party to the proceedings has thus not been taken adequately into account.

Languages:

German, English.



Identification: GER-2003-3-019

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the First Panel / **d)** 11.06.2003 / **e)** 1 BvR 1573/02 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Child, support obligation / Parent, single / Education, financing, right.

Headnotes:

A single mother may not in principle be discriminated against under the Federal Act Concerning the Promotion of Education in relation to the financing of her education for acting in such a way as to ensure her ability to pay child support through gainful employment.

Summary:

I. The complainant, who was born in 1960, brought a constitutional complaint against the refusal of benefits pursuant to the Federal Act Concerning the Promotion of Education (*Bundesausbildungsförderungsgesetz*, BAföG) for a degree in medicine. The reason given for the refusal was that the complainant had discontinued previous retraining to become a job trainer in 1989 without a cogent reason within the meaning of § 7.3 sentence 1 number 1 of the Federal Act Concerning the Promotion of Education. The complainant claimed that her fundamental rights under Articles 6 and 3.1 of the Basic Law had been violated. She claimed that she had been unable to complete the requisite work experience for her retraining because had to fulfil child support obligations to her children who were born in 1981 and 1983. She further stated that she had not wanted to claim social welfare benefits.

II. The Third Chamber of the First Panel granted the relief sought by way of the constitutional complaint and gave the following reasons.

The impugned judgment of the Administrative Court (*Verwaltungsgericht*) violated the complainant's fundamental rights under Article 6.2 of the Basic Law. The uncertain legal term requiring the existence of a "cogent reason" within the meaning of § 7.3.1.1 of the Federal Act Concerning the Promotion of Education must be interpreted in conformity with Article 6.2 of the Basic Law. A single mother may not in principle be discriminated against under the Federal Act Concerning the Promotion of Education in relation to the financing of her education for acting in such a way as to ensure her ability to pay child support through gainful employment.

The Administrative Court had failed to consider that aspect adequately. It had allowed the complainant to be disadvantaged by the fact that she had no definite prospects of obtaining adequately well-paid work experience at the beginning of her retraining as job trainer. Admittedly, the complainant had also been obliged within the framework of § 7.3 of the Federal Act Concerning the Promotion of Education to plan her retraining carefully. However, in view of Article 6.2 of the Basic Law, it would only have been possible to assume that the complainant had breached her obligation to plan carefully if it had been clear to her from the start or at least appeared highly probable that she would not be able to find work experience with adequate remuneration at the relevant time. In the case in question, there was no evidence of that.

Languages:

German.



Identification: GER-2003-3-020

a) Germany / b) Federal Constitutional Court / c) Second Chamber of the Second Panel / d) 02.07.2003 / e) 2 BvR 273/03 / f) / g) / h) CODICES (German).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.16 **General Principles** – Proportionality.
5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Trial within reasonable time.

Keywords of the alphabetical index:

Statute barred for want of prosecution / Penalty, mitigation / Administrative offence, proceedings, duration.

Headnotes:

Article 2.1 of the Basic Law, in conjunction with the principle of the rule of law, guarantees an accused in proceedings dealing with an administrative offence, just as it guarantees an accused in criminal proceedings, the right to a fair trial and due process. The latter right includes the right to have the proceedings completed within a reasonable time.

In a case where the duration of proceedings is excessive and not in accordance with the principle of the rule of law, the principle of proportionality entails the obligation to review carefully whether and, if so, with which means the state may (still) prosecute the person concerned for the administrative offence.

Such principles are also applicable where the delay in proceedings only occurs at the appellate level (i.e. where there is an appeal from proceedings concerning an administrative offence).

Summary:

I. The complainant was fined DM 4,000 for an administrative offence by a Local Court (*Amtsgericht*) in 1998. The complainant promptly appealed on a point of law giving his reasons. In addition to raising specific objections, he pleaded that the Local Court had erred on the facts. In July of 1998 the chief public prosecutor's office (*Generalstaatsanwaltschaft*) gave its comments on the complainant's plea. In an order dated 15 January 2003, the Higher Regional Court (*Oberlandesgericht*) dismissed the complaint as inadmissible "because the re-examination of the case on the basis of the reasons given in the appeal did not show any serious legal errors that disadvantaged the person concerned". The Higher Regional Court also stated that the prosecution of the offence was not barred by the statute of limitations because the running of the period of limitation had been suspended since the delivery of the impugned judgment (see § 32.2 of the Administrative Offences Act, *Ordnungswidrigkeitengesetz*, OWiG).

In a constitutional complaint, the complainant alleged a violation of his fundamental right to effective legal protection. He claimed that the Higher Regional Court had taken four and a half years to make an order stating brief reasons on the basis of the file before it and that it had, therefore, not concluded the complaint

proceedings within a reasonable time-limit. He further alleged that the offence had occurred in August 1994. According to the law in effect at the time, the limitation period was two years. The decision by the Higher Regional Court had taken longer than four times the normal limitation period and more than twice as long as the maximum limitation period.

The Ministry of Justice in Baden-Württemberg indicated in its comments on the matter that its judges had been at the time primarily occupied with criminal matters, which took precedence. Therefore, in individual cases, other proceedings had to wait. The Ministry of Justice claimed that the sole judge hearing the case had made it clear to the complainant's defence lawyers in a telephone call in the middle of 2002 that the panel was overburdened, but that the proceedings would not be discontinued on the basis that they were statute-barred for want of prosecution.

II. The Second Chamber of the First Panel found the constitutional complaint well-founded. It overturned the impugned decision and referred the matter for retrial to the Higher Regional Court. The Federal Constitutional Court gave the following reasons.

Article 2.1 of the Basic Law, in conjunction with the principle of the rule of law, guarantees an accused in proceedings concerning an administrative offence the right to a fair trial, which includes the right to have the proceedings completed within a reasonable time. Whether the duration of the proceedings is still reasonable must be assessed according to the circumstances of the individual case. Factors that are generally significant are, in particular, an extension of the length of proceedings due to court delays, the entire length of the proceedings, the seriousness of the alleged offence, the scope and difficulty of the subject-matter of the proceedings as well as the degree to which the accused is especially burdened due to the length of the proceedings. The severity of the applicable measure is, however, eased in the case of administrative offences by the fact that the penalty is simply intended as a sharp reminder of a person's obligations and does not have the intensity of state intervention in the form of criminal punishment. It seems reasonable to assume that the duration of proceedings is too long if the duration is several times the normal limitation period.

Even in proceedings concerning an administrative offence, every avoidable delay can expose the person concerned to additional burdens. With an increasing delay in the proceedings, these burdens conflict with the principle that lays down that punishment must be proportionate and in just proportion to the perpetrator's guilt. That principle is derived from the principle of the rule of law.

Therefore, a delay in proceedings in violation of the principle of a state governed by the rule of law can also have effects on the size of the fine and even lead, in extreme cases, to the discontinuation of proceedings (see § 47.2 of the Administrative Offences Act). In a case where the duration of proceedings is excessive and not in accordance with the principle of the rule of law, the principle of proportionality entails the obligation to review carefully whether and, if so, with which means the state may (still) prosecute the person concerned. It is generally necessary to find expressly that the nature and scope of the requirement of reasonable time has been violated and to define more clearly the extent to which this has to be taken into account.

Where the judiciary is responsible for significant and avoidable delays that first occur at the appellate level, the question still arises as to whether the judgment is compatible with the principle of proportionality. Even delays that occur for the first time at the appellate level can be a burden on the complainant. After all, a judgment against the accused – even if it is not *res iudicata* – still exists and its lawfulness remains unclear over a longer period of time. Thus, the accused is perceptibly burdened.

In the case at instance, the conduct of the proceedings for an administrative offence had been subjected to considerable delay. The Higher Regional Court, whose task in the case in question had been merely to decide on the existence of errors of law (see § 79.3 sentence 1 of the Administrative Offences Act and § 337 of the Code of Criminal Procedure, *Strafprozessordnung*, StPO), did not make an order for over four and a half years even though there was no indication that the appeal contained particularly difficult questions of law. The reference by the Ministry of Justice in Baden-Württemberg to the difficult personnel situation – regardless of the fact that it did not deal specifically with the burden experienced by the actual court hearing the case or the organisational measures taken to rectify the problems – could not justify the proceedings lasting so long, since the state community bears full responsibility where proceedings cannot be concluded within a reasonable time due to a lack of personnel.

It did not follow from that that the proceedings should have been discontinued. The Higher Regional Court should have examined whether and, if so, to what extent its own delay in the proceedings, which had been in violation of the principles of a state governed by the rule of law, led to the disproportionality of the judgment by the Local Court and thus to the requirement to reduce the fine. It had failed to do so and instead had been satisfied by its finding that the

case had not been statute barred for want of prosecution. If the Higher Regional Court were to find the judgment by the Local Court disproportionate, it would have to make a decision itself and reduce the fine (see § 79.6 of the Administrative Offences Act). Since the delay had occurred at the Higher Regional Court level, the obligation to ensure proceedings are conducted within a reasonable time prevented the case from being referred back to the Local Court.

Languages:

German.



Identification: GER-2003-3-021

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the First Panel / **d)** 30.07.2003 / **e)** 1 BvR 792/03 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift* 2003, 2815-2816 EuGRZ 2003, 515-517; CODICES (German).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
 5.2.1.2.1 **Fundamental Rights** – Equality – Scope of application – Employment – In private law.
 5.2.2.6 **Fundamental Rights** – Equality – Criteria of distinction – Religion.
 5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of worship.
 5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Dismissal, employee's behaviour / Employment, dismissal, wrongful / Headscarf, refusal to remove.

Headnotes:

As to the termination of employment relationships, Article 12.1 of the Basic Law may also be applied in favour of the employer.

Article 12.1 of the Basic Law protects the employer's interest in employing in his or her business only employees who comply with the employer's

expectations and in restricting the number of employees to the extent that he or she determines.

Although Article 12.1 of the Basic Law protects the employees' interest in keeping their employment, it does not provide direct protection from the loss of one's place of work on the grounds of private dispositions. The state, however, has a duty to protect, which follows from the fundamental right. The dismissal protection regulations in force take this duty into consideration.

In the case of settlements under private law that set limits to the freedom of contract, a balance must be achieved between two conflicting interests that are both guaranteed by fundamental rights. The interaction of the conflicting fundamental rights positions must be assessed, and limits must be set to them in such a way that the fundamental rights positions become effective to the greatest extent possible for all interested parties.

It is first and foremost for the competent courts to weigh, with reference to the specific dispute and the respective employment relationship concerned, whether in the individual case, a specific expectation as regards the employee's behaviour can justify a dismissal where the employee does not see himself or herself in a position to comply with such expectation in the framework of his or her freedoms that are protected by fundamental rights.

Summary:

I. The complainant, a limited company, operates a department store, where it employed a Turkish-born employee as a "shop assistant." The employee informed the complainant that due to a change in her religious beliefs, she no longer wanted to appear in public, i.e. including work, without wearing a headscarf. The complainant terminated the employment relationship because in its opinion, the employee's continued employment was impossible because the sales staff was obliged to dress in accordance with the style of the department store, i.e. in a neat and unobtrusive manner. The complainant put forward that particularly in the perfume department, a shop assistant wearing a headscarf was unacceptable.

The shop assistant's action for protection against unfair dismissal was unsuccessful in the first and the second instance. The Federal Labour Court (*Bundesarbeitsgericht*) granted the relief sought in the action holding that the dismissal was unjustified on social grounds (§ 1.2 of the Protection against Dismissal Act, *Kündigungsschutzgesetz*).

In a constitutional complaint, the complainant challenged a violation of its entrepreneurial freedom (Articles 2.1 and 12.1 of the Basic Law). The complainant submitted that in legal relations under private law, fundamental rights were reduced in their meaning, and that the Federal Labour Court had erred in its consideration of that matter. The complainant did not deny that the employee could invoke the fundamental right under Article 4.1 of the Basic Law GG to justify her wearing a headscarf, but submitted that the employee's fundamental right did not enjoy absolute protection. The complainant argued that there were limits to the employee's right resulting from the complainant's rights under Articles 12.1 and 2.1 of the Basic Law, and concluded that a weighing of the conflicting fundamental rights positions was required.

II. The Second Chamber of the First Panel did not admit the constitutional complaint for decision, holding that the Federal Labour Court did not err in the protection of the employer's fundamental rights under Article 12.1 of the Basic Law when interpreting and applying the dismissal protection regulations.

The reasoning was essentially as follows.

In the particular case, both the dismissed employee and the complainant could invoke the protection of their occupational freedom under Article 12.1 of the Basic Law. To the extent that the employee is not a German citizen, the employee's protection follows from Article 2.1 of the Basic Law. Apart from that, the employee could, first and foremost, invoke protection pursuant to Article 4.1 of the Basic Law because she was supposed to leave her employment due to behaviour that she felt she had to engage in because of religious reasons. The fundamental right includes the freedom to live and to act in accordance with one's own religious beliefs. Admittedly, the freedom of creed is guaranteed without a constitutional requirement of the specific enactment of a statute to this effect, but it is not guaranteed without any limits at all. In particular, the positive freedom to profess one's faith encounters its limits where its exercise by the a person enjoying that fundamental right meets with the conflicting fundamental rights of differently minded persons.

In the particular case, the employee's freedom conflicted with the complainant's freedom to engage in business activities, which is protected by Article 12.1 of the Basic Law. Occupational freedom within the meaning of Article 12.1 of the Basic Law protects the employer's interest in employing in his or her business only employees who comply with the employer's expectations, and in restricting the number of employees to the extent that he or she

determines. Article 12.1 of the Basic Law also protects the employee's interest in keeping his or her place of work.

Where the decision of a Labour Court affects the freedom of creed and conscience, Article 4.1 of the Basic Law requires that the courts take the meaning of this fundamental right into consideration when interpreting and applying the relevant private-law provisions. The Federal Labour Court recognised the mutual fundamental rights positions both of the employee who had been dismissed and of the complainant and assessed them in a plausible manner and in a way that was constitutionally unobjectionable.

Contrary to the complainant's opinion, no abstract standards resulted from the conflicting fundamental rights positions of the employee and complainant on the basis of which it was possible to determine the extent of the restriction on the employer's freedom to give notice of dismissal in order for the employer to respect the employee's sphere of freedom within the framework of the freely entered into employment relationship. What was instead required was a weighing of the respective protected fundamental rights positions of both parties to the contract in the individual case. The result of that weighing is not predetermined in the Constitution itself in any definite manner.

The Federal Labour Court had expressly emphasised that the complainant's entrepreneurial freedom could be considered as a competing legal position that was protected by the fundamental right guaranteed in Article 12.1 of the Basic Law. The Federal Labour Court had based the result of its weighing mainly on the conclusion that the complainant did not substantiate in a sufficiently plausible manner that the employee's behaviour would result in a disruption of business or an economic loss. In that context, the complainant could not rely on the usual practices in its line of business or on knowledge of everyday life, especially since the employee could also be assigned to other, less exposed departments to work as a shop assistant there. Contrary to the complainant's opinion, that argumentation was not one-sided; it did not place too much emphasis on the employee's fundamental rights position.

Languages:

German.



Identification: GER-2003-3-022

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 26.08.2003 / **e)** 1 BvR 2243/02 / **f)** / **g)** / **h)** *Europäische Grundrechtezeitschrift* 2003, 638-640; CODICES (German).

Keywords of the systematic thesaurus:

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

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

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

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

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

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

Keywords of the alphabetical index:

Information, disparaging, Federal Chancellor / Information, truthfulness, obligation to verify / Media, press agency, freedom of expression / Media, information, dissemination, standard of care.

Headnotes:

The fact that a press agency is obliged to examine the truth of its reports before distributing them does not infringe the fundamental right of the freedom of expression.

If allegations of fact are concerned that have not been established as false from the outset, or if the truth of such allegations cannot be verified, they admittedly come within the scope of the freedom of expression. In the weighing of interests, however, they are, as a general rule, given less importance because from the point of view of the freedom of expression, there is no interest worthy of protection that would justify the upholding and dissemination of disparaging allegations of fact.

Summary:

The complainant is a press agency. In an interview with one of its employees, the image consultant S. v. E. made statements about the clothes, styling and appearance of Edmund Stoiber and Gerhard Schröder, who were candidates for the chancellorship at the time. A report about the interview that was distributed by the complainant on 23 January 2002

contained, *inter alia*, the following statement about Federal Chancellor Gerhard Schröder:

[According to Ms. v. E.,] also his completely dark hair did not look authentic. "It would be of benefit to his powers of persuasion if he did not colour the greying hair at his temples."

As a reaction to a letter from the Federal Chancellor in which he requested the complainant to refrain from making this statement, the complainant distributed a "withdrawal" of the report that had been objected to, and a "correction" that pointed out, *inter alia*, that Federal Chancellor Gerhard Schröder attached importance to the statement that "his hair is neither dyed nor coloured." The complainant further stated that it would not repeat the quotation with knowledge of its falsity, not, at any rate, without an addition that corrected it.

The Federal Chancellor thereupon obtained a temporary injunction from the Regional Court (*Landgericht*) of Hamburg, which enjoined the complainant, under penalty of an administrative fine, to refrain from disseminating the following (in the form of a quotation by the image consultant S. v. E.): "It would be of benefit to his (i.e. Gerhard Schröder's) powers of persuasion if he did not colour the greying hair at his temples", and from having the quotation disseminated by third parties.

The complainant was also unsuccessful in the main action before the Regional Court and the Higher Regional Court (*Oberlandesgericht*) of Hamburg.

By way of its constitutional complaint, the complainant essentially challenged the violation of its fundamental rights under Article 5.1 of the Basic Law (freedom of expression).

The First Chamber of the First Panel did not admit the constitutional complaint for decision.

The Chamber's reasoning was essentially as follows:

When the civil-law statutes that restrict the freedom of expression pursuant to Article 5.1.1 of the Basic Law are reviewed, a weighing of the legal interests that are affected must normally be performed. If allegations of fact are concerned that have not been established as false from the outset, or if the truth of such allegations cannot be verified, they admittedly come within the scope of the freedom of expression. In the weighing of interests, however, they are, as a general rule, attached less importance because from the point of view of the freedom of expression, there is no interest worthy of protection that would justify the upholding and dissemination of disparaging allegations of fact. In

such cases, the obligation to assume liability on the part of the disseminating party is determined, in particular, by the disseminating party's compliance with the requirements that are placed on due care. Such requirements depend on the possibilities of verification that exist in the respective case, and also on the position of the party that makes the statement in the process of the forming of public opinion. The requirements that are placed on the media are therefore stricter than those placed on private individuals (cf. Decisions of the Federal Court of Justice: *Bundesgerichtshof, BGH, Neue Juristische Wochenschrift* 1966, p. 2010 [at p. 2011]; *Neue Juristische Wochenschrift* 1987, p. 2225 [at p. 2226]; *Entscheidungen des Bundesgerichtshofs in Zivilsachen*, Decisions of the Federal Court of Justice in Civil Matters 132, p. 13 [at pp. 23-24]). What is decisive under the Constitution is, however, that the requirements placed on the obligation to be truthful are not so excessive that they hinder the free communications process that Article 5.1 of the Basic Law aims to achieve (cf. *BVerfGE* 54, p. 208 [at pp. 219-220]; 99, p. 185 [at p. 198]).

The requirements of due care that are placed on the complainant as a press agency are in no way less strict than those that apply to other press companies. Press agencies play a prominent role, which has become more and more important recently, as regards the selection and presentation of news items in the press. In practice, they supply a large share of the news items to the press companies in a form that is ready for the press. With a view to the confidence that media companies undoubtedly place in press agencies, and to the agencies' prominent opinion-forming function, awarding protection from civil-law claims by the persons affected to the news items that they publish is justified only to the extent that the practical possibilities of verifying their truth have been used within the bounds of what is reasonable. In the case of press agencies, the fact that they deal with a large number of news items every day makes the requirements that are placed on them by no means less strict.

The more strongly the statement impairs the legal positions of the third parties that are affected by it, the higher is the standard of care that must be applied. In the present case, it is not apparent that the requirements placed on due care have been excessive. The statement that was challenged in the present case did not deal with a subject of great political, social or economic importance, but it was, however, not at all insignificant to the public and to the person affected, namely the Federal Chancellor as the plaintiff in the original proceedings. The interview compared two candidates for the chancellorship, and consequently, it also addressed the question whether the plaintiff

“came across well” in his public presentation. The challenged statement did not incidentally deal with the colour of the Federal Chancellor's hair but served as a basis for statements about his credibility and powers of persuasion. This made the reference to the colour of his hair a kind of test for important qualifications of a politician. The Federal Chancellor's interest in not being judged on a wrong basis in this context corresponded with the public's interest in being informed as correctly as possible.

Cross-references:

- Decisions of the Federal Constitutional Court: *BVerfGE* 61, p. 1 [at p. 8]; 94, p. 1 [at p. 8];
- Decisions of the Federal Court of Justice: *Bundesgerichtshof, BGH: Neue Juristische Wochenschrift* 1966, p. 2010 [at p. 2011]; *Neue Juristische Wochenschrift* 1987, p. 2225 [at p. 2226];
- *Entscheidungen des Bundesgerichtshofs in Zivilsachen* (Decisions of the Federal Court of Justice in Civil Matters) 132, p. 13 [at pp. 23-24].

Languages:

German.



Identification: GER-2003-3-023

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the First Panel / **d)** 02.10.2003 / **e)** 1 BvR 536/03 / **f)** / **g)** / **h)** *Europäische Grundrechtezeitschrift* 2003, 746-749; CODICES (German).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.24 **General Principles** – Loyalty to the State.
- 5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
- 5.2.2.6 **Fundamental Rights** – Equality – Criteria of distinction – Religion.
- 5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of worship.
- 5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of assembly.

Keywords of the alphabetical index:

Association, religious, ban / Association, criminal aim / Religion, privilege, constitution / Constitutional order, destruction.

Headnotes:

The ban on a religious association that undermines the liberal and democratic fundamental order in a belligerent and aggressive manner does not infringe the freedom of religion (Article 4.1 and 4.2 of the Basic Law).

Summary:

As a consequence of the terrorist attacks on 11 September 2001, the German Parliament extended the applicability of the Act Governing Private Associations (*Vereinsgesetz*) to religious associations. Thereupon, the Federal Ministry of the Interior banned one of the complainants in the present case, the Caliphate State, an association all or most of whose members are foreigners. The Federal Ministry of the Interior substantiated the ban by means of the following arguments. The Caliphate State's adherents reject democracy and the constitutional order established by the Basic Law. According to the Caliphate State's adherents, the sole basis of the state system of rule is Allah's will. The Caliphate State regards itself as a fully-fledged state with its own state authority, and it does not recognise the monopoly on the use of force of the Federal Republic of Germany's state bodies. Thus, the complainant legitimises that its members disregard the German laws and assert the Caliphate State's ideas by means of violence.

The Federal Administrative Court (*Bundesverwaltungsgericht*) dismissed the complainants' action against the ban. The constitutional complaint challenged the dismissal. In particular, it claimed a violation of the complainants' fundamental rights under Article 4.1 and 4.2 of the Basic Law. The complainants argued that by abolishing the "religious privilege" in the Act Governing Private Associations, pursuant to which religious groups were not regarded as associations under the terms of the law, the legislature had, without any justifying reason, encroached upon the fundamental right under Article 4 of the Basic Law, which is granted without reservation.

The Second Chamber of the First Panel did not admit the constitutional complaint for decision. The grounds for the decision were essentially as follows:

The challenged infringements of the Constitution cannot be established. Admittedly, the Federal Administrative Court's decision concerns at least the first complainant's (i.e. the Caliphate State's) rights under Article 4.1 and 4.2 of the Basic Law if it is regarded as a religious group. In the final analysis, however, the impairment of fundamental rights that exists in this context does not meet with considerable constitutional reservations.

The Basic Law attaches great importance to the freedom of association of religious groups. Their freedom of association must also be respected if religious groups take a critical attitude towards the state, towards its constitutional order and its rule of law. The Federal Administrative Court therefore rightly required that the severe encroachment that the ban of a religious association constitutes must be indispensable in accordance with the principle of proportionality. The Federal Administrative Court's further assumption that this is normally the case if the association actively and belligerently opposes the constitutional principles of democracy and the rule of law, which are declared unamendable in Article 79.3 of the Basic Law, does not meet with constitutional reservations.

However, the protection of the fundamental right of religious freedom and of its exercise by the subject of the fundamental right requires effective procedural precautions in cases that involve the ban on a religious association. The administrative authority and the administrative court must carefully clarify the facts that are relevant to the ban, and they must do so in such a comprehensive manner that the necessary forecast concerning the aims of the association, which is complex, can be made on the basis of reliable factual information. In the final analysis, the assumption that the complainants, in a belligerent and aggressive manner, pursue the aim of undermining the Basic Law's constitutional order particularly by seeking to replace the unamendable principles of democracy and of the rule of law, if necessary by violence, also in Germany, with a state system of rule that is incompatible with these principles does not meet with constitutional reservations. The complainants do not just want to criticise, in an abstract manner, the Federal Republic of Germany's constitutional system while preserving their willingness to act in conformity with the law. They rather intend to assert their own ideas with violent means if necessary. This is evidenced by the incidents surrounding the sentencing of the association's president, Metin Kaplan, by the Higher Regional Court (*Oberlandesgericht*) of Düsseldorf. Metin Kaplan had, in a final judgment, been sentenced to four years' imprisonment for incitement to a crime. The judgment had been based on the incitement to murder his religious

opponent S., which Metin Kaplan had made at a wedding reception and at a meeting of functionaries and adherents of the first complainant (i.e. of the Caliphate State). In its judgment, the Federal Administrative Court was permitted to attribute Metin Kaplan's statements to the complainant.

Languages:

German.



Hungary Constitutional Court

Statistical data

1 September 2003 – 31 December 2003

Number of decisions:

- Decisions by the plenary Court published in the Official Gazette: 17
- Decisions by chambers published in the Official Gazette: 6
- Number of other decisions by the plenary Court: 50
- Number of other decisions by chambers: 9
- Number of other (procedural) orders: 47
- Total number of decisions: 129

Important decisions

Identification: HUN-2003-3-006

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 27.10.2003 / **e)** 47/2003 / **f)** / **g)** 2003/122 / **h)**.

Keywords of the systematic thesaurus:

- 3.10 **General Principles** – Certainty of the law.
 3.12 **General Principles** – Clarity and precision of legal provisions.
 5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
 5.3.13.14 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Independence.
 5.3.31.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.

Keywords of the alphabetical index:

Crime, prevention, permissible means / Police, surveillance, released convict.

Headnotes:

The Constitutional Court held that provisions allowing the police to monitor, for the purposes of crime prevention, convicts released after at least three years' imprisonment clearly violated the fundamental rights of convicts, especially their right to the protection of personal data and the privacy of the home.

Summary:

The petitioner sought constitutional review of certain provisions of the Act XXXIV of 1994 on the Police (Police Act) concerning crime prevention on the ground that they violated the principle of legal certainty.

The impugned provision authorises the police to monitor, for the purposes of crime prevention and under certain circumstances set out in the Act, convicts released after at least three years' imprisonment. Monitoring means, *inter alia*, collecting secret data without judicial authorisation, including the right to enter the home of such a person without any prior judicial authorisation.

In its decision, the Constitutional Court struck down the impugned provisions of the Police Act on the grounds that they violated the right to remedy and the right of access to court, as well as Article 50.3 of the Constitution, which guarantees the independence of judges. The Court argued that the Act failed to lay down the guiding principles for the decision-makers exercising discretionary power. Thus, the judicial proceedings were a mere formality; the decision was not, in fact, made by the judiciary.

The Constitutional Court also considered that the provisions lacked legal certainty and struck them down for that reason. The provisions in question were not clearly defined; they did not comply with the requirements concerning foreseeable legal consequences.

Languages:

Hungarian.

*Identification:* HUN-2003-3-007

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 05.12.2003 / **e)** 62/2003 / **f)** / **g)** 2003/145 / **h)**.

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.

4.4.1.1 **Institutions** – Head of State – Powers – Relations with legislative bodies.

4.4.1.4 **Institutions** – Head of State – Powers – Promulgation of laws.

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

Keywords of the alphabetical index:

Law, reconsideration by parliament / President, legislative veto.

Headnotes:

In relation to the promulgation of Acts, the rights of the President defined in Article 26 of the Constitution represent a counterbalance to the legislative activity of parliament. The institution of reconsideration stems from the principle of the separation of powers. Where the parliament does not secure the right circumstances for a real reconsideration of an Act sent back to it by the President, it is a violation of Article 26.3 of the Constitution, and that Act is null and void. Securing the President's right to participate in and speak at sittings of the parliament and of its committees is a precondition for the validity of an Act that has gone through the process of reconsideration.

Summary:

The parliament enacted Act LXXXIV of 2003 on Some Questions Related to Medical Activities, which came into force on 1 July 2003. It aimed at unifying the rules for doctors and other professionals working in the medical field, and also at identifying special circumstances requiring different types of legislative acts.

On 23 June 2003 the President asked the representatives to reconsider the bill, whereupon the bill was passed on the same date with the same content. Numerous parties, political and professional organisations applied to the Constitutional Court and challenged the constitutionality of the Act. The President of the Republic promulgated the Act, but at the same time filed a petition with the Constitutional

Court. As a consequence of the circumstances under which the bill had been passed, the President asked the Constitutional Court to interpret his role in the legislative process.

The President requested an interpretation of matters related to three main issues. Firstly, he requested an interpretation of the way the parliament had to act in order to satisfy Article 26 of the Constitution, which requires a renewed discussion in case of an Act being sent back to it. Secondly, he asked the Court to compare Article 26.3 and 26.4 of the Constitution in order to determine whether the President, instead of promulgating an Act that had been previously sent back to and reconsidered by parliament, could make a reference to the Constitutional Court for preliminary constitutional review of that Act. Finally, he asked for an interpretation in relation to what partial rights made up the President's right to participate in and speak at sittings of the parliament and its committees, in particular, in the case of the reconsideration of Acts previously sent back to parliament.

According to Article 29.1 of the Constitution the President guards the democratic operation of the State, and the rule of law falls within this. The Court ruled that according to Article 2.1 of the Constitution, the preconditions of the realisation of a democratic state are the separation of powers, the obligation of the separate constitutional bodies to co-operate, their mutual respect for the autonomy of decision making and processes of the others, and also the existence of procedural rules derived from the Constitution and their observance.

As a result of the obligation to co-operate, when sending back an Act, the President must present comments to the parliament that are suitable for starting and conducting the process of the reconsideration of the Act.

At the same time, the constitutional legal status of the President requires that his comments are truly dealt with. Unlike comments of representatives, the parliament may reach a decision concerning an Act only after real consideration of the comments by the President. The parliament, however, is only bound to a real reconsideration of the Act; and it is not bound to accept the comments of the President and, as a result, to amend the Act.

Regarding the reconsideration of the Act, the general and specific provisions of the Standing Order of parliament have constitutional importance. A violation of any of those provisions results in the violation of the nature of the democratic state, set out in Article 2.1 of the Constitution. Legislation made in violation of procedural rules is defective in form and

is, as a result, unconstitutional. The result may be that the Act is struck down.

The Constitutional Court stated that the President of the Republic represented the partly political, partly legal control of the legislature through the exercise of his right to send back an Act, and through his right to initiate preliminary review of an Act. These presidential veto powers through which the President may express his disagreement with an Act combine to form a right that may be exercised only once for every piece of legislation. The Constitutional Court found that that resulted from both the grammatical interpretation of the constitutional provisions and the constitutional legal status of the President. If the disagreement of the President with the legislative power were to make a piece of legislation untenable, the President would not represent a counterbalance to the legislative power, but an unjustified limit on that power.

Relating to the President's right to participate in and speak at sittings of the parliament and its committees, the Constitutional Court ruled that this right of the President could not be questioned, even in general. A real opportunity had to be secured for him to participate and speak, including giving him reasonable notice in writing of the time and place. The repeated final voting of the Act cannot take place unless the President has had an opportunity to participate in the meeting of the reconsideration of the Act and to elaborate orally on his reasons in detail. Otherwise, the President's sphere of authority would be devoid of all meaning, just as it would be if the reconsideration were to take place without an opportunity for real debate.

Supplementary information:

Considering the part of the decision holding that the President had an opportunity to use his veto power against the same Act only once, the Constitutional Judges delivered several concurring and dissenting opinions.

In his concurring opinion, László Kiss emphasised the importance of the political neutrality of the President: his further presence in the legislative process would question that neutrality. Ottó Czúcz joined Kiss in his opinion.

István Kukorelli deduced the exclusion of the repeated use of the veto from the historical interpretation of the Hungarian President of the Republic's constitutional position.

In his dissenting opinion, István Bagi elaborated that where the President finds that it is unequivocal that

the process of reconsideration has resulted in the Act being adopted in an unconstitutional way, that is to say, it suffers from a patent unconstitutionality that can directly be deduced from the Constitution, then the President must not sign the reconsidered Act, but must instead refer it to the Constitutional Court. That could be directly deduced from the interpretation of Article 29.1 of the Constitution.

In a dissenting opinion, Árpád Erdei pointed out that in a case where parliament amends an Act in the process of reconsideration and the President has reservations as to the constitutionality of those amendments, then the exercise of a constitutional veto could not be excluded.

Attila Harmathy's dissenting opinion also found it worrisome to exclude the constitutional veto in a case of an Act amended during reconsideration.

János Strausz drew attention to the reasons for invalidity during reconsideration. In such cases, the Constitution does make it possible for the President to initiate preliminary review.

Éva Vasadi's dissenting opinion also referred to the text of the Act subject to amendment during reconsideration, and to the fact that the interpretation of the Constitution based on the majority decision might indirectly prevent the President from exercising the right of the political veto.

Languages:

Hungarian.



Identification: HUN-2003-3-008

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 18.12.2003 / **e)** 65/2003 / **f)** / **g)** 2003/148 / **h)**.

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
 3.17 **General Principles** – Weighing of interests.
 3.18 **General Principles** – General interest.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.

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

5.3.12 **Fundamental Rights** – Civil and political rights – Security of the person.

Keywords of the alphabetical index:

Arrest, legal grounds / Police custody, maximum period / Drunkenness, police custody / Identity, check, police custody.

Headnotes:

No other fundamental rights exist that could be secured by the detention, i. e. restricting the freedom (under Article 33.2.g of the Police Act), of a person reported missing.

Moreover, the provision of the Police Act authorising the police to take a person into custody for reasons of public security for 24 hours where the interest of the person (being in a condition where that person presents a risk of danger to himself/herself or others due to drunkenness or other reasons) requires such custody is unconstitutional in so far as drunkenness, as a situation where a person presents a risk of danger to himself/herself or others, cannot be considered grounds for detention.

Summary:

Under Article 33.2.a, b, c, g of the Act XXXIV of 1994 on the Police (Police Act), in the interest of public security the police may bring before the competent authority any person who is unable to prove his or her identity; who may be suspected of a criminal offence; from whom a blood or urine test is required as evidence of a crime; and a person who is reported as missing. The Police may restrict personal freedom by bringing a person before the competent authority only for the necessary period of time not exceeding 8 hours, which may be prolonged once by 4 hours.

The Hungarian Civil Liberties Union, *inter alia*, filed a complaint with the Constitutional Court, alleging that the above-mentioned provisions of the Police Act were unconstitutional for the reasons that those provisions did not require a well-founded suspicion for limiting a person's personal freedom and that short-term arrest was absolutely unnecessary in the case of a person reported as missing. Once the person was found, there was no reason to keep that person in detention.

According to the Constitutional Court, no other fundamental rights exist that could be secured by

the detention, i. e. restricting the freedom (under Article 33.2.g of the Police Act), of a person reported missing. Although some missing persons may pose a risk to public security, this is not necessarily true of all missing persons. Consequently, the attainment of the above-mentioned constitutional aim cannot always be used a reason for restricting personal freedom. The Constitutional Court also found it important whether a missing person who is held as such engages or has engaged in any behaviour violating the law, because disappearing is not in itself against the law. For that reason, the Constitutional Court was of the opinion that the impugned provision of the Police Act amounted to an unnecessary and disproportionate restriction of personal freedom, and was therefore unconstitutional.

In addition, the Court found unconstitutional the provision of the Police Act permitting the police to take a person brought before the competent authority into custody for reasons of public security for 24 hours where the interest of the person (being in such a condition as to present a risk of danger to himself/herself and others due to drunkenness or other reasons) requires such custody. Both the Police Act and Health Act require that an injured, sick person or a person requiring urgent treatment in custody be given medical treatment. On that basis, the police can meet the general obligation to protect life, thereby making custody for public-security reasons in such cases unnecessary. For those reasons, the Constitutional Court declared the provision regulating the temporary restriction of personal freedom unnecessary, and stated that it violated Articles 8.2 and 55.1 of the Constitution.

According to the second sentence of Article 19.1 of the Police Act, the lawfulness of police measures cannot be questioned during the actions themselves. In the petitioner's opinion, that provision also ran contrary to Article 55.1 of the Constitution.

However, in the Court's opinion, the effectiveness of police measures could not depend on the understanding of the person affected by the measures, and thus the measures in question could be effected by force if necessary. The person affected by the measures could challenge the lawfulness of police actions at the time they were taking place only exceptionally. Presuming the lawfulness of police actions is a kind of legal protection. Their lawfulness may be challenged by subsequent review; a legal remedy may be sought against those actions; and there is also a possibility of a final judicial review of the injurious police measures. For those reasons, the Constitutional Court stated that that provision did not

violate the constitutional provisions concerning freedom and personal security.

As to Article 33.2 of the Police Act authorising the police to bring before the competent authority any person suspected of a criminal offence, the petitioner submitted that unlike a substantiated suspicion, a simple suspicion could lead to an unjustified limitation of freedom. The Constitutional Court found that during the time of custody, the authority had opportunity to state the existence of a substantiated suspicion. Therein lies the constitutionally relevant distinction, which makes any argument demanding substantiated suspicion untenable. According to the Police Act, however, such detention may only occur for the sake of public safety.

Concerning the provision of the Police Act that gives the police the right to bring before the competent authority a person unable to prove his identity, the Constitutional Court was of the opinion that where an order for custody on the grounds of public safety is being considered, the will of the person involved plays an important role, and that person may be exempted from detention where he/she co-operates with the authority. In cases of lack of co-operation, the limitation is justified as long as the constitutionally-acceptable aim, that is to say, an identity check, is in progress. Moreover, there is a possibility of seeking a legal remedy against and final judicial review of police actions.

According to Article 38.2 of the Police Act, the personal freedom of a person in custody may be limited for a period of time not exceeding 72 hours, where that person has hidden from the authorities or is strongly suspected of doing so. The petitioners sought a declaration of unconstitutionality of that term, arguing that it was unnecessary; violated Article 55.1 of the Constitution; and opened up the possibility of the authority's use of unnecessary force. The Constitutional Court considered that the person affected fell under a situation governed by criminal procedure, which did not involve a deprivation of personal freedom, but resulted in a restriction of fundamental rights. The provision in question of the Police Act and the police actions taking place under it make it possible to order law enforcement by force and the implementation of such law enforcement. The manifestation of the state's objective to fight crime involves ensuring law enforcement; one of the means to do so is by taking enforcement actions. The limitation of personal freedom takes place in pursuit of this constitutional aim. Moreover, the Police Act provides for a legal remedy and judicial review as well. For those reasons, the Constitutional Court rejected the petition.

Regarding that decision, Ottó Czúcz delivered a dissenting opinion. In his opinion, Article 38.1 of the Police Act was not unconstitutional for making custody for reasons of public security possible where the interest of the person, being in such a condition as to present a risk of danger to himself/herself or others due to drunkenness or other reasons, required such custody. According to the dissenting opinion, it derived from the right to life (Article 54.1 of the Constitution), specifically the objective side of that fundamental right, that the temporary and considered limitation of fundamental personal freedom could not always be viewed as unnecessary and disproportionate. Ottó Czúcz was joined in his dissenting opinion by Constitutional Judges Mihály Bihari, Attila Harmathy and Éva Vasadi.

István Kukorelli also delivered a dissenting opinion, in which he stated that he was also of the opinion that detention for an identity check could be necessary to promote effective police action. In his opinion, however, Article 38.1 of the Police Act provides for 24 hours for an identity check, a period of time that was disproportionately long for the aim to be attained. That was a disproportionately and unjustifiably long period of time and, therefore, unconstitutional.

Languages:

Hungarian.



Ireland Supreme Court

Important decisions

Identification: IRL-2003-3-002

a) Ireland / **b)** Supreme Court / **c)** / **d)** 04.11.2003 / **e)** 130/03 / **f)** Melton Enterprises Ltd. v. The Censorship of Publications Board Ireland and The Attorney General / **g)** / **h)**.

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.

4.7.1.1 **Institutions** – Judicial bodies – Jurisdiction – Exclusive jurisdiction.

Keywords of the alphabetical index:

Media, press, prohibition of publication / Censorship, Censorship of Publications Board, powers / Administrative act, nature / Criminal offence, element, essential.

Headnotes:

In deciding whether the powers or functions of a body relate to a criminal matter, it is necessary to examine both the consequences of any determination made by that body and the manner in which the body reaches that determination. No body or person suffers any of the forms of punishment which normally follow criminal conduct when an order of prohibition is made in respect of a periodical publication. Such an order of prohibition is not made in the context of the kind of procedures usually associated with the prosecution of a person for a crime. Hence a finding by a statutory body that the publication of a periodical should be prohibited because its recent issues have frequently been indecent or obscene does not relate to a criminal matter. Nor does such a finding involve a breach of the separation of powers through the exercise by a statutory body of functions that should be or have traditionally been reserved for the judicial branch of government.

Summary:

Under Section 9 of the Censorship of Publications Act, 1946, the Censorship of Publications Board was empowered to make an order of prohibition on the sale of a periodical publication where recently published issues of that publication had frequently been indecent or obscene. The appellants were a limited company that owned and operated a periodical publication in respect of which the Board had considered making a prohibition order. The appellants sought a declaration that Section 9 of the 1946 Act was unconstitutional. First, it was argued that the section permitted the Board to exercise judicial functions in a criminal matter in contravention of the Constitution. In the alternative, the appellants submitted that the section did not place a limit on the judicial functions exercised by the Board and hence permitted an unconstitutional usurpation of the judicial power by a statutory body.

It was claimed that a finding that a publication was indecent or obscene must involve a criminal matter because the Constitution stated that the publication of indecent material was a crime. The appellants also referred to judicial statements indicating that an order of prohibition involved a finding of criminal wrongdoing. Reference was also made to cases which showed, in the appellants' contention, that judicial functions of the kind exercised by the Board were not limited.

The Supreme Court stated that the Constitution reserved the trial of criminal matters for the judiciary. It was emphasised that there was a presumption in favour of interpreting a statute in a manner which conformed with the Constitution. Bearing this in mind, it was held that the powers and functions of the Board did not relate to criminal matters. A prohibition order on publication was not a form of punishment that would normally ensue from a finding of criminal liability. Orders of prohibition made by the Board were not made in the context of the procedure usually associated with the prosecution of a person for a crime and the fact that a person could be prosecuted for the publication of indecent material did not demonstrate that such an order related to criminal matters. If any judges of the Court had previously indicated that a prohibition order constituted an adjudication that the publishers had committed a criminal offence, these statements were erroneous and should not be followed.

The Court also held that the judicial functions exercised by the Board were limited in nature and that there had been no contravention of the Constitution in this respect. Unlike the functions of other bodies which had been held not to be limited in

the past, the powers of the Board were not of a kind that had traditionally been exercised by the judiciary. Although a prohibition order could undoubtedly have a serious effect on a publisher's reputation, the consequences of the exercise of the Board's functions were not sufficiently profound and far reaching to mean that these functions were not limited.

Languages:

English.

*Identification:* IRL-2003-3-003

a) Ireland / **b)** Supreme Court / **c)** / **d)** 13.11.2003 / **e)** 236/02 / **f)** D.W. v. The Director of Public Prosecutions / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Trial within reasonable time.

Keywords of the alphabetical index:

Prosecution, criminal, delayed / Prejudice, presumption / Child, sexual abuse.

Headnotes:

In deciding whether there has been undue delay between the commission of an offence of child sexual abuse and the initiation of a criminal trial in respect of that offence, the court is required to balance the accused's right to trial with reasonable expedition with the community's interest in having such offences prosecuted. The question of whether psychological evidence renders explicable the inaction of the alleged victim between the time of the offence and the time of making the complaint will influence the court in favour of allowing the trial to proceed. However, the overriding issue for the court is whether the accused has shown on the balance of probabilities that there is a real and serious risk of an unfair trial.

Summary:

In June 1998, the complainant reported sexual offences that had allegedly been committed by the applicant between 1985 and 1988. Proceedings were instituted against the applicant in November 1999. The applicant sought judicial review of the decision to prosecute, on the basis that his constitutional right to trial with reasonable expedition had been breached because of the time that had elapsed since the alleged incidents of child sexual abuse.

The applicant claimed that, in a case where the alleged offences are of a sexual nature, the onus is on the prosecution to prove that the delay is attributable to the applicant or that it is due to the psychological effects of the offences on the complainant. It was argued that the expert psychological evidence in this instance was insufficient to explain the complainant's delay in reporting the alleged offences. The applicant also claimed that State authorities had failed to explain or justify the series of delays that had occurred in the course of the prosecution of the case. Finally, it was submitted that the applicant had been prejudiced by the delay due to the fading of memory of possible witnesses and the difficulty in establishing certain evidential matters with certainty.

The Supreme Court held that the onus of showing on the balance of probabilities that there was a real and serious risk of an unfair trial lay on the accused and that the following factors would be particularly relevant to this determination: the length of the delay; the relationship between the complainant and the accused and the relationship between the complainant and other parties; the relative ages of the parties; the availability of evidence and witnesses; any admission of guilt; psychological evidence.

The Court ruled that the length of the delay in the instant case was not enough in itself for prejudice against the applicant to be inferred, nor were there such evidential difficulties as a result of the delay as to cause substantial prejudice. It was further held that the periods of delay attributable to the State were adequately explained and were not unduly long.

Despite certain weaknesses in the expert psychological evidence offered, the Court also ruled that the complainant's delay in reporting the offences was explicable in all the circumstances. As a result of all these considerations, therefore, it was held that there was not a real and serious risk of an unfair trial.

Languages:

English.



Israel

High Court of Justice

Important decisions

Identification: ISR-2003-3-009

a) Israel / **b)** High Court of Justice / **c)** Panel / **d)** 11.11.2003 / **e)** H.C. 316/03 / **f)** Bakri v. Israel Film Council / **g)** to be published in the Official Digest / **h)**

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
- 5.3.22 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

Keywords of the alphabetical index:

Media, film, censorship / Expression, freedom, irrespective of veracity / Administrative decision, judicial review / Censorship, film / Expression, freedom, assertion / Fundamental right, exercise / Information, accuracy / Judicial review, test / Media, accurate information / Debate, public, contribution.

Headnotes:

Freedom of expression is one of the fundamental principles of democracy. The Supreme Court's judgments, long ago, recognized it as a "superior right", even acknowledging that it serves as a basis for other rights. The fact that expression may be offensive, rude, or grating cannot serve as a reason not to protect it. It has been established that regarding the freedom of expression, the truth of the expression is not relevant. To permit the restriction of the false expression would allow the authorities the power to distinguish between the true and the false. A governmental body has no monopoly over the truth. In general, revelation of the truth in a free and open society is a prerogative given to the public. This is

exposed to a spectrum of opinions and expressions, even false expressions.

An open, democratic society, which upholds the freedom of expression, certain in the feeling that this advances society and does not threaten it, is willing to bear offence, even substantial offence to the feelings of the public, in the name of the freedom of expression.

Summary:

On 3 April 2002 the Israeli Defense Forces (IDF) entered the Jenin refugee camp, located in the northern part of the West Bank. The camp served as a central base for organizing terror attacks, from which many suicide bombers had been sent to commit such attacks all over Israel. After the civilian population was warned to evacuate, IDF forces engaged in intense house-to-house combat. Armed Palestinians hid among civilians. During the battle, 23 IDF soldiers were killed and about 60 were wounded. According to IDF data, the Palestinians suffered 52 dead, half of whom were civilians. Serious damage was caused to property. During the warfare and for several days thereafter, journalists were forbidden from entering the camp. It was only possible to learn of what had occurred by seeing the battlefield itself, and from testimony of the people involved.

The petitioner, an Israeli-Arab, filmed the reactions of Palestinian residents to the events, and edited them into the film "Jenin, Jenin". From the outset, the petitioner declared that he did not attempt to present the Israeli position or present a balanced portrayal of the events. His goal was to present the Palestinian story. According to the film, the IDF carried out a massacre in Jenin and attempted to cover it up by hiding the bodies. IDF soldiers, so it claims, intentionally harmed children, women, the elderly and the handicapped.

In anticipation of its commercial screening in Israel, the film was submitted, as required by the Film Ordinance of 1927, for approval to the Israeli Film Council. The film left a difficult impression upon the Council members. A majority of Council members decided that the film should not be approved for screening, as its content was a false propaganda, and would disrupt public order. A minority of dissenting Council members suggested that the screening be permitted, but that it either be accompanied by slides presented by an IDF spokesman, or that it be permitted exclusively for viewers 18 and older. The petitioner claimed that the Council's decision was unconstitutional. The state asserted before the court that the film is false, and must be censored, due to the danger that it poses to the public order and the offence it causes to feelings of the public. The Supreme Court allowed the families of

the IDF soldiers who fell in battle, as well as a group of soldiers who participated in the fighting, to join as additional respondents to the petition.

The Court decided that the film "Jenin, Jenin" should be permitted to be screened, and that the decision of the Council should be reversed. Justice Dorner held that the Council's decision infringes the freedom of expression of its producer and of others, to whose opinions the film gives voice. Freedom of expression is not an absolute right. The court distinguished between the very principle of freedom of expression and the degree of protection, which may only be partial. Rude and offensive expressions as well as false expressions are protected.

Justice Dorner held that the Council has a clear purpose: exposing the truth, however, it was not granted the authority to expose the truth by silencing expression that members of the Council consider to be lies. The Council does not have the authority to restrict expression that is principally ideological or political, simply because the government, part of the public, or even a majority of it, disagrees with the views expressed. She also held that the Council's decision was not proportionate. As to the suitability of the means chosen, after being censored, "Jenin, Jenin" was transformed into a symbol. Clearly, this was not the Council's intention. As to the minimal violation test, prohibiting the screening of a film is not the only means available to the Council. The Council could have made use of a less blunt instrument. As for the relativity test, the damage caused by the Council's decision is greater than its benefit.

Justice Procaccia concurred. She focused on the severe offence to the feelings of many members of the Israeli public caused by the film. The allegedly documentary presentation of the operations of the IDF – portraying them as war crimes – provokes difficult emotional reactions in three circles of the public. First, the inner circle of soldiers who participated in the operation, who closely experienced the horrors of battle. Second, the circle of bereaved families who lost those dear to them in battle. Third, large parts of the public. The offence is intensified by the reality that the country continues to confront terrorist attacks.

The Council may prevent the presentation of films which may disturb the public order. "Disturbing the public order" is a broad concept, which also takes account of offence to the sensitivities of the public. The force of an offence is not only connected to its content, but also to its timing. Offence during times of peace and calm is not similar to offence during times of war. The Council must place, on the one hand, the principle of freedom of expression, which reflects a fundamental right with constitutional weight and, on the other hand,

other values which the Council is responsible for preserving. The general principle is the freedom of expression. This freedom applies to messages regardless of their nature, content, quality, or truth.

In order to balance the two, the Council must first take into account the type of expression at issue. Second, the offence to the sensitivities of the public should be evaluated on two levels. Both the severity of the offence, and the probability of its occurrence must be taken into account. In light of the importance of the freedom of expression, it will be restricted only when we are faced with an offence whose intensity is beyond the level of tolerance which persons in a democratic society must accept. The restriction must be proportionate. It may not exceed that which is necessary to ensure public order.

Justice Procaccia held that under the circumstances, even though the wound is grave, it is not of the severity required to restrict the freedom of speech. The injury to the public is both broad as well as deep. It is not a superficial injury, transient, and blowing over like the wind. The feeling, the reaction, is genuine and harsh. The recent occurrence of the events may aggravate the intensity of offence. Between the battle in Jenin and the Council's decision to prohibit the film, almost seven months passed. The interim period has strengthened the public endurance in the face of the offence caused by the film. It can now meet the film head-on. Prohibiting its screening does not accord with our standards for balancing the conflicting values here.

With Justice Grunis also joining both Justice Dorner's and Justice Procaccia's comments, this judgment was unanimous.

Cross-references:

- H.C. 73/53 "Kol Ha'am" Company Limited v. Minister of the Interior 7 Isr.S.C. 871; An English translation is to be found in *Selected Judgments of the Supreme Court of Israel* Vol. 1 (1948-1953) 90;
- H.C. 4804/94 Station Film Co. v. The Film Review Board 50(5) Isr.S.C. 661; An English translation is to be found in *Israel Law Reports* (1997) 23.

Languages:

Hebrew, English (translation by the Court).



Italy

Constitutional Court

Important decisions

Identification: ITA-2003-3-003

a) Italy / **b)** Constitutional Court / **c)** / **d)** 01.10.2003 / **e)** 309/2003 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 15.10.2003 / **h)**.

Keywords of the systematic thesaurus:

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

3.18 **General Principles** – General interest.

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

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

5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of worship.

Keywords of the alphabetical index:

Residence, obligation / Religion, collective worship.

Headnotes:

The provision of Law no. 1423 of 1956 (on preventive measures in respect of persons presenting a danger for security or public morals) whereby a person subject to preventive surveillance who is required to stay within the boundaries of a given municipality may be authorised to leave that area by the courts under certain conditions, but solely for health reasons, without the same possibility being open in order to enable that person to participate in ceremonies specific to his or her religion, does not breach Article 19 of the Constitution (on freedom of worship).

This is because, to enable the person under surveillance to take part in religious ceremonies from time to time, permission would probably have to be granted once and for all, covering the entire period of the residence obligation, and it would doubtless prove impossible to allow his or her regular attendance at places of worship in accordance with security requirements.

Summary:

A court made a reference to the Constitutional Court for a ruling on the provision of Law no. 1423 of 1956 (on preventive measures in respect of persons presenting a danger for security or public morals) because, while acknowledging that it was for parliament to determine the exceptional circumstances in which a person subject to a residence obligation might leave his or her place of residence, it deemed that failure to include among those circumstances the situation of an individual unable to practise his or her religion for lack of a community of believers in his or her place of residence breached Article 19 of the Constitution. That article guaranteed everyone the right to “freely profess religious beliefs in any form, individually or with others, to promote them and to celebrate rites in public or in private, provided they are not offensive to public morality.”

The aim of a surveillance measure combined with a residence obligation was to prevent crime. Preventing, and punishing, crime was one of the most important tasks incumbent on the public authorities. The prevention measures permitted by law could include, as in the case before the Court, restrictions on the freedom of movement and of residence of a person considered to be dangerous. Such restrictions inevitably affected rights which could not possibly be exercised without enjoying those freedoms. In the case under consideration, the restriction on the right to practise one's religion was a possible indirect consequence of applying the surveillance measure combined with a compulsory residence order: it followed from the lack of an organised community of believers of the relevant religion in the municipality where the person concerned was required to reside.

In general, it was nonetheless necessary for parliament to ensure that restrictions on such freedoms were kept to a minimum, so that rights depending on them would be less affected. For instance, with regard to prevention measures, parliament had allowed the possibility of making exceptions on health grounds from the rules specific to surveillance with a compulsory residence order, in which case a person concerned by such measures might be given permission by the courts to leave the area of the municipality in question under circumstances taking account of the relevant security requirements. This possibility apparently did not exist with a view to satisfying needs linked to the right to practice one's religion through collective worship.

The challenged provision's application could not be extended to departure from the municipality of compulsory residence for religious reasons – as requested by the referring court – without disregard-

ing the security considerations on which the compulsory residence order was based. No compromise was possible, and the safety of all members of the population would have to be sacrificed to requirements linked to a single individual's religious freedom.

However, a practical solution might be found by assigning the person concerned by the preventive measure a place of residence where the religious organisation to which he or she belonged was represented.

The Court rejected the question as, in this particular case, weighing the interests at stake proved impossible.

Languages:

Italian.



Identification: ITA-2003-3-004

a) Italy / **b)** Constitutional Court / **c)** / **d)** 24.11.2003 / **e)** 350/2003 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 10.12.2003 / **h)**.

Keywords of the systematic thesaurus:

1.5.4.6 **Constitutional Justice** – Decisions – Types – Modification.
 3.20 **General Principles** – Reasonableness.
 5.2.2.7 **Fundamental Rights** – Equality – Criteria of distinction – Age.
 5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.
 5.3.42 **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:

House arrest, substituting detention, need to care for disabled child / Disability, serious.

Headnotes:

A provision of Law no. 354 of 1975 on the prison regime and enforcement of custodial sentences was held to be unconstitutional, since it failed to provide that house arrest could be allowed in the case of a mother given a custodial sentence who lived with a child (even an adult one) suffering from a serious disability entailing total invalidity, or a father given the same kind of sentence where the mother was deceased or incapable of taking care of her children.

Summary:

The Bari court had referred to the Constitutional Court a provision of Law no. 354 of 1975 on the prison regime and enforcement of custodial sentences on the ground that it failed to allow the courts the possibility of ordering house arrest in the case of a mother sentenced to prison who lived with her totally invalid son, whereas that treatment could under certain conditions be granted a mother living with a child under the age of ten (or a father in the circumstances mentioned above). The Court made a declaration of unconstitutionality on the ground that parliament had taken account solely of needs linked to the personal well-being of a child under the age of ten and had failed to take into consideration the care needs of a child (even an adult one) who was a complete invalid, which continued to exist regardless of the child's age and which must be satisfied if his or her personality was to develop in any way. It was clear that the child's state of health, both physical and mental, could be seriously jeopardised if the necessary care was dispensed by a person other than either of his or her parents.

Allowing the placement under house arrest of a seriously disabled person's mother or father (where the mother was deceased or incapable of taking care of her children) fulfilled the Republic's duty to remove "... social obstacles that ... prevent full individual development", mentioned in the second paragraph of Article 3 of the Constitution.

Since it did not allow the courts to decide to grant house arrest in view of the particular situation of the mother (or the father under certain conditions) of a seriously disabled person, whatever that person's age, the provision referred to the Court conflicted with the principle of reasonableness, which followed from the same article.

The principle of equal treatment was also infringed, since the situation before the referring court was dealt with differently compared with the situation of the mother of a child under the age of ten, even though

the circumstances were similar in many respects, as it could not be denied that a person suffering from a serious handicap, whatever his or her age, needed – at least from a physical standpoint – as much assistance, if not more, than a child under the age of ten.

Supplementary information:

The judgment was “additional” in nature. In other words, by this decision the Court supplemented the impugned provision with an additional rule, the lack of which had caused the violation of the Constitution. However, the “part” of law added by the Court was not the outcome of a discretionary decision: it was incorporated into the law in the only possible way that brought the provision into compliance with the Constitution.

Languages:

Italian.



Korea Constitutional Court

Important decisions

Identification: KOR-2003-3-002

a) Korea / **b)** Constitutional Court / **c)** / **d)** 27.11.2003 / **e)** 2003Hun-Ma694 700 742 / **f)** National Referendum Case / **g)** 87 *Korean Constitutional Court Gazette*, 80 / **h)**.

Keywords of the systematic thesaurus:

3.3.2 **General Principles** – Democracy – Direct democracy.

4.9.2 **Institutions** – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy.

5.3.28.1 **Fundamental Rights** – Civil and political rights – Right to participate in public affairs – Right to participate in political activity.

5.3.40.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.

Keywords of the alphabetical index:

Public power, exercise, definition / Referendum, decision to organise, legal effects.

Headnotes:

Article 68.1 of the Constitutional Court Act sets out that anyone whose constitutionally protected rights have been infringed by the “exercise or non-exercise of public power” may lodge a constitutional complaint.

The legal procedure for a national referendum is commenced when the subject of the referendum is specifically determined and the President issues a referendum bill. Before a referendum bill is issued, a political proposal, internal drafting and consideration of a referendum amount to mere preparatory steps, which are subject to change or withdrawal.

The President’s proposal to hold a national referendum on his leadership made during a policy speech in the National Assembly did not amount to an exercise of public power, but only a political

proposal devoid of any legal effect. Therefore, the complainants' application seeking either an annulment of that proposal or the Court's declaration of its unconstitutionality does not fall within the jurisdiction of the Constitutional Court.

Summary:

1. On 13 October 2003 the President of the Republic proposed that a national referendum be held on his leadership during a policy speech in the National Assembly. The complainants filed a constitutional complaint, alleging that a referendum that was on the leadership of the President and not associated with an important policy was in breach of Article 72 of the Constitution, and that it infringed their right to pursue happiness, right to freedom of conscience, right to vote in a referendum and right to property.

2. The Constitutional Court held that the President's proposal to hold a national referendum on his leadership made during a policy speech in the National Assembly was merely a political proposal and not an act producing legal effects; therefore, it could not be deemed to amount to an exercise of public power subject to review by the Constitutional Court. The Court dismissed the complainants' application.

The essential reasoning was as follows.

Article 68.1 of the Constitutional Court Act sets out that anyone whose constitutionally protected rights have been infringed by the "exercise or non-exercise of public power" may lodge a constitutional complaint, but it does not set out what constitutes an "exercise or non-exercise of public power." It has to be determined in each case whether an exercise of public authority amounts to an "exercise of public power" subject to review by the Constitutional Court.

On 10 October 2003 the President of the Republic declared during a press conference that he would ask for a "vote of confidence" (plebiscite) from the people. Three days later, while giving a policy speech on the floor of the 243rd National Assembly, the President expressed his opinion on the method and the time-frame of the vote of confidence.

Taking into consideration the context of the President's proposal and the circumstances surrounding it, the Court found that the President's proposal meant that if a method on which there was a political consensus were presented to him, he would use the procedures in that method for holding a referendum. It was even clearer upon consideration of the specific

terms of his proposal, such as "it is not a matter for me to decide" or "if there should be a political agreement".

The legal procedure for a national referendum is commenced when the subject of the referendum is specifically determined and the President issues the referendum bill. According to the National Referendum Act, a referendum is conducted through a process of issuing the bill, posting notice of the Bill, campaigning, registering voters, voting and officially counting ballots, etc. Therefore, according to the National Referendum Act or any special Act, there has to be a commencement of the legal procedure of a referendum in order for there to be an exercise of political power that has a legal effect. Before a referendum bill is issued, a political proposal, internal drafting and consideration of a referendum amount to merely preparatory steps in an unsettled matter, which may be at any time be changed or withdrawn. The President's proposal was of that nature, and that could not be deemed to be a legally binding decision, a step taken in relation to the referendum or one that affected the legal status of the people.

The act of the President was not an exercise of public power and was not a subject to review by the Constitutional Court. Therefore the complainants' application for its annulment or a Court declaration of unconstitutionality was dismissed.

Supplementary information:

Four of the nine judges dissented. Among their reasons, they stated that the right to hold a referendum falls under the exclusive competence of the President, thus the public proposal of a referendum made by the President was a manifestation of the President's clear decision to hold a referendum and was in itself an exercise of public power.

On the merits, the dissenting justices stated that the use by the President of a referendum as a means to secure the people's confidence in his leadership would be violation of Article 72 of the Constitution, which sets out that a referendum must be on 'important policies relating to diplomacy, national defence, unification and other matters concerning the national destiny'. That would also infringe the people's right to fair participation in the exercise of State power through a referendum on specific affairs of the State, and in the process would infringe the complainants' right to political participation, right to vote in a referendum and the right not to be forced to display one's political opinion.

Cross-references:

- Decision of 01.10.1992 (92Hun-Ma68);
- Decision of 16.07.1997 (97Hun-Ma70).

Languages:

Korean.



Latvia

Constitutional Court

Important decisions

Identification: LAT-2003-3-010

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 06.10.2003 / **e)** 2003-08-01 / **f)** On the Compliance of Article 96.2 (the first sentence) of the Code of Criminal Procedure of Latvia with Articles 89 and 92 of the Constitution (*Satversme*) / **g)** *Latvijas Vestnesis* (Official Gazette), 138(2903), 07.10.2003 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
 3.18 **General Principles** – General interest.
 4.7.15.1 **Institutions** – Judicial bodies – Legal assistance and representation of parties – The Bar.
 4.7.15.2 **Institutions** – Judicial bodies – Legal assistance and representation of parties – Assistance other than by the Bar.
 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
 5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.
 5.3.13.27 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel.

Keywords of the alphabetical index:

Criminal procedure, guarantees.

Headnotes:

The impugned provision, which provides that only an advocate of the Republic of Latvia may act as a defence counsel in a criminal case, does not ensure the effective exercise of the right to proper, high-quality and accessible legal assistance, guaranteed in Article 92 of the Constitution (*Satversme*), for the reason that the professional organisation of sworn advocates is presently not able to guarantee the realisation of the right to a fair trial in practice.

Summary:

The petitioner claimed that the impugned provision violated her right to a fair trial, guaranteed by Article 6 ECHR. Even though the Code of Criminal Procedure uses both terms – “defence counsel” and “advocate”, the petitioner pointed out that the legislator had “included a narrower interpretation of the concept of “defence counsel” in the Law, as advocates are only a small part of the body of persons entitled to carry out the functions of counsel”. The petitioner submitted that any person with sufficient knowledge of criminal procedure should be able to act as defence counsel in a criminal matter.

The Court pointed out that the right to a fair trial included the right of a person to legal assistance. The rule, incorporated into the Constitution, reads, “everyone has the right to the assistance of counsel”. The petitioner argued that the legal concept of “counsel” incorporated into Article 92 of the Constitution should be interpreted in a more extensive way, that is to say, as the right of a person to receive legal assistance by freely choosing his/her counsel or representative from a wider range of qualified lawyers and, in cases provided for by law, also from a range of other persons.

However, the Court did not agree with the petitioner when she argued that any person might act as counsel in criminal proceedings. The Court agreed with the viewpoint expressed in the Saeima’s written reply that only qualified lawyers should act as counsel in criminal proceedings for the reason that only where counsel has adequate legal knowledge can counsel successfully carry out his/her duty.

The Court acknowledged that the right to a fair trial was not absolute and might be restricted. The fundamental rights may be subject to restrictions in circumstances provided for by law in order to protect public interests and where the principle of proportionality is observed. Thus, the Court had to assess whether the restriction of the right to a fair trial complied with the following requirements:

- a. it had to be established by law;
- b. it had to comply with the legitimate aim that the state wished to attain by laying down the restriction;
- c. there were no other less restrictive means that could be used; and
- d. it had to comply with the principle of proportionality.

The Court held that the infringement of the fundamental rights in question had been established by law. The aim of the legislator when passing the impugned provision was to secure proper, accessible and high-quality counsel for criminal proceedings to all

persons. The Court agreed that that objective was legitimate, even though it had to be assessed whether the impugned provision attained that aim.

The Court noted that the following might create an artificial shortage of supply of legal services and increase in prices of the services: the insufficient increase in the number of advocates; their unequal distribution throughout regions; the fact that the Collegium of Sworn Advocates was the only professional organisation of advocates in Latvia; the extensive freedom of action of the Latvian Council of Sworn Advocates (including the right to determine the number of sworn advocates and the procedure for qualifying as a sworn advocate or an assistant sworn advocate, make decisions on the ethical and other violations by sworn advocates); the lack of an efficient controlling mechanism; and the fact that no appeal lied from the decision of admission to the profession of sworn advocate. That shortage and increase might, in turn, lead to violation of the rights guaranteed by Article 92 of the Constitution. It is important ensure that the right to legal assistance in criminal proceedings is an effective and a not formal one. Thus, even though the impugned provision had a legitimate aim, that aim was not attained. At the time, the professional organisation of sworn advocates was not able to guarantee the realisation of the right to a fair trial in practice.

The Court assessed that the legitimate aim, determined by the legislator, i.e. to allow legal assistance in criminal proceedings to be given only by lawyers who were the members of the Collegium of Sworn Advocates, could be reached by less restrictive means. One of such means could be enlargement of the range of qualified practicing lawyers permitted to act as counsel in criminal proceedings.

The Court pointed out that the right to a fair trial might be restricted but it should be done by less restrictive means. Therefore, the limitations laid down by the legislator were not proportionate for the reason that not every accused in criminal proceedings had the assistance of counsel, and therefore, the impugned provision did not allow for the exercise of the right to a fair trial.

The Court declared the impugned provision contrary to Article 92 of the Constitution and null and void as of 1 March 2004 if by that date the legislator failed to amend the legal regulation on the activities of advocates so that it complied with the standards of the European Union and the Council of Europe, and fully guaranteed the right to a fair trial.

Cross-references:

Previous decisions of the Constitutional Court in cases:

- no. 2002-09-01 of 26.11.2002, *Bulletin* 2002/3 [LAT-2002-3-009];
- no. 2002-20-0103 of 23.04.2003, *Bulletin* 2003/1 [LAT-2003-1-005];
- no. 2003-03-01 of 27.06.2003, *Bulletin* 2003/2 [LAT-2003-2-009];
- no. 2003-04-01 of 27.06.2003, *Bulletin* 2003/2 [LAT-2003-2-008].

Languages:

Latvian, English (translation by the Court).

*Identification:* LAT-2003-3-011

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 29.10.2003 / **e)** 2003-05-01 / **f)** On the Compliance of Article 271 of the Criminal Code with Articles 91 and 100 of the Constitution (*Satversme*) / **g)** *Latvijas Vestnesis* (Official Gazette), 138(2903), 30.10.2003 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
 3.17 **General Principles** – Weighing of interests.
 5.3.20 **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 respect for one's honour and reputation.

Keywords of the alphabetical index:

Criminal Law / Official, definition / Libel, through the press / Official, protection against libel.

Headnotes:

The impugned provision of the Criminal Law on libel against a representative of public authority or another

State official, or defamation of such a person in connection with that person's professional duties is contrary to Article 100 of the Constitution (*Satversme*) on the ground that the legislator has not specified the range of officials who – in the performance of the duties assigned to them – need the protection of the Criminal Code.

Summary:

Article 271 of the Criminal Code (the impugned provision) under Chapter XXII of the Code entitled "Criminal Offences against Administrative Order" sets out: "a person who commits libel against a representative of public authority or another State official, or defamation of such persons in connection with their professional duties, shall be punished by deprivation of liberty for a term not exceeding two years, or detention, or community service, or a fine not exceeding sixty times the minimum monthly wage".

Chapter XV of the Criminal Code entitled "Criminal Offences against Personal Liberty, Honour and Dignity" incorporates provisions that protect the honour and dignity of every person.

The petitioner is editor-in-chief of the newspaper "Diena". She pointed out that the impugned statutory provision violated her rights under the Constitution (*Satversme*) and international instruments. A State official and any other person are both "persons"; therefore, their situations are comparable. The official has special status. The European Court of Human Rights in its practice has concluded that the limits of permissible criticism (even in reference to dignity and respect) are wider with regard to the politician or an official than with regard to a private person. A different approach, which might have been valid in some periods of history, was not justified in a democratic society.

The petitioner submitted that the restrictions of freedom of expression that follow from the impugned provision were not proportionate and necessary in a democratic society; therefore, they ran contrary to Article 100 of the Constitution (*Satversme*).

The Court stressed that freedom of expression in its public aspect also included freedom of the press. Thus, the term "freedom of expression", which is incorporated into Article 100 of the Constitution, also includes the concept of "freedom of the press". Thus any limitation of freedom of the press in a wider sense shall be understood as limitation of freedom of expression.

The Court pointed out that the right to freedom of expression was not absolute and did not amount to permissiveness. The State may determine restrictions to freedom of expression in cases where the right of a person to freedom of expression may affect the rights of other persons as well as in cases where freedom of expression creates a clear and direct threat to society.

The Court stressed that two fundamental rights guaranteed to the person are directly opposed in the present case: the right to freedom of expression and the right to inviolability of dignity and respect. Just like the right to freedom of expression, the right to inviolability of human dignity and respect is set out in the Constitution and several international human rights conventions binding on Latvia. The Court found reasonable the viewpoint expressed by the parliament (*Saeima*) representative at the Court session. That viewpoint was that when determining limits between freedom of expression and the right to the protection of dignity and respect, it was necessary to strike a fair balance.

The Court reiterated that the fundamental rights might be subject to restrictions only in cases envisaged by the Constitution and by observing the principle of proportionality. That being so, the restrictions of freedom of expression should be:

1. established by law;
2. justified by a legitimate aim; and
3. proportionate to that aim.

The Court held that the impugned provision had a legitimate aim – to protect the rights of other persons, democratic state system, public security and impartiality of courts. A democratic state system would be unthinkable without the alignment and protection of the activities of state administration, which in its turn guarantees both public security and the rights of other persons.

The Court noted that Article 100 of the Constitution envisages not only the right to express one's viewpoint freely and distribute information, but also the right to freely receive such information. In essence, the right to freedom of expression follows from the public right to receive information. The Court agreed with the viewpoint of Ā. Kleckins, the mass media expert, that the right to freedom of expression and the press was derived from the public right to receive information, and it should not be regarded as a special right of journalists. Thus, the obligation of the press is to distribute correct information. In that respect, freedom of expression also includes duties and responsibilities.

In order to assess whether the restrictions incorporated in the impugned provision were needed in a democratic society and whether they could serve as a means for reaching the legitimate aim, it had to be clear which persons were considered to be State officials by the Criminal Code, and how wide the concept of "the State official" was in the impugned provision.

The Court analysed the use of the concept of "official" in several laws and found that it was too widely defined. The Court could not find any support for the viewpoint that all officials who were covered by the concept of "the State official" in the Criminal Code performed the kind of duties that required the special protection of the State. That being so, the Court found that the impugned provision extended that protection to too wide a range of officials. Consequently, the wording of the impugned provision was not proportionate to the legitimate aim and ran contrary to the right of freedom of expression, guaranteed by Article 100 of the Constitution.

The Court declared Article 271 to be contrary to Article 100 of the Constitution and null and void as of 1 February 2004, if up to that time the legislator failed to specify the range of officials, who – for performing the duties assigned to them – needed the protection of the Criminal Code.

Supplementary information:

As a consequence of that decision, the Parliament amended the Criminal Code and repealed the impugned provision.

Cross-references:

Previous decisions of the Constitutional Court in cases:

- no. 2001-06-03 of 22.02.2002, *Bulletin* 2002/1 [LAT-2002-1-002];
- no. 2003-02-0106 of 05.06.2003, *Bulletin* 2003/2 [LAT-2003-2-007];
- no. 2003-03-01 of 27.06.2003, *Bulletin* 2003/2 [LAT-2003-2-009].

European Court of Human Rights:

- Judgment of 23.04.1992 in case of *Castells v. Spain*, Vol. 236, Series A of the Publications of the Court; *Special Bulletin ECHR* [ECH-1992-S-003];

- Judgment of 20.05.1999 in case of *Bladet Tromso and Stensaas v. Norway, Reports of Judgments and Decisions* 1999-III.

Languages:

Latvian, English (translation by the Court).



Identification: LAT-2003-3-012

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 06.11.2003 / **e)** 2003-10-01 / **f)** On the Compliance of Article 83 (Item 4) of the Code of Civil Procedure with Article 92 of the Constitution (*Satversme*) of the Republic of Latvia / **g)** *Latvijas Vestnesis* (Official Gazette), 07.11.2003, 157(2922) / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
 4.7.15.2 **Institutions** – Judicial bodies – Legal assistance and representation of parties – Assistance other than by the Bar.
 5.3.13.1.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Civil proceedings.
 5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
 5.3.13.27 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel.

Keywords of the alphabetical index:

Lawyer, representation, choice, restriction / Lawyer, fee.

Headnotes:

The impugned provision of the Code of Civil Procedure sets out which persons may act as representatives in civil proceedings. The requirement to retain the services of an advocate and the amount of the remuneration established for his/her services disproportionately restrict the right of a person of access to a court.

A person should be allowed, as much as possible, to freely choose his/her representative, including lawyers. When choosing a representative in civil proceedings, a person must give reasons for his/her choice, and the courts must take a decision as to whether that representative may act.

Summary:

An applicant filed an action with the Jelgava Court against the Jelgava City Hospital seeking reinstatement. The Jelgava Court dismissed the action. The applicant's spouse, the authorised representative of the applicant, lodged an appeal. As the case was very complicated, the need for qualified legal assistance at the appellate instance arose. The applicant asked two firms providing legal services to represent her in that court; however, they stated that they could not do so due to the impugned provision.

The applicant brought a constitutional claim. The impugned provision of the Code of Civil Procedure sets out which persons may act as authorised representatives in civil proceedings: "ascending and descending kin, spouse, full brothers and sisters of natural persons as well as persons who are authorised to and actually manage the property of the authorising person."

The applicant submitted that she had been denied the right to freely choose her representative in the civil proceedings, for the reason that the impugned provision permitted only a limited range of persons to act as representatives. The applicant argued that the impugned provision limited without reason her right to freely choose her representative, as she was compelled to retain the services of an advocate – a member of the only profession that, in accordance with the impugned provision, was able to guarantee quality and professional legal representation. However, the services of advocates being expensive, the applicant was "compelled" to represent herself in the civil proceedings or authorise her spouse, who did not have adequate professional knowledge, to do so. She concluded that her right to a fair trial had been violated.

The Constitutional Court pointed out that the right to a fair trial means also free access to a court. Moreover, in cases where a person for some reason may not bring a case before or address an appellate court, free access to a court also means the possibility of addressing the court with the assistance of a representative. A person exercises the right of choosing his/her representative in order to protect his/her rights and legitimate interests in a court.

The Court held that the impugned provision of Article 83 CCP restricted the right of a person to freely choose his/her representative in civil proceedings.

As the Court has concluded before, the right to a fair trial is not absolute and may be limited. Fundamental rights may be subject to restrictions in cases set out in the Constitution (*Satversme*) for the purpose of protecting important public interests and where the principle of proportionality is observed. Thus, the Court had to assess whether the restriction in question to the right to a fair trial complied with the following requirements:

- a. it had been determined by law;
- b. it was in conformity with the legitimate aim that the state wished to attain by laying down the restriction;
- c. there were no less restrictive means that could have been used; and
- d. it complied with the principle of proportionality.

The Court found that the restriction of the fundamental right had been determined by law. The legitimate aim of the impugned provision was to ensure the effective representation of the parties in court. The means chosen by the legislator were as a whole appropriate for reaching the legitimate aim; however, they amounted to a serious restriction on some persons' ability to exercise their procedural rights.

In assessing whether the legitimate aim (i.e. allowing a limited range of persons to represent a natural person in civil proceedings) determined by the legislator could be reached by less restrictive means, the Court found that the limitation of the choice of the representative prevented the applicants from exercising their rights, as they might only seek the assistance of an advocate.

To ensure maximum free access of persons to courts, natural persons must be given the possibility of choosing adequate representation. In that way, the person, when choosing his/her representative in civil proceedings must give reasons for his/her choice, and the courts must take a decision on whether the representative may act. In cases where the court has concluded that the representative chosen by the party to the proceedings cannot render legal assistance that is compatible with the law, the court has the right to refuse to allow that representative to act for the party in the proceedings.

The Court pointed out that the right to free access to a court might be restricted to ensure more efficient representation in civil proceedings, but that restriction should be effected by the use of less restrictive means. Consequently, the restriction laid down by the

legislator was not proportionate on the ground that representation in a court was not accessible to all persons; therefore, the impugned provision did not allow for the exercise of the right to a fair trial.

The Court declared Article 83 (Item 4) of the Code of Civil Procedure incompatible with Article 92 of the Constitution (*Satversme*) and null and void as of the day of publication of the judgment.

Cross-references:

Previous decisions of the Constitutional Court in cases:

- no. 2000-03-01 of 30.08.2000, *Bulletin* 2001/1 [LAT-2000-03-004];
- no. 2002-04-03 of 22.10.2002, *Bulletin* 2002/3 [LAT-2002-3-008];
- no. 2002-09-01 of 26.11.2003, *Bulletin* 2002/3 [LAT-2002-3-007];
- no. 2002-20-0103 of 23.04.2003;
- no. 2003-04-01 of 27.06.2003;
- no. 2003-08-01 of 06.10.2003.

The European Court of Human Rights:

- Judgment of 21.02.1975 in the case of *Golder v. the United Kingdom*, Vol. 18, Series A of the Publications of the Court.

Languages:

Latvian, English (translation by the Court).



Identification: LAT-2003-3-013

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 27.11.2003 / **e)** 2003-13-0106 / **f)** On the Compliance of Articles 57.1, 136.3 (Items 2 and 3) and 143.4 (Items 2 and 3) of the Labour Law with Article 106 of the Constitution (*Satversme*) of the Republic of Latvia, Articles 1, 2 and 4 of the 28 June 1930 Convention Concerning Forced Labour and Article 1 of the 25 June 1957 Convention Concerning the Abolition of Forced Labour / **g)** *Latvijas Vestnesis* (Official Gazette), 27.11.2003, 168(2933) / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

5.3.5.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Prohibition of forced or compulsory labour.

Keywords of the alphabetical index:

Labour Law / Employment, employer, rights / Employment, employee, work, overtime.

Headnotes:

The impugned provisions of the Labour Law set out that in certain cases and circumstances, an employer has the right to require an employee to perform work not provided for by the employment contract, as well as to demand overtime work from an employee without the employee's written consent. Such provisions, which aim at ensuring the normal operation of an undertaking, are in the interests of both the employer and the employee. Thus, the work envisaged in the impugned provisions cannot be regarded as forced labour within the meaning of Article 106 of the Constitution (*Satversme*).

Summary:

The Prosecutor General, the applicant, challenged the compatibility of Articles 57.1, 136.3 (Items 2 and 3) and 143.4 (Items 2 and 3) of the Labour Law with Article 106 of the Constitution (*Satversme*), Articles 1, 2 and 4 of the International Labour Organisation Convention (no. 29) Concerning Forced Labour and Article 1 of the International Labour Organisation Convention (no. 105) Concerning the Abolition of Forced Labour.

The impugned provisions set out the following. An employer has the right to require an employee to perform work not provided for by the employment contract for a period not exceeding one month within a one-year period in order to avert the consequences caused by *force majeure*, an unexpected event or other exceptional circumstances that adversely affect or may affect the normal business activities of the undertaking. In the event of a difficult economic situation, an employer has the right to require an employee to perform work not provided for by the employment contract for a period not exceeding two months within a one-year period. In some exceptional cases, an employer has the right to demand overtime work from an employee, without the employee's written consent.

The applicant argued that the impugned provisions permitted forced labour or compulsory labour as they

gave the employer the right to require an employee to perform work not provided for by the employment contract, overtime work or to work during the weekly day of rest, without the consent of the employee. The impugned provisions do not envisage participation in the relief of disasters and their effects, with the exception of cases where there is a need to avert consequences that may adversely affect normal business activities. The applicant pointed out "the requirements of the impugned provisions ... [did] not aim at the use of forced labour for public purposes or as an extraordinary undertaking, but envisage[d] granting the employer the right of requiring an employee – without the latter's consent – to perform unforeseen work, which ...[was] connected with economic interests of the enterprise, and ensure[d] normal business activities and completion of urgent work".

The Court underlined that Article 106 of the Constitution does not give a definition of forced labour. It only lists the kind of work that shall not be deemed forced labour – participation in the relief of disasters and their effects, and work pursuant to a court order. The European Court of Human Rights uses the definition of forced labour found in Article 2.1 of the ILO Convention no. 29. The European Court of Human Rights regards that definition as binding. As Latvia is a State Party to the Convention, the judgments of the European Court of Human Rights are binding on it, and it must respect the conclusions on the interpretation of international legal rules that are incorporated in the judgments.

The Court pointed out that forced labour is any work or service that is unjust and oppressive, and that the person has not volunteered to perform. Forced labour is prohibited not only in public-law relations but also in civil-law relations and labour-law relations, which are regulated by the Labour Law.

However, the Court established that the objective of the impugned provisions was to avert the consequences caused by *force majeure*, an unexpected event or other exceptional circumstances that might adversely affect or affect normal business activities of the undertaking, as well as to complete urgent unforeseen work within a specified period of time. Therefore, the claim was not true of forced labour being envisaged for the objectives of economic development. The impugned provisions aim at ensuring the normal operation of an undertaking and are in the interests of both the employer and the employee. The impugned provisions did not contain any of the aims and means prohibited by the international instruments. Nor could the work be qualified unjust and cruel. Thus the work, envisaged in the impugned provisions, could not be regarded as forced labour within the meaning of Article 106 of the Constitution.

The Court declared the impugned provisions compatible with Article 106 of the Constitution.

Cross-references:

European Court of Human Rights:

- Judgment of 27.10.1983 in the case of *Van der Mussele v. Belgium*.

Languages:

Latvian, English (translation by the Court).



Liechtenstein State Council

Statistical data

1 January 2003 – 30 December 2003

Number of decisions: 95

Important decisions

Identification: LIE-2003-3-004

a) Liechtenstein / **b)** State Council / **c)** / **d)** 17.11.2003 / **e)** StGH 2003/44 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Enrichment, money laundering / Confiscation, assets, penalty / Penalty, nature.

Headnotes:

The provision set out in § 20b.2 of the Criminal Code, whereby assets obtained through punishable behaviour must be confiscated, is not to be regarded as a criminal penalty pursuant to the criteria established by the European Court of Human Rights in the *Welch v. the United Kingdom* judgment, 1/1994/448/527, and accordingly subject to the principle of non-retrospective application of penal provisions under Article 7 ECHR, nor is it to be assimilated with the penalties referred to in Article 33.2 of the Constitution.

Summary:

The Court dismissed a constitutional appeal lodged following the freezing of an account. It found no violation of the principle of non-retrospective

of criminal penalties by § 20b.2 of the Criminal Code. Applying the criteria established by the European Court of Human Rights, the Court gave the following reasons for its decision.

A confiscation measure under § 20b.2 of the Criminal Code:

- a. was not necessarily linked to a criminal penalty, according to the clearly worded terms of the law;
- b. should not constitute a(n) (ancillary) penalty – the provision's character and purpose were to deprive someone of an unlawful pecuniary benefit as part of the efforts to combat money laundering;
- c. was, from the standpoint of its characteristics, more civil than criminal in nature, since the primary focus was on elimination of enrichment through assets acquired by criminal means; in addition, the unlawful behaviour's specific consequence under property law was ample reason to conclude that it was mainly a matter of the civil-law implications of a criminal offence. This followed, in particular, from the fact that, in the event of refusal to pay, execution measures must be ordered without any possibility of imprisonment for non-payment;
- d. was, from a procedural standpoint, concerned solely with property, unlike deprivation of enrichment, which affected persons. The question of fault was not entered into, with the result that the courts had no discretionary power; and
- e. must eliminate the enrichment derived from an offence. Regarding the seriousness of such measures, it should be noted that this was a mere "disenrichment" by way of a "*contrarius actus*".

Cross-references:

Judgment of the European Court of Human Rights:

- *Welch v. the United Kingdom*, vol. 307-A, Series A of the Publications of the Court, Bulletin 1995/1 [ECH-1995-1-002].

Languages:

German.



Lithuania Constitutional Court

Statistical data

1 September 2003 – 31 December 2003

Number of decisions: 5 final decisions (of which 3 are important).

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

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

Important decisions

Identification: LTU-2003-3-009

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 30.09.2003 / **e)** 40/01 / **f)** On questions concerning property formerly held by trade unions that were active in Lithuania prior to the restoration of the independent state of Lithuania / **g)** *Valstybės Žinios* (Official Gazette), 93-4223, 03.10.2003 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
 3.18 **General Principles** – General interest.
 5.2 **Fundamental Rights** – Equality.
 5.3.38.4 **Fundamental Rights** – Civil and political rights – Right to property – Privatisation.
 5.4.11 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Property, use, by State / Ownership, right, restoration / Trade union, property, transfer.

Headnotes:

The property that was held by state trade unions that were active in Lithuania prior to the restoration of the independent State of Lithuania and was nationalised

or otherwise unlawfully dispossessed by the occupation government does not necessarily belong to the State of Lithuania by right of ownership.

According to the Constitution, the state is endowed with the right of ownership. Property that belongs to the state by right of ownership must be used in such a way that it serves the common welfare of the nation and the general interest of society as a whole. Under the Constitution, the legislator is under an obligation to establish by law the legal regulation for the possession, use and disposal of state-owned property so that that property is used for the needs of society, and serves the public interest and the welfare of the nation.

In cases where the state temporarily holds or uses property that does not belong to it by right of ownership, that property must be preserved, properly administered and not wasted. This constitutional imperative also applies to property that has been illegally nationalised or otherwise unlawfully dispossessed by the occupation government and is temporarily held or used by the state. According to the law, the rights of ownership of such property may be restored.

Summary:

The Supreme Administrative Court of Lithuania, the petitioner, applied to the Constitutional Court requesting a constitutional review of the following provisions:

- Article 2.8 of the Law concerning the Property of Sanatoriums and Nursing Homes Previously Held by Former Trade Unions of the Lithuanian Soviet Socialist Republic, and
- Article 3.5 (wording of 20 July 2000) of the Law on the Distribution of the Property of Trade Unions

as to their conformity to with Article 23 of the Constitution.

It was under Article 3.5 (wording of 20 July 2000) of the Law on the Distribution of the Property of Trade Unions that the ownership of Anykščiai Rehabilitation Centre, formerly known as the “*Šilėlis*” Nursing Home, (including the administrative building, which is registered in the Real Property Register as property object 2.12, no. 34/962-0056-01-0) was transferred to trade unions.

The petitioner argued that the guarantees protecting the rights of ownership as laid down by Article 23 of the Constitution not only had to be applied in protecting the rights of ownership enjoyed by persons

but also had to be taken into account in protecting the legitimate interests of persons whose rights of ownership had been discontinued by the occupation government.

The petitioner contended that the rule established by Article 2.8 of the Law concerning the Property of Sanatoriums and Nursing Homes Previously Held by Former Trade Unions of the Lithuanian Soviet Socialist Republic and Article 3.5 (wording of 20 July 2000) of the Law on the Distribution of the Property of Trade Unions permitted the transfer of the ownership of the building to present-day Lithuanian trade unions. Before nationalisation, that building, which is part of the complex of buildings of the *Anykščiai* Rehabilitation Centre (formerly known as the “*Šilėlis*” Nursing Home), had been in the possession of a person by right of ownership. The above-mentioned transfer barred the way for the heirs of the former owner to seek restitution of that property. The rights of the heirs of the former owner could be restricted in such a manner only if a concrete and clearly expressed need of society for that property exists. However, the aforementioned laws did not indicate any such need. Consequently, the petitioner sought a ruling as to firstly, whether the legislator, by restricting by law the right of the heirs of the former owner to seek restitution of the property in question and by transferring that property (i.e. the building) to other persons in the absence of a concrete and clearly expressed need of society, violated the constitutional right of the heirs of the former owner to inviolability of property; and secondly, whether the legislator properly discharged its duty to adopt laws protecting rights of ownership against illegal encroachment.

The Constitutional Court examined *ex officio* whether some legal acts regulating questions on property previously held by former trade unions active in Lithuania prior to the restoration of the independent state of Lithuania conflicted with the Constitution of the Republic of Lithuania.

The Constitutional Court recalled that until the restoration of the independent State of Lithuania, trade unions that had been active in Lithuania had been a part of the USSR trade union system, that is to say, a part of the USSR state mechanism through which the state discharged certain social and other functions. The property held by state trade unions, which had been a part of the USSR trade union system until the restoration of the independent State of Lithuania, was the property of the State of Lithuania.

The provision of Article 50.1 of the Constitution providing for trade unions to be established freely and function independently lays down the limits of the

interaction between the state and trade unions. Along with those limits, there are also constitutional limits on the support that may be given by the state to trade unions. Without violating the provisions of the Constitution and taking into account the fact that according to Article 50.2 of the Constitution all trade unions have equal rights, the state may give material and financial support to trade unions at the initial stage of their establishment or to newly-established trade unions in order to allow them to start their activities and independently discharge the functions of trade unions entrenched in the Constitution. At the initial stage, state support of trade unions may not be linked to the discharge of the functions of trade unions; those functions, under the Constitution, must be discharged independently by the trade unions. State support of trade unions at the initial stage may be linked to the establishment and commencement of the activities of trade unions as an element of civil society.

The Constitutional Court found that:

1. the administrative building of the *Anykščiai* Rehabilitation Centre had been the property of a Lithuanian citizen until the occupation of Lithuania by the government of USSR;
2. during the period of Soviet occupation, the administrative building that had been nationalised by the occupation government had been held by state trade unions active in Lithuania before the restoration of the independent State of Lithuania; and
3. after the restoration of the independent State of Lithuania, which proclaimed the continuity and restoration of the rights of ownership, that administrative building was temporarily *de facto* held and used by the independent State of Lithuania. The rights of ownership of that property had to be restored.

The Court ruled that the provisions of Article 2.8 of the Law concerning the Property of Sanatoriums and Nursing Homes Previously Held by Former Trade Unions of the Lithuanian Soviet Socialist Republic and those of Article 3.5 (wording of 20 July 2000) of the Law on the Distribution of Property of Trade Unions that allowed the ownership of the *Anykščiai* Rehabilitation Centre (formerly known as the “*Šilelis*” Nursing Home) to be transferred to present day trade unions conflicted with the Constitution to the extent that they permitted the transfer of the ownership of the administrative building described above.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2003-3-010

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 29.10.2003 / **e)** 1/02 / **f)** On the requirements of the publication of legal acts / **g)** *Valstybės Žinios* (Official Gazette), 103-4611, 01.11.2003 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 1.3.5.5.1 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law – Laws and other rules in force before the entry into force of the Constitution.
 2.2.2.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution.
 3.9 **General Principles** – Rule of law.
 3.13 **General Principles** – Legality.
 3.15 **General Principles** – Publication of laws.
 4.6.2 **Institutions** – Executive bodies – Powers.

Keywords of the alphabetical index:

Legal act, publication, complete, rule.

Headnotes:

Only legal acts that have been published, in accordance with the requirements of official publication and promulgation established by the Constitution in its entirety (including its all constituent parts), in the Lithuanian state language may be recognised as fulfilling the requirements of Article 7.2 of the Constitution, and are, therefore, valid. The Constitution does not establish *expressis verbis* sources of the official publication of legal acts or all possible ways of their publication. It is up to the legislator to establish them by law. Given the variety of legal acts and their content, when regulating this matter, the legislator is free to establish different legal regulations. When doing so, the legislator must respect the Constitution.

In accordance with the Constitution, law-making bodies have a duty to revise all legal acts that are still in force and that have been adopted by them before the entry into force of the Constitution. Those bodies must assess whether those acts conform to the Constitution. The duties of law-making bodies also imply the obligation to guarantee the harmonisation of

those legal acts with the provisions of the Constitution not only as to their content and the scope of the legal regulation they establish, but also as to the form of the legal acts in question, including their publication in accordance with Article 7.2 of the Constitution.

According to Article 95.2 of the Constitution, the Government's resolutions are to be signed by the Prime Minister and the competent Minister. After the entry into force of the Constitution, only those resolutions that have been signed by the Prime Minister and the competent Minister are valid.

Summary:

The Vilnius Regional Court, the petitioner, sought a Constitutional Court ruling on whether Government of Lithuania Resolution no. 458 on the Approval of the Methods for the Calculation of Damage to the Environment as a Result of Violation of the Environmental Protection Laws of 8 November 1991 (hereinafter referred to as the Resolution) conflicted with Articles 7.2 and 95.2 of the Constitution, and Article 8.1 of the Law on the Procedure of Publication and Coming Into Force of Lithuanian Laws and Other Legal Acts (hereinafter referred to as the Law) adopted on 6 April 1993.

The petitioner argued that the Resolution had been published in the official gazette *Lietuvos Respublikos Aukščiausiosios Tarybos ir Vyriausybės žinios* (1991, no. 33-928), but the Methods for the Calculation of Damage to the Environment as a Result of Violation of Environmental Protection Laws (hereinafter referred to as the Methods), as approved by Item 1 of the Resolution, had not been published with the Resolution or later. The petitioner submitted that because the Methods were an inseparable constituent part of the Resolution, not publishing them together with the Resolution violated the procedure of publication of legal acts. The petitioner also argued that under Article 8 of the Law, any Government Resolution providing that legal rules are to come into force the day after the Resolution is signed by the Prime Minister and the competent Minister must be published in the official gazette *Valstybės žinios* on that day, unless a later date for their coming into force has been established by the resolution itself. In the particular case, only the Prime Minister had signed the impugned Resolution. The petitioner questioned whether the Resolution conformed to Articles 7.2 and 95.2 of the Constitution, and Article 8.1 of the Law.

The Constitutional Court held that all parts of a normative legal act (as well as annexes) constituted a whole, were inseparably related and had equal legal power. It held that annexes could not be separated from the legal act, because the entire content of the

legal regulation as established in the legal act would be changed if the legal regulation established in it were changed.

Article 2 of the Law on the Procedure of Entry into Effect of the Constitution of the Republic of Lithuania, which was recognised as the constituent part of the Constitution by the Constitutional Court, provides that laws, other legal acts or parts thereof which were in effect on the territory of the Republic of Lithuania prior to the adoption of the Constitution of the Republic of Lithuania shall be effective to the extent that they are not in conflict with the Constitution and this Law, and shall remain in effect until they are either declared null and void or harmonised with the provisions of the Constitution. For that reason, the Constitutional Court emphasised that the Constitution establishes that legal acts, which had been adopted before the entry into effect of the Constitution, cannot be valid where they are inconsistent with the Constitution and where it has been established, on the basis of and according to the procedure established in the Constitution, that those legal acts are in conflict with the Constitution. The Constitutional Court also emphasised that under the Constitution, the formulation "shall remain in effect until they are either declared null and void or harmonised with the provisions of the Constitution" of Article 2 of the Law on the Procedure of Entry into Effect of the Constitution of the Republic of Lithuania means that the legislator and other bodies with legislative powers have the duty to revise and assess the conformity to the Constitution of three types of legal acts: the first, all legal acts still in force adopted by them prior to the entry into effect of the Constitution; the second, the legal acts still in force that have been adopted after the entry into force of the Constitution by defunct institutions and that regulate the relationships falling under the competences of the legislator or the body with legislative powers; and the third, the legal acts still in force that have been adopted before the restoration of the independent State of Lithuania and that regulate the relationships falling under the competences of the legislator or the body with legislative powers. Upon finding that one of the above-mentioned legal acts (or part thereof) conflicts with the Constitution, the legislator or the body with legislative powers has a constitutional duty to either harmonise that act with the Constitution, i.e. to pass a new legal act that would, in its opinion, amend the legal act (or part thereof) that conflicts with the Constitution, or to declare the legal act that, in its opinion, conflicts with the Constitution, to be no longer valid.

The Constitutional Court found that the Methods had never been published. The Court ruled that the Resolution was in conflict with Article 7.2 of the Constitution, Article 2 of the Law on the Procedure of

Entry into Effect of the Constitution, and the constitutional principle of a state governed by the rule of law. At the request of the Vilnius Regional Court, the Constitutional Court dismissed the part of the case seeking the examination of whether the Resolution conflicted with Article 8.1 (wording of 18 May 1999) of Law on the Procedure of Publication and Coming Into Force of Laws and Other Legal Acts.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2003-3-011

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 30.12.2003 / **e)** 40/03 / **f)** On Granting Lithuanian Citizenship by Way of Exception / **g)** *Valstybės Žinios* (Official Gazette), 124-5643, 31.12.2003 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
 3.13 **General Principles** – Legality.
 4.4.1.2 **Institutions** – Head of State – Powers – Relations with the executive powers.
 4.4.4.1 **Institutions** – Head of State – Status – Liability.
 4.6.10 **Institutions** – Executive bodies – Liability.
 5.3.8 **Fundamental Rights** – Civil and political rights – Right to citizenship or nationality.

Keywords of the alphabetical index:

Citizenship, acquisition, conditions / Decree, presidential, signature, joint / President, counter-signing.

Headnotes:

According to Article 85 of the Constitution “the President of the Republic, implementing the powers vested in him or her, shall issue decrees. To be valid, the decrees of the President of the Republic on subjects listed in Items 3, 15, 17 and 21 of Article 84 of the Constitution must be signed by the Prime Minister or a competent Minister. Responsibility for

such a decree shall lie with the Prime Minister or the Minister who signed it.”

The term “decrees of the President of the Republic” of the provision “[t]o be valid, the decrees of the President of the Republic” of Article 85 of the Constitution means that a decree becomes a legal act of the President only after it has been signed by the President. Until the President has done so, there are no legal grounds to state that the President has issued a decree. Such document is only a draft-decree of the President, but not a valid decree. Under Article 85 of the Constitution, the Prime Minister or a competent minister has the right to decide whether or not to sign the decree of the President. The Prime Minister or a competent minister is not obliged to sign a decree that has been issued in disregard of the Constitution, that fails to follow the procedure established in relevant legislation, or fails to fulfil other established requirements. Otherwise, the Prime Minister or a competent minister would be responsible for actions that he or she had to perform without having any choice in the matter, i.e. irrespective of his or her will.

Responsibility for a decree, which is on a subject listed in Items 3, 15, 17 and 21 of Article 84 of the Constitution, that amounts to a gross violation of the Constitution, breach of the oath or the commission of a crime lies not only with the Prime Minister or a competent minister, but also with the President of the Republic. Breach of the oath is also a gross violation of the Constitution, and a gross violation of the Constitution is also a breach of the oath.

In the sense of the Law on Citizenship, “special merit” to Lithuania is the ground for granting Lithuanian citizenship by way of exception. Such merit is to be found only in a person’s actions, where a person has very significantly contributed to strengthening Lithuanian statehood, to the increase in the power and authority of Lithuania in the international community, and where it is obvious that the person has already been integrated into Lithuanian society.

Summary:

The parliament (*Seimas*) *in corpore*, the petitioner, applied to the Constitutional Court requesting an investigation as to whether or not the provision in President of the Republic Decree no. 40 “On Granting Citizenship of the Republic Lithuania by Way of Exception” of 11 April 2003 granting Lithuanian citizenship to Mr Borisov by way of exception was in conflict with the principle of a state governed by the rule of law entrenched in the Constitution, Articles 29.1, 82.1 and 84.21 of the Constitution as well as Article 16.1 of the Law on Citizenship.

The representative of the petitioner pointed out that there were no legal grounds to grant Lithuanian citizenship to Mr Borisov by way of exception.

The Constitutional Court found that Mr Borisov had unlawfully acquired Lithuanian citizenship in 1991 and that the Migration Department acknowledged that a Lithuanian passport had been issued to Mr Borisov unlawfully, but it nevertheless made an exception and allowed him to keep his Lithuanian citizenship and Lithuanian passport. Less than a year after Mr Borisov had been granted that exception and had received special treatment from the Lithuanian state institutions, Mr Borisov applied to the President of Russian Federation seeking the citizenship of the Russian Federation. Mr Borisov had been aware of the fact that he would lose Lithuanian citizenship upon acquisition of Russian citizenship. That being so, Mr Borisov had clearly shown that Lithuanian citizenship was less valuable to him than Russian citizenship and that he gave priority to Russian citizenship.

The Constitutional Court held that in taking his decision to grant Mr Borisov Lithuanian citizenship by way of exception, the President had treated him exceptionally, had failed to observe the requirements established in the Law on Citizenship and had failed to take crucial circumstances into consideration. The decision of the President to grant Lithuanian citizenship to Mr Borisov had not been based on any special merit of Mr Borisov in relation to Lithuania, but rather on his especially generous financial and other support of Mr Paksas during the presidential elections of 2002.

The Constitutional Court held that under the Law on Citizenship, the merits of a citizen of a foreign state or a stateless person to the State of Lithuania cannot, in general, be evaluated on the basis of the mere amount of money, material or other support given by a citizen of a foreign state or stateless person to a certain citizen or group of citizens of Lithuania, a state official, an enterprise, an establishment or an organisation or even to the State of Lithuania itself. It follows neither from the Constitution, nor the Law on Citizenship, nor other laws that Lithuanian citizenship may be acquired for financial, material or any other support, i.e. bought.

The Constitutional Court held that President of the Republic Decree no. 40 "On Granting Citizenship of the Republic Lithuania by Way of Exception" of 11 April 2003 to the extent that it granted Lithuanian citizenship by way of exception to Jurij Borisov, born 17 May 1956 in Russia and permanently residing in Lithuania, was in conflict with Article 29.1, the provision of Article 82.1 "the elected President of the

Republic [...] shall take an oath [...] to be equally just to all", Article 84.1 of the Constitution, the constitutional principle of a state governed the rule of law, as well as Article 16.1 of the Republic of Lithuania Law on Citizenship.

Languages:

Lithuanian, English (translation by the Court).



Moldova

Constitutional Court

Important decisions

Identification: MDA-2003-3-008

a) Moldova / **b)** Constitutional Court / **c)** / **d)** 09.10.2003 / **e)** 21 / **f)** Review of constitutionality of certain provisions of the Law on Consumer Co-operatives no. 1252-XIV of 28 September 2000, in the version amended by Law no. 61-XV of 21 February 2003 amending and supplementing the Law on Consumer Co-operatives no. 1252-XIV of 28 September 2000 / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
 4.5.2 **Institutions** – Legislative bodies – Powers.
 5.2 **Fundamental Rights** – Equality.
 5.3.26 **Fundamental Rights** – Civil and political rights – Freedom of association.
 5.3.38 **Fundamental Rights** – Civil and political rights – Right to property.
 5.4.7 **Fundamental Rights** – Economic, social and cultural rights – Consumer protection.

Keywords of the alphabetical index:

Co-operative, consumers, autonomy / Co-operative, decision, approval, procedure, quorum / Association, state regulation.

Headnotes:

In amending the law on consumer co-operatives, the legislature, in accordance with the Constitution and international regulations, provided guarantees to ensure wider participation by members of co-operatives in the making of decisions, prevent abuse on the part of the management bodies, strike a fair balance between the interests of employees of the consumer co-operatives and the interests of their members, and optimise the management of the assets of the consumer co-operatives in order to contribute to the proper functioning of the system of co-operatives, guarantee and protect the interests of

all members of the co-operatives and prevent misuse of the right to property and of equality before the law.

Summary:

The Court was requested to review the constitutionality of certain amendments to the Law on consumer co-operatives relating to the legal requirements concerning the deliberative nature of the assembly of the co-operative sector, meetings of the executive office of the territorial and central union and of the congress of consumer co-operation; the requirement that the President of the executive office should be familiar with the system of consumer cooperation and have some experience in the activities of the economic sector; the representation of employees of the consumer co-operative in the membership of the board of directors; a prohibition on a member of the board of directors occupying at the same time a post as a member of the executive office; and the rounding up to a full member's share of the members' shares previously held by the members of consumer co-operatives and their reinstatement in the consumer co-operatives concerned, as well as the shares of the management organs of the co-operatives, for the purpose of adjusting the members' shares held by the members of the co-operatives and restoring the status of member to persons excluded from the consumer co-operative and of transferring the property of the Central Union of consumer co-operatives to the territorial unions and to the consumer co-operatives.

The Court stated that the Constitution provides expressly that citizens are free to associate in parties and other social and political organisations, which are equal before the law. The State ensures the protection of the rights and legitimate interests of parties and other social and political organisations (Article 41 of the Constitution).

These constitutional provisions are wholly consistent with Article 11 ECHR, which provides that everyone has the right to freedom of association, with Article 20 of the Universal Declaration of Human Rights, Article 8 of the International Covenant on Economic, Social and Cultural Rights and Article 22 of the International Covenant on Civil and Political Rights, which also enshrine the right of every person to associate freely with other persons in the form of parties or socio-political formations and unions, in order to participate in political life and to satisfy and protect social, occupational, economic and cultural interests.

It was in order to bring the legislation into conformity with the constitutional principles and the parameters of democracy that, on 21 February 2003, Parliament

amended the Law on consumer co-operatives by introducing certain guarantees for the members of the consumer co-operative and the conduct of their activities.

In its decision, the Court noted that the purpose of these provisions of the law is to ensure fuller participation by members of the co-operatives in the adoption of decisions, to prevent abuse on the part of the management organs, to protect the system of consumer cooperation from incompetent managers, to strike a fair balance between the interests of employees of the consumer co-operative and the interests of its members, to restore the status of members to persons unlawfully excluded from consumer co-operatives and to reinstate their rights, to optimise the management of the assets of consumer co-operatives in order to contribute to the proper functioning of the system of co-operatives, to guarantee and protect the interests of all members of the co-operatives and to prevent the misuse of the right to property and of equality before the law.

In keeping with those aims, the Court observed that, according to their legal nature, the amendments submitted for review of their constitutionality did not constitute interference by the State in the activities of the organisations of consumer cooperation.

However, the Court stated that Articles 46 and 127 of the Constitution guarantee and protect property. The amendments to the Law on consumer co-operatives reinforce that right by ensuring that all members of a co-operative are able to participate in the fair and effective management of its assets. The requirements introduced by Parliament concerning the quorum of the congress, of the executive office and of the assembly of the co-operatives sector constitute guarantees of the exercise of the right to property and other rights by the members of the co-operative.

By increasing the deliberative quorum of the management organs of the consumer co-operatives, Parliament pursued the aim of enhancing the degree of credibility, authenticity and fairness of the decisions adopted.

The provisions requiring presidents of boards of directors and executive offices to be familiar with the system of consumer co-operation and have experience in the activities of the economic area pursue the aim of revitalising the system of co-operation and increasing efficiency and economic activity and, in that sense, Parliament did not exceed its powers.

In the exercise of its power to complete the constitutional jurisdiction, the Constitutional Court stated that the provisions referred to cannot be regarded as

unconstitutional because by their terms they have no impact on freedom of association, the right to property and equal protection by the law, are consistent with the lawful aim pursued and are consistent with the constitutional provisions and the international instruments on human rights and fundamental freedoms.

Cross-references:

In the grounds of Judgment no. 17 of 25 April 2000, the Constitutional Court ruled on the exercise of the right of free association, stating that under Article 66.a of the Constitution, the more detailed regulation of social relations is within the powers of Parliament. Provided that the normative acts of Parliament do not contravene the Constitution and international instruments, which take priority over domestic laws, they constitute a continuation of those instruments by providing the legal framework for specific social relations. The legislature is entitled to establish a logical order in respect of certain relations in order to improve the way in which they are conducted and thus to preclude the wrongful and abusive interpretation of both domestic and international rules of a general nature.

Languages:

Romanian, Russian.



Identification: MDA-2003-3-009

a) Moldova / **b)** Constitutional Court / **c)** / **d)** 06.11.2003 / **e)** 24 / **f)** Review of constitutionality of Article 78.1 of the Code of Civil Procedure, adopted by Law no. 225-XV of 30 May 2003 / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

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

4.7.15.2 **Institutions** – Judicial bodies – Legal assistance and representation of parties – Assistance other than by the Bar.

5.2 **Fundamental Rights** – Equality.

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

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

Keywords of the alphabetical index:

Parliament, member, capacity to act as representative in Court proceedings.

Headnotes:

The prohibition for Members of Parliament from being representatives in court proceedings in order to protect the rights of parties to civil proceedings, is in conformity with the Constitution because it prevents the activities of the courts from being called into question by Members of Parliament, who, by their authority, might influence the court, by breaching the constitutional principle of the independence and impartiality of judges.

Summary:

An application was submitted to the Constitutional Court by a Member of Parliament, Stefan Secareanu.

The applicant maintains that the prohibition on Members of Parliament and on councillors of the representative authorities acting as representatives before the courts, provided for in Article 78.1 of the Code of Civil Procedure, constitutes a direct violation of fundamental human rights. He also claims that the provisions of that article are contrary to Articles 1.3, 4.2, 7, 15, 16.2, 26.2, 26.3, 39.2, 54.1 and 134.3 of the Constitution, Articles 7, 21 and 23 of the Universal Declaration of Human Rights and Article 26 of the International Covenant on Civil and Political Rights.

Article 78.1 of the Code of Civil Procedure provides that judges, prosecutors, officers responsible for criminal proceedings, police officers, Members of Parliament and councillors of the representative authorities cannot act as representatives before the courts, except where they take part in the proceedings as agents of those authorities or as statutory representatives.

The Constitutional Court reviewed the constitutionality of Article 78.1 of the Code of Civil Procedure and held that the sentence “Members of Parliament cannot act as representatives before the courts” was consistent with the Constitution. Under Article 60.d of the Code of Constitutional Jurisdiction, the proceedings for review of the constitutionality of the phrase “and

councillors of the representative authorities” were annulled.

In its judgment, the Court stated that according to Article 16 of the Constitution and Article 26 of the International Covenant on Civil and Political Rights (which has applied in the Republic of Moldova since 26 April 1993), all citizens of the Republic are equal before the law and public authorities, without any distinction on grounds of race, nationality, ethnic origin, language, religion, sex, opinion, political allegiance, property or social origin.

In certain cases, both the international regulations and the Constitution permit the restriction of the exercise of certain rights and freedoms.

However, the exercise of a right may be restricted only by law, and any such restriction must respect the principle that the restriction must be proportionate to the situation which gave rise to it. The decision as to whether it is appropriate to restrict the exercise of a right is a matter for the legislature.

The restriction of the right of Members of Parliament to act as representatives in court is determined primarily by their status. According to the constitutional provisions, the status of Member of Parliament is incompatible with the exercise of any remunerated activity, with the exception of teaching and scientific activities.

Languages:

Romanian, Russian.



Identification: MDA-2003-3-010

a) Moldova / **b)** Constitutional Court / **c)** / **d)** 25.12.2003 / **e)** 6 / **f)** Review of constitutionality of Government Decree no. 891 of 17 July 2003 on the setting-up of the Emergency Medical Assistance Service of Moldova / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

1.5.1.3.2 **Constitutional Justice** – Decisions – Deliberation – Procedure – Vote.

1.5.4.3 **Constitutional Justice** – Decisions – Types – Finding of constitutionality or unconstitutionality.

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

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

4.10.8 **Institutions** – Public finances – State assets.

5.1.1.5.2 **Fundamental Rights** – General questions – Entitlement to rights – Legal persons – Public law.

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

Keywords of the alphabetical index:

Hospital, medical assistance / Municipality, property, transfer to state / Property, public, disposal, limitation / Public property / Constitutional Court, vote, tie.

Headnotes:

The Constitution establishes the basic principles of the local public administration (Chapter III). Thus, the public administration in the administrative and territorial units is based on the principles of local autonomy, decentralisation of public services, eligibility of the local public administrative authorities and consultation of citizens in local problems of particular interest.

According to Article 127 of the Constitution, public property belongs to the State or to the administrative and territorial units, but the State protects property.

Summary:

Applications were brought by Members of Parliament seeking the review of the constitutionality of Government Decree no. 891 of 17 July 2003 on the setting up of the Emergency Medical Assistance Service of Moldova which intended to ensure better access by the population to emergency medical assistance. By this decree, the service in question was integrated within the Ministry of Health and the departmental and municipal emergency medical assistance centres and municipal hospitals had to be transferred to the Ministry of Health by the departmental/municipal councils, the territorial administrative unit, Gagauzia and the Municipal Council of Chisinau.

The application claimed that Government Decree no. 891 infringed the provisions of Articles 36, 46, 102, 109, 112 and 127 of the Constitution, certain

provisions of the legislation in force and the provisions of Article 4 of the European Charter of Local Self-Government, thus violating the right to public property of the administrative and territorial units.

In view of the subject-matter of the applications, Decree no. 891 was examined in a plenary sitting according to the procedures laid down for constitutional jurisdiction matters (Chapter 8 of the Code of Constitutional Jurisdiction).

Following the deliberation, which took place in accordance with Article 55 of the Code of Constitutional Jurisdiction, a vote was taken on the proposals of the Judge-Rapporteur and the other judges.

When the Court adopted its decision on Decree no. 891, the votes were evenly split. According to Article 27.2 of the Law on the Constitutional Court and Article 66.5 of the Code of Constitutional Jurisdiction (the wording of which was determined by Law no. 1570 of 20 December 2002), the contested act is presumed to be constitutional and the proceedings in the case are stayed.

Languages:

Romanian, Russian.



Norway Supreme Court

Important decisions

Identification: NOR-2003-3-007

a) Norway / **b)** Supreme Court / **c)** / **d)** 02.09.2003 / **e)** 2003/509 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 2003, 1100 / **h)** CODICES (Norwegian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Sanction, disciplinary, non-penal nature / Prison, sentence, implementation.

Headnotes:

Disciplinary sanctions imposed pursuant to Section 40 of the Implementation of Sentences Act are not punishment within the terms of the *ne bis in idem* principle in Article 4.1 Protocol 7 ECHR and therefore do not amount to a bar to subsequent criminal proceedings.

Summary:

While serving a twelve-year sentence for homicide and drug offences, A. was found to be in possession of and to have smoked hashish. An order was therefore made pursuant to Section 40 of the Implementation of Sentences Act whereby A.'s daily allowance was reduced by half for a period of 10 days. The total amount of the reduction was NOK 230. Subsequently, A. was indicted for breach of Section 162.1 cf. Section 162.5 of the Criminal Code (simple drug felony and complicity in a drug felony) for the acquisition of hashish, and for breach of Section 31.2 and 31.4 cf. Section 24.1 of the Drug Act for the possession and use of hashish. A. admitted the facts upon which the indictment was based, but pleaded that he could not be punished because he had already been given a disciplinary sanction for the same conduct.

The District Court found that the disciplinary sanction pursuant to Section 40 of the Implementation of Sentences Act was not punishment within the terms of Article 4.1 Protocol 7 ECHR. The District Court convicted A. in accordance with the indictment and sentenced him to 30 days' imprisonment. A. appealed to the Court of Appeal, but the appeal was dismissed. A.'s appeal to the Supreme Court was also dismissed.

The Supreme Court found that according to the case-law of the European Court of Human Rights, a disciplinary sanction must be of a relatively seriously intrusive nature in order for there to be a criminal charge pursuant to Article 6 ECHR. As stated by the majority of the Supreme Court in the plenary decision of 3 May 2002 summarised in *Bulletin* 2002/2 [NOR-2002-2-002], it must in practice amount to a deprivation of liberty. The question of what amounts to punishment pursuant to Article 4.1 Protocol 7 ECHR must be determined in accordance with the same criteria as for Article 6 ECHR. On those grounds, the Supreme Court found that none of the disciplinary sanctions available pursuant to Section 40 of the Implementation of Sentences Act could be deemed to be punishment pursuant to Article 4.1 Protocol 7 ECHR. The disciplinary sanction imposed on A. was therefore no bar to subsequent criminal proceedings.

The Supreme Court also stated, *obiter dictum*, that the breach of Section 162 of the Criminal Code and of the provisions of the Drug Act could not be deemed to be the same conduct as the breach of Section 40 of the Implementation of Sentences Act.

Languages:

Norwegian.



Identification: NOR-2003-3-008

a) Norway / **b)** Supreme Court / **c)** / **d)** 23.09.2003 / **e)** 2002/1389 / **f)** / **g)** *Norsk Retstidende* (Official Gazette), 2003, 1221 / **h)** CODICES (Norwegian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Bankruptcy / Sanction, disqualification from business.

Headnotes:

An order imposing disqualification from business upon a bankrupt is not a bar to subsequent criminal proceedings pursuant to the *ne bis in idem* principle in Article 4.1 Protocol 7 ECHR. This principle only applies where a person is “finally acquitted or convicted” of an offence.

Summary:

A. ran a cafe and restaurant business. The business was declared bankrupt, and he was disqualified from business pursuant to the Bankruptcy Act Section 142.1.1 and 142.1.2. Subsection 1.1 provides that disqualification may be imposed where there are justifiable grounds for suspecting that one or more criminal offences have been committed during the course of business leading to the bankruptcy. Subsection 1.2 provides that disqualification may be imposed in the case of reprehensible business conduct rendering the bankrupt unfit to found a new company or hold office as board member. Almost two years after the disqualification order was made, A. was convicted of and given a custodial sentence for the criminal offences upon which the disqualification order was based. He appealed to the Court of Appeal and thereafter to the Supreme Court and pleaded that the criminal conviction subsequent to the disqualification from business was a violation of the *ne bis in idem* principle in Article 4.1 Protocol 7 ECHR.

The Supreme Court found that there was no repetition of criminal proceedings.

With regard to the disqualification imposed pursuant to Section 142.1.2, the Supreme Court referred to the admissibility decision of the European Court of Human Rights of 14 September 1999 in the case of *DC, HS and AD v. the United Kingdom* (application no. 39031/97). The English rules concerning the disqualification of directors had clear similarities with the disqualification provisions in subsection 1.2, but the sanction under the English rules was more far-reaching. The European Court of Human Rights had stated that neither the domestic classification of the offence, nor the nature of the offence, nor the nature and degree of severity of the sanction indicated that there was a criminal charge within the meaning of Article 6.1 ECHR.

The Supreme Court found that disqualification pursuant to subsection 1.2 of the Bankruptcy Act had to be viewed the same way, and that the prohibition against repeated criminal proceedings therefore did not apply.

With regard to disqualification imposed pursuant to Section 142.1.1 of the Bankruptcy Act, the Supreme Court pointed out the fact that the *ne bis in idem* principle only applies if a person is “finally acquitted or convicted” of an offence. A disqualification order could not be said to satisfy that condition. The kind of guilt required, the purpose of the sanction and the procedure to be followed when imposing disqualification from business suggest that it cannot be deemed to be a final conviction for the criminal offences upon which the order was based. Moreover, the Supreme Court found that the case against the United Kingdom is also applicable where disqualification is imposed pursuant to subsection 1.1. Neither the purpose of the sanction nor its nature nor its degree of severity indicates that disqualification from business is a criminal charge.

Languages:

Norwegian.

*Identification:* NOR-2003-3-009

a) Norway / **b)** Supreme Court / **c)** / **d)** 27.11.2003 / **e)** 2003/227 / **f)** / **g)** *Norsk retstidende* (Official Gazette) / **h)** CODICES (Norwegian).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Acquitted person, obligation to pay compensation to victim / Compensation, determination, grounds / Rape, compensation, civil claim.

Headnotes:

According to the case-law of the European Court of Human Rights, a person who is acquitted of a criminal offence may only be ordered to pay compensation on condition that the reasons for allowing a claim for compensation are not such as to cast doubt upon the correctness of the acquittal.

Summary:

After the accused in a rape case had been acquitted of the crime, the Court of Appeal ordered him in the same case to pay compensation to the victim amounting to NOK 28 710.60 for economic loss and NOK 60 000 for non-economic loss. The main issue before the Supreme Court was whether the Court of Appeal when determining the claim for compensation had violated the presumption of innocence in Article 6.2 ECHR.

According to the Supreme Court, not only does Article 6.2 ECHR prescribe the standard of proof necessary to convict a person of a criminal offence, but it also protects a person who is suspected or accused of a criminal offence against any judicial decision or other statement by State officials amounting to an assessment of his guilt without him having previously been proved guilty according to law in criminal proceedings. Where criminal proceedings result in an acquittal, the presumption of innocence also places limitations on the premises upon which subsequent civil proceedings can be based. According to the case-law of the European Court of Human Rights, the Court cannot give a reason for its decision in subsequent proceedings that is apt to cast doubt on the accused's criminal guilt.

The Supreme Court affirmed that conviction of the accused is not a condition for ordering compensation in a criminal case under Norwegian law. The Supreme Court found that the judgments of the European Court of Human Rights of 11 February 2003 in the cases of *Ringvold* (application no. 34964/97) and *Y.* (application no. 56568/00) *v. Norway* must be understood to mean that Norwegian law on that point is not in breach of the presumption of innocence. However, following the decisions of the European Court of Human Rights, a person who is acquitted in criminal proceedings may only be ordered to pay compensation on the condition that the reasons for allowing a claim for compensation are not such as to cast doubt upon the correctness of the acquittal.

In the case in question, the Court of Appeal had allowed the claim for compensation on the grounds

that it was clearly more likely than not that the accused had acted both objectively and subjectively as set out in the accusation against him that was delivered to the jury. That had to be understood to mean that the Court of Appeal had found that there was a clear likelihood that both the objective and the subjective requirements for conviction were satisfied. In its reasoning for granting the compensation award, the Court of Appeal had used terminology that is typical of criminal law. In the view of the Supreme Court, the Court of Appeal had thereby cast such doubt on whether the acquittal was correct that it had to be deemed to be a violation of the presumption of innocence.

However, the Supreme Court held that its finding of a violation of Article 6.2 ECHR and its disassociation from the language of the Court of Appeal provided just satisfaction. The civil basis of liability in the case was not dependent upon proof that the requirements for a criminal conviction were fulfilled. On the basis of the Court of Appeal's assessment of evidence, there was a clear likelihood that the conditions for compensation were satisfied. No appeal had been made against the Court of Appeal's assessment of evidence, but on the basis of that assessment there could be no doubt that the Court of Appeal would have come to the same conclusion in the event of a retrial. The Supreme Court had therefore no cause to quash the Court of Appeal's judgment, and the appeal was therefore dismissed.

Cross-references:

- Decision of the Supreme Court of 05.06.1996, *Bulletin* 1996/2 [NOR-1996-2-006].

European Court of Human Rights:

- Judgment of 11.02.2003, *Ringvold v. Norway*, *Reports of Judgments and Decisions* 2003-II;
- Judgment of 11.02.2003, *Y. v. Norway*, *Reports of Judgments and Decisions* 2003-II (extracts).

Languages:

Norwegian.



Identification: NOR-2003-3-010

a) Norway / b) Supreme Court / c) / d) 22.12.2003 / e) 2003/735 / f) / g) *Norsk retstidende* (Official Gazette) / h) CODICES (Norwegian).

Keywords of the systematic thesaurus:

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

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

5.3.13.23 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent.

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

Keywords of the alphabetical index:

Minor, compulsory detention, institution of serious juvenile offenders / Social welfare board, procedure, principles.

Headnotes:

Where the grounds of serious or repeated criminality are the basis for placing a minor in an institution without his or her consent or the consent of his or her guardian, the procedure before the county social welfare board must satisfy the conditions laid down in the European Convention on Human Rights for the determination of criminal cases and be considered criminal proceedings for the criminal act in question.

Summary:

A. is under 18 years of age. He was placed in an institution for treatment and guidance for a period of up to 12 months on the basis of an order of the county social welfare board made pursuant to Section 4-24.2, cf. 4-24.1 alternative 1 of the Child Welfare Act. The issue before the Supreme Court was whether the order amounted to a bar to subsequent criminal proceedings for the conduct upon which the institutionalisation was based.

Section 4-24.1 of the Child Welfare Act provides that an order to place a child in an institution without the consent of the child or his or her guardian may be made where the child “has displayed serious behavioural problems:

- in the form of serious or repeated criminality,

- in the form of persistent abuse of intoxicating substances, or
- in other ways.”

Placement in an institution without the consent of the child or his or her guardian on the ground of “serious or repeated criminality” may only be ordered if both the subjective and the objective requirements for criminal liability are fulfilled.

The main reason for the decision of the county social welfare board was that A. was guilty of serious criminality. Unlike the District Court and the Court of Appeal, both of which had allowed the trial, the Supreme Court found, with one dissenting vote (4 against 1) that the order of the county social welfare board was a bar to subsequent criminal proceedings for the same conduct. The Supreme Court therefore quashed the order of the Court of Appeal.

The Supreme Court referred to the case-law of the European Court of Human Rights and to the decision of the Supreme Court on 2 September 2003 in Case no. 2003/509, paragraphs 46 and 47, and found that the criteria for determining what amounts to a “criminal charge” in the terms of Article 6 ECHR, and for what amounts to “criminal proceedings” in the terms of Article 4.1 Protocol 7 ECHR are the same.

The majority of the Court referred to the fact that the European Court of Human Rights has interpreted Article 6.2 ECHR in such a way that it not only prescribes the standard of proof for conviction for a criminal offence, but also protects a person who is suspected or accused of a criminal offence against any judicial decision or other statement by State officials amounting to an assessment of his guilt without him having previously been proved guilty according to law. The Court referred to the judgments of the European Court of Human Rights of 10 February 1995 in the case of *Alenet de Ribemont v. France* at paragraph 35, 21 March 2000 in the case of *Rushiti v. Austria* at paragraph 1, and 3 October 2002 in the case of *Böhmer v. Germany* at paragraphs 54 and 67. The Court also referred to the interlocutory order of the Supreme Court of 27 November 2003 in Case no. 2003/227 at paragraph 22. The question of guilt cannot be determined prejudicially in a case that deals with a separate matter or separate claim. The majority of the Court found that a measure that was justified on the grounds that the objective and subjective qualifications for criminal liability were satisfied, in terms of the criteria laid down in the case of *Engel et al. against Netherlands* of 8 June 1976, had to be deemed to be “criminal in nature” and amounted to a bar to subsequent criminal proceedings for the same conduct.

The minority of the Court, on the other hand, found that the proceedings were not criminal in the terms of the criteria laid down in the *Engel* case. The minority emphasised, in particular, the non-penal purposes of the measure. As long as the procedure before the county board satisfied the minimum requirements laid down in the European Convention on Human Rights for dealing with criminal cases, the presumption of innocence was not violated. In the view of the minority, there was nothing in the case-law of the European Court of Human Rights that indicated that the question of guilt could not be determined prejudicially in a case like the present one. The fact that the presumption of innocence was to be applied under such circumstances did not necessarily mean that the non-consensual measure had to be deemed to be criminal within the terms of the Convention.

Cross-references:

- Decision of the Supreme Court of 02.09.2003 (2003/509);
- Decision of the Supreme Court of 27.11.2003 (2003/227).

European Court of Human Rights:

- Judgment of 10.02.1995, *Alenet de Ribemont v. France*, Series A, no. 308.

Languages:

Norwegian.



Poland Constitutional Tribunal

Statistical data

1 May 2003 – 31 August 2003

Total number of decisions: 127

I. Decisions by type

- Final judgments: 25
- Cases discontinued: 12
- Decisions refusing to proceed with further action on an application (preliminary consideration procedure): 89
- Signalization decisions: 1

II. Decisions by procedure (in admitted cases)

- Preliminary review: 0
- Abstract review *ex post facto*: 10 judgments, 7 discontinued
- Court referrals: 6 judgments, 1 discontinued
- Constitutional complaint: 9 judgments, 3 discontinued
- Disputes over competency: 0
- Political party review: 0 judgments, 1 discontinued
- Signalization: 1

Judgments declaring the challenged provisions:

- to conform with the Constitution: 14
- not to conform with the Constitution (in whole or in part): 11

Statistical data

1 September 2003 – 31 December 2003

Total number of decisions: 134

I. Decisions by type

- Final judgments: 22
- Cases discontinued: 9
- Decisions refusing to proceed with further action on an application (preliminary consideration procedure): 103

II. Decisions by procedure

- Preliminary review: 0
- Abstract review *ex post facto*: 14 judgments, 2 cases discontinued
- Courts referrals: 3 judgments, 1 case discontinued
- Disputes over competency: 0
- Political party review: 0
- Signalisation: 0

Judgments declaring the challenged provisions:

- to conform to the Constitution: 7
- not to conform to the Constitution (in whole or in part): 15

Important decisions

Identification: POL-2003-2-015 (revised version)

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 26.02.2003 / **e)** K 1/01 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest) / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

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

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

5.1.1.4.2 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Incapacitated.

5.2 **Fundamental Rights** – Equality.

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

Keywords of the alphabetical index:

Foster family, social aid / Child, disabled, care, costs.

Headnotes:

The State is under an obligation to allocate adequate financial resources to ensure that the constitutional social rights are realised. The question of whether the legislator has adopted the most appropriate regulation of the matter at hand is beyond the competence of the Tribunal. The constitutional review of the mechanism of administering social assistance may only determine whether or not it breaches constitutionally enshrined rights (i.e. equality or justice).

Providing a higher amount of social assistance to foster families of handicapped children than to families of non-handicapped children is sufficient to ensure compliance with obligations under Article 23.2 of the UN Convention on the Rights of the Child.

Even though the Constitution does not explicitly express the principle of the protection of acquired rights, it has been on numerous occasions found to be a part of the general clause of “state subject to the rule of law” as contained in Article 2 of the Constitution, along with other closely linked-principles, such as protection of legitimate expectations, legal certainty and trust in the State. The fact that the new Constitution expressly proclaims many rights that have previously been inferred from this general clause while omitting the principle of acquired rights cannot be treated as depriving this principle of its constitutional status. The notion of a “democratic state subject to the rule of law” has a well-established legal content and its inclusion in Article 2 is a clear indication of the intention to uphold all the principles contained therein.

The principle of legal certainty requires the legislator to respect existing legal relations. Introducing, by way of enactments of law, substantial changes to the legal system affecting the rights and obligations of private parties that are not objectively justified by the circumstances may infringe the principle of a democratic state subject to the rule of law.

The change of the legal means by which social assistance is administered to foster families for covering the cost of upkeep of a child does not in itself contradict the provisions of the UN Convention on the Rights of the Child.

Summary:

The case was initiated by a motion from the Commissioner for Citizens’ Rights (Ombudsman) and was joined during proceedings with a question of law referred by a court that concerned one of the provisions under review and cited the same constitutional provision as the basis of review.

The claims of unconstitutionality concerned several provisions of the Social Aid Act 1991 (in the wording given by subsequent amendments) and an executive regulation thereto, which the Tribunal addressed in turn.

According to Article 33c.5 of the Social Aid Act 1990, when a foster child reaches the age of majority, the foster family is dissolved and, consequently, assistance under Article 33g of the Act is no longer provided. An adult ex-foster child could only be granted assistance under Article 33p.1 of the Act to

continue his/her education. This situation was distinctly different from the one concerning children remaining in residential child care institutions who have been allowed to live in the institution after reaching the age of majority, provided they continued their studies at the current educational facility [school]. They were also entitled, like foster children, to financial assistance for continuing their education. Both groups were in an analogous factual situation until they reached the age of majority (differences are irrelevant), when the children in residential care institutions continued to receive state support, which was denied to foster families. There is no justification for the differentiation in the situation of the two groups by depriving foster children of financial support upon them reaching the age of majority, when they continue their education at the current school. That led to the conclusion that the provision under review contradicted the principle of equality.

The second of the provisions under review, Article 33g.2.2 and 33g.2.3 and the executive regulation thereto, had been amended in 2001 and, in effect, financial assistance to foster families of disabled children had been reduced and differentiated according to the age of the child. The Commissioner for Citizens' Rights argued that the assistance provided was too low to meet the needs of those families, since those needs were considerably higher than those of able-bodied children due to high healthcare and rehabilitation costs. The applicant alleged that that contravened Article 23.2 of the UN Convention on the Rights of the Child and provisions of the Constitution regarding the protection of children. The Tribunal found, however, that the assistance provided to foster families of disabled or handicapped children was in any case higher than assistance provided to foster families with non-handicapped children. While the system of providing assistance to foster families with handicapped children was naturally limited by the financial capabilities of the state, the regulations did not infringe any constitutional or international law principles.

Lastly, the Tribunal examined the claim made by both the Commissioner and the District Court in Poznań that Article 55.2 of the Act breached the principle of trust in the state and its laws, the principle of legitimate expectations and the principle of protection of acquired rights. The aforementioned article, introduced in an amendment in February 2000, changed the legal regime governing the provision of financial assistance to foster families from one based on civil-law agreements to one that was solely administrative in nature. As a consequence, all agreements concluded beforehand were rescinded by virtue of law as of 31 December 2000. Both applicants argued that that was an illegitimate intrusion in the sphere of private

contracts and that the alteration of obligations between the parties to such contracts should only come about by consensual agreement between both parties, rather than by an Act of Parliament; such an intrusion infringed the guarantees of legal stability in civil law relations and the certainty of legal transactions. The Tribunal in its reasoning stated that although the assistance to foster families had been provided on the basis of civil-law agreements, it had not been in essence a civil-law relationship. The parties had had no discretion in agreeing on the terms of the assistance, especially concerning the amounts to be paid. Those agreements had simply been a type of performance of public services in a form governed by civil law. The Constitutional Tribunal's case-law has on various occasions reiterated that the legislator may choose the form of administering social assistance seen as most beneficial for citizens and best suited to the current economic situation. The effect of the provisions at hand was not to deprive foster families of assistance (although it did reduce its level in many cases), but simply to change the method of granting it. The modification did not therefore infringe the essence of the right to social assistance of the foster child. The Tribunal did not therefore find the existence of an unconstitutional infringement of the principles of the protection of acquired rights and trust in the state and its laws.

Cross-references:

- Decision of 26.04.1995 (K 11/94);
- Decision of 20.11.1995 (K 23/95);
- Decision of 17.06.1996 (K 8/96);
- Decision of 19.12.1999 (K 4/99).

Languages:

Polish. Substantial parts of the judgment are also available in English.



Identification: POL-2003-3-023

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 20.05.2003 / **e)** K 56/02 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2003, no. 101, item 944; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 5A, item 42 / **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.

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

Keywords of the alphabetical index:

Regulation, determining statutory matters / Minister, exceeding of power / Housing, benefits, determination.

Headnotes:

An Act authorising regulations to be passed on a matter that is not described or regulated in the Act itself amounts to a *de facto* authorisation to regulate a matter independently, and consequently, violates the principle of valid statutory delegation guaranteed by Article 92.1 of the Constitution.

Summary:

The Constitutional Tribunal examined an application lodged by the Ombudsman.

Pursuant to the principle of valid statutory delegation, the competence to issue regulations must be set out in a detailed nature both in terms of legal capacity, i.e. it must specify the authority empowered to issue the ordinance, and in terms of subject-matter, i.e. it must indicate the scope of the delegated powers and set out guidelines as to the contents of the regulation.

Neither the Act nor the impugned provision defines the term “housing equivalent”; nor does either set out the principles on which the amount of the benefit is to be calculated.

The impugned provision contains a delegation of competences to the Minister of National Defence who, in agreement with the Finance Minister, is to set out detailed principles for determining the amount of the housing equivalent and procedure for awarding it.

In the Act on the Housing of the Armed Forces of Poland, the provision concerning the detailed principles for determining the amount of the housing equivalent violates the principle of valid statutory delegation (Article 92.1 of the Constitution).

In the regulation issued by the Minister of National Defence, there are provisions concerning the housing

equivalent for lessees and persons entitled to separate housing. Those provisions were, in fact, not issued for the purpose of executing the Act, but instead issued on the basis of an invalid authorisation contained in the Act. Consequently, those provisions are contrary to the principle of valid statutory delegation.

Cross-references:

- Decision of 26.11.1997 (U/97);
- Decision of 05.01.1998 (P 2/97); *Bulletin* 1998/1 [POL-1998-1-003];
- Decision of 11.05.1999 (P 9/98); *Bulletin* 1999/2 [POL-1999-2-014];
- Decision of 26.10.1999 (K 12/99); *Bulletin* 1999/3 [POL-1999-3-027].

Languages:

Polish.

*Identification:* POL-2003-3-024

a) Poland / b) Constitutional Tribunal / c) / d) 09.06.2003 / e) SK 12/03 / f) / g) *Dziennik Ustaw* (Official Gazette), 2003, no. 109, item 1036; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 6A, item 51 / h) CODICES (Polish).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.10 **General Principles** – Certainty of the law.
- 3.11 **General Principles** – Vested and/or acquired rights.
- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 3.19 **General Principles** – Margin of appreciation.
- 4.7.2 **Institutions** – Judicial bodies – Procedure.
- 4.7.7 **Institutions** – Judicial bodies – Supreme court.
- 5.3.13.1.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Civil proceedings.
- 5.3.37.2 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Civil law.

Keywords of the alphabetical index:

Appeal, admissibility / Supreme Court, procedure, modification / Regulation, interim absence.

Headnotes:

The impugned provisions violate the principle of trust in the law created by the state, since their wording permits the immediate application of the new laws to pending appeals in cassation. This situation violates the justified expectations of persons who have filed an appeal in cassation before 1 July 2000. A balance has not been struck between the interests of such persons and the pragmatic interests of the administration of justice, in accordance with the principle of proportionality.

Summary:

The Constitutional Tribunal examined a constitutional complaint.

An amendment of the Code of Civil Procedure introduced the institution of preliminary consideration and new content requirements for appeals in cassation into the cassation procedure. However, the amendment does not provide for any clearly defined interim provisions regarding those amendments. A judgment of the Supreme Court held that the provisions concerning preliminary consideration were to become effective immediately in relation to all final appeals, including those filed before 1 July 2000.

The legislature has a significant degree of freedom in deciding on interim issues; however, it should do so in accordance with the principles resulting from the principle of trust vested in the state and rule of law. These principles include: no retroactivity and the principle of the observance of properly acquired rights, a principle forbidding the annulment or limitation of the rights to which an individual is already entitled.

The legislature may also apply the principle of the direct implementation of new laws, where this is warranted by important social reasons that cannot be weighed against the rights of the individual. The public interest in question must be disclosed and of sufficient importance so as to justify the departure from the principle of the operation of old laws, in reliance and in trust of which the individual has defined his or her interests or arranged his or her affairs. The Constitutional Tribunal settled the matter by using the principle of applying the new act, subject

to procedures enabling the interested parties to adapt to the new situation.

In the Act amending the Code of Civil Procedure, the Act on Registered Charges over Property and Register of Charges over Property, the Act on Court Fees in Civil Matters and the Act on Court Bailiffs and Enforcement dated 24 May 2000, there is a provision amending Article 393.1 of the Code of Civil Procedure as to the conditions of acceptance of an appeal in cassation by the Supreme Court. To the extent that the provision does not provide for an interim regulation concerning the acceptance of appeals in cassation filed before 1 July 2000, that provision is contrary to the principle of a democratic state ruled by law (Article 2 of the Constitution).

Cross-references:

- Decision of 02.03.1993 (K 9/92);
- Decision of 15.06.1996 (K 5/96);
- Decision of 15.09.1998 (K 10/98); *Bulletin* 1998/3 [POL-1998-3-016];
- Decision of 28.04.1999 (K 3/99); *Bulletin* 1999/2 [POL-1999-2-012];
- Decision of 22.06.1999 (K 5/99);
- Decision of 13.03.2000 (K 1/99);
- Decision of 08.05.2000 (SK 22/99);
- Decision of 06.09.2001 (P 31/01);
- Decision of 28.01.2003 (SK 37/01).

Languages:

Polish.

*Identification:* POL-2003-3-025

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 10.06.2003 / **e)** K 16/02 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2003, no. 109, item 1038; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 6A, item 52 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
 3.17 **General Principles** – Weighing of interests.
 3.19 **General Principles** – Margin of appreciation.
 3.21 **General Principles** – Equality.
 4.5.2 **Institutions** – Legislative bodies – Powers.
 4.10.8.1 **Institutions** – Public finances – State assets – Privatisation.
 5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Enterprise, public, privatisation, equality / Share, acquisition, gratuitous.

Headnotes:

The legislature has a certain degree of appreciation in regulating social and economic life within the State. In the light of the equality principle, this means that the legislature has the choice of the criteria of permissible differentiation. That differentiation must be made in accordance with the relevant constitutional principles.

Summary:

The President of the Constitutional Tribunal ordered that the constitutional complaint (SK 36/02) be joined with an application submitted by a group of deputies of parliament (K 16/02), due to the identical subject-matter of the cases.

The imperative of the equal treatment of persons belonging to a specific category follows from the principle of equality. All persons sharing same significant characteristic should be treated equally, i.e. in the same manner. An exception to this rule is constitutionally permitted, providing that the following conditions are met: the differentiating criterion remains rational in relation to the purpose and content of a given regulation; the importance of the interests that the differentiation is to serve remains appropriately proportionate to the importance of the interests that will be violated as a result of the implemented differentiation; and the differentiating criterion remains rational in relation to other values justifying the different treatment of similar persons.

In the relevant Act, the fundamental criterion for the gratuitous acquisition of shares is permanent employment with the state enterprise being privatised at the time of its privatisation. The preferential criteria for the acquisition of shares serves the main purpose of an incentive for the employees of enterprises in order to speed up and minimise the employees'

resistance to privatisation. The requirements laid down by the legislature for the gratuitous acquisition of shares are strictly connected to the purpose of the privatisation legislation. The differentiation in the impugned provision remains proportional to the economic and social purposes of the Act and the importance and scope of interests, which were taken into consideration and covered by the Act.

A provision of the Act on Commercialisation and Privatisation of 30 August 1996 concerning the gratuitous acquisition of shares by persons who have worked in a state enterprise for at least 10 years and whose contract of employment has been terminated due to retirement, payment of a disability pension or collective redundancy conforms to the principle of equality (Article 32 of the Constitution), and the principle of protection of ownership and property rights (Article 64.1 and 64.2 of the Constitution).

Languages:

Polish.

*Identification: POL-2003-3-026*

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 10.06.2003 / **e)** SK 37/02 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2003, no. 109, item 1037; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 6A, item 53 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

- 2.1.1.1 **Sources of Constitutional Law** – Categories – Written rules – National rules.
 5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.
 5.4.11 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Employment, labour Law, by-laws / Employment, contract / Collective agreement / Articles of association, binding force.

Headnotes:

The constitutional system of sources of law encompasses only those acts that establish general and abstract legal norms. Such acts must be safeguarded by state coercion. Where a violation of a given norm results in contractual liability, the situation considerably supports the presumption that the source of the given norm is an act executed by an individual and falls within the scope of civil or labour law.

Article 9 of the Labour Code lays down that *Statuty* (sing. *Statut*) i.e. a constitution of a legal person, a term similar to the English terms “articles of association” and “memorandum of association”) constitute *verba legis* one of the sources of labour law. However, even though *Statuty* create employee rights and obligations, they do not constitute a source of law within the meaning of the Constitution, as they are based on an employment relationship.

Summary:

The Constitutional Tribunal examined a constitutional complaint.

The sources of labour law are divided into two categories: the sources of generally applicable law and the acts of law of an internal nature. Unlike the system of the sources of generally applicable law, the system of acts of internal law is of an open nature.

The legislature leaves a relatively wide margin of appreciation as to the determination of the scope and importance of collective agreements as a form of regulating labour relationships. The right to conclude collective agreements is not contrary to the employer's general right to direct the work of his or her employees within the framework laid down by the legislation and collective agreements in force. The employees' rights remain strictly connected with the obligation of performing work according to the instructions of the managers of the entity employing them.

To the extent that the provision of the Labour Code specifying the sources of labour law applies to articles of association, it is in conformity with the right to bargain (Article 59.2 of the Constitution) and with the principle of the closed catalogue of the sources of generally applicable law (Article 87.1 of the Constitution).

Cross-references:

- Decision of 01.12.1998 (K 22/98);
- Decision of 28.06.2000 (K 5/99);
- Decision of 23.10.2001 (K 22/01).

Languages:

Polish.

*Identification:* POL-2003-3-027

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 17.06.2003 / **e)** P 24/02 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2003, no. 110, item 1060; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Gazette), 2003, no. 6A, item 55 / **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.
 3.22 **General Principles** – Prohibition of arbitrariness.
 5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.

Keywords of the alphabetical index:

Forced labour, compensation, time-limit.

Headnotes:

In a democratic state ruled by law, a situation cannot arise in which an interested party is deprived of the possibility of acquiring statutory rights as a result of irrational actions taken by the legislature and negligence of the public administration during the time that an Act remains in force, since the ambiguity of the provisions of law deprives the citizens of a sense of legal security and results in the undermining of their trust in the state.

Summary:

The Constitutional Tribunal examined a case that had been referred to it by the Gdansk Local Division of the Supreme Administrative Court.

The principle of equality is violated by the impugned provision, since the legal norm differentiates within a group of persons on the basis of the criterion of the

date on which an application for compensation was filed. The date of filing of an application cannot be deemed a relevant factor justifying such differentiation.

The Constitutional Tribunal found that the principle of a democratic state ruled by law and the principle of civic trust in the state were violated, *inter alia*, for the reason that the impugned provision of law drastically changed the situation of a specific group of persons. Relying on the original wording of the Act (before the impugned amendment), persons had attempted to gather the requisite documentation for obtaining compensation and were later surprised by the amendment, which made their attempts and efforts useless. The fact that the legislature provided for a relatively long period of time before the Act came into force and a relatively long time-limit for submitting a complete application for compensation was irrelevant in the particular case, since the time-consuming nature of the procedure of gathering the requisite documentation and the characteristics of the addressees of the Act (persons who are old and in poor health) in many cases could have rendered meeting the time-limit imposed by the amendment impossible.

In the Act on Compensation for Persons Deported into Forced Labour or Incarcerated in Labour Camps by the Third Reich and the USSR, the provisions regulating the procedure for obtaining benefits are contrary to the principle of a democratic state ruled by law and implementing the principles of social justice (Article 2 of the Constitution), and the principle of equal treatment (Article 32.1 of the Constitution).

Cross-references:

- Decision of 09.03.1988 (U 7/87);
- Decision of 25.11.1997 (K 26/97); *Bulletin* 1997/3 [POL-1997-3-024];
- Decision of 28.04.1999 (K 3/99); *Bulletin* 1999/2 [POL-1999-2-012];
- Decision of 15.04.1999 (SK 4/02).

Languages:

Polish.



Identification: POL-2003-3-028

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 02.07.2003 / **e)** K 25/01 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2003, no. 119, item 1121; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 6A, item 60 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Proceedings, costs, reimbursement / Administrative proceedings.

Headnotes:

As to proceedings before the anti-monopoly court, to the extent that the provisions of the Code of Civil Procedure do not envisage ordering costs to be paid by the President of the Office for the Protection of Competition and Consumers, the President of the Energy Regulatory Authority, the President of the Telecommunications and Post Office Regulatory Authority, or the President of the Office of Railway Transportation, those provisions are contrary to the principle of access to court (Article 45.1 of the Constitution).

Summary:

The Constitutional Tribunal examined an application filed by the Ombudsman.

The case concerned special administrative and court proceedings. There are two stages of proceedings: the first is conducted within the framework of general administrative proceedings or within the framework of detailed administrative proceedings and results in a decision being issued; the second stage is conducted within the framework of detailed (judicial) civil proceedings and ends with the issuance of a judgment by the anti-monopoly court. Civil procedure overlaps with administrative procedure, although both are based on separate and different principles (also in relation to awarding costs of the proceedings).

A violation of access to court may take on a direct form, for example, by way of the exclusion of recourse to court, or an indirect form, for example, by making the procedural requirements such that the initiation of proceedings becomes extremely difficult. The regulations pertaining to the costs of the proceedings, including the amount and the principles of their payment by the parties, are strictly connected with the realisation of the constitutional rules of legal order, which guarantee the effective protection of an individual's right of access to court.

The impugned regulations infringe upon the very nature of the right of access to court, since they burden the party bringing an appeal against an administrative decision with the costs of the proceedings, irrespective of the outcome of the proceedings. In practice, this may lead to reluctance to use this legal remedy, even in situations where the administrative decision issued clearly violates the legal order in force.

Cross-references:

- Decision of 09.06.1998 (K 28/97), *Bulletin* 1998/2 [POL-1998-2-013];
- Decision of 16.03.1999 (SK 19/98), *Bulletin* 1999/1 [POL-1999-1-007];
- Decision of 10.05.2000 (K 21/99), *Bulletin* 2000/2 [POL-2000-2-013];
- Decision of 21.05.2001 (SK 15/00);
- Decision of 12.06.2002 (P 13/01), *Bulletin* 2002/2 [POL-2002-2-019].

Languages:

Polish.



Identification: POL-2003-3-029

a) Poland / b) Constitutional Tribunal / c) / d) 14.07.2003 / e) K 35/01 / f) / g) *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2003, no. 134, item 1267; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 6A, item 64 / h) CODICES (Polish).

Keywords of the systematic thesaurus:

- 4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2 **Fundamental Rights** – Equality.
- 5.3.38 **Fundamental Rights** – Civil and political rights – Right to property.
- 5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Housing, military, lease / Collection, mandatory.

Headnotes:

As to the extent to which tenants enjoy the right of supervision by the courts over the proper performance of the provisions of a lease of residential premises, there is no justified ground for the difference in treatment of property rights arising from a lease concluded with the Military Housing Agency and those arising from a lease concluded in accordance with the Civil Code and the Act on the Protection of the Rights of Tenants.

The provision of the Act on the Housing of the Armed Forces of the Republic of Poland runs contrary to the principle of the equal protection of the title of ownership and other property rights (Article 64.2 of the Constitution) on the ground that it subjects the outstanding rent and fees connected with the occupation of residential premises by the lessees to mandatory administrative collection under an enforcement order in accordance with the procedure of administrative enforcement proceedings.

Summary:

The Constitutional Tribunal examined an application brought by the Ombudsman.

The impugned provision regulates proceedings in cases of mandatory collection of rent and fees for the occupation of residential premises as well as for the occupation of military living quarters. In both cases, it establishes mandatory collection in accordance with the procedure laid down by the provisions concerning administrative enforcement proceedings under an enforcement order issued by the Territorial Offices of the Military Housing Agency.

The Tribunal noted that the legal relationship linking a natural person occupying premises that were not military living quarters with the Military Housing

Agency was of a civil-law nature. Thus, disputes arising in connection with the determination of rent and other fees associated with the use of residential premises should be settled in accordance with civil procedure, which precludes lessors from independently issuing enforcement orders against lessees and the application of the provisions on administrative enforcement proceedings. In the particular case, there were no material factors allowing a differentiation to be made.

A limitation of the legal remedies available to all persons entitled thereto is statutorily possible only where such a limitation in a democratic state of law is indispensable for security or public order, or for reasons connected with the protection of the environment, public health and public morals, or the freedoms and rights of other persons.

Cross-references:

- Decision of 02.06.1999 (K 34/98), *Bulletin* 1999/2 [POL-1999-2-019].

Languages:

Polish.



Identification: POL-2003-3-030

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 16.09.2003 / **e)** K 55/02 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2003, no. 174, item 1690; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 7A, item 75 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

- 1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
- 1.6 **Constitutional Justice** – Effects.
- 3.9 **General Principles** – Rule of law.
- 3.10 **General Principles** – Certainty of the law.
- 3.15 **General Principles** – Publication of laws.
- 5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Acquis communautaire, harmonisation / *Vacatio legis*, necessary length / Constitutional Court, negative legislator.

Headnotes:

Allowing for an adequate period of *vacatio legis* (the time between the promulgation of a law and its entry into force) is a key element in ensuring the proper course of the legislative process, which is in turn one of the foundations of a democratic state subject to the rule of law. It is especially important when newly introduced regulations burden their addressees with new obligations and entail legal responsibility for non-compliance therewith.

The principle of protection of interests in due course is not synonymous with the law remaining forever unchanged or with the perpetual existence of certain privileges. The legislator may abolish certain privileges in conformity with the Constitution, provided its actions are predictable and do not surprise the addressees.

Where the substantive content and purpose of the legislation in question are not disputed, the Constitutional Tribunal should resort to invalidating normative acts solely on the ground of insufficient *vacatio legis* only in the most flagrant cases.

Summary:

Before 1 January 2003, radio and television cable network operators were permitted to re-transmit programmes broadcast by Polish and foreign broadcasters without the need to conclude a licensing agreement, provided the programmes in question were available in the given area through traditional or satellite transmitters and the transmission was simultaneous and unaltered in relation to the original broadcast. The holders of distribution rights to these works were entitled to remuneration. This was referred to as the “statutory license”, since cable network operators were granted distribution rights by virtue of the law.

The aforementioned privilege of Polish cable network operators was abolished as of 1 January 2003 by an amendment to the Copyright and Neighbouring Rights Act 1994, passed by the *Sejm* on 28 October 2002 and promulgated in the Journal of Laws on 27 November of that year. This change was effected as a result of the harmonisation of Polish law with the *acquis communautaire*, and it entailed considerable difficulties for cable operators. A particular consequence was that as of 1 January 2003, Polish viewers were deprived of certain foreign television pro-

grammes, which were previously retransmitted by cable networks. According to the operators, the change came as a surprise to them, and the mere 34-day *vacatio legis* (the period between the promulgation of the law and its entry into force) did not allow them to adjust to the new legal requirements.

The criticism of the haste with which this change was introduced prompted the Commissioner for Citizens' Rights to bring an application before the Constitutional Tribunal, alleging that the provision determining the date of entry into force of the amendment constituted a breach of Article 2 of the Constitution (the rule of law principle) by the legislator.

The Tribunal did not share that view. In its reasoning, the Tribunal pointed out that the "statutory license" was an exception (*lex specialis*) to the rule that works may be distributed only on the basis of a licensing agreement. Poland's obligation to harmonise domestic copyright regulations with EU legislation by removing that exception was well known for a long time, and cable network operators must have been aware of it and taken it into account. The "statutory license" was also incompatible with the principle of economic freedom, depriving one party of the freedom to control the distribution of its copyrights. The imminent abolition of that privilege must have been obvious to those who benefited from it and, therefore, the claim of being surprised with sudden changes of law was unfounded.

The Tribunal also noted the severe effects that would occur if the new provisions of an otherwise undisputed statute were to be found unconstitutional because of the date of their entry into force. Upon finding that a given *vacatio legis* is too short, the Constitutional Tribunal, acting as a "negative legislator", may only rule on the unconstitutionality of the provision prescribing this period. It may not, however, assume the role of legislator and decree a period that would be, in its opinion, sufficient. Such a ruling deprives the Act in question of its legal effects until Parliament decides on a new date of entry into force. This usually means that the statute enters into force considerably later than originally planned. Where the normative content of the act does not infringe constitutional rights, this is justified only in the most severe cases.

The Tribunal also pointed out that many operators had made considerable efforts to adjust to the new regulations, as the Act was already in force. Striking it down at that point would have amounted to an unjust penalty for those who had respected the new regulations, whilst benefiting those who had disregarded them, thereby undermining the citizens' trust in the State and its laws.

Cross-references:

- Decision of 18.10.1994 (K 2/94), *Bulletin* 1994/3 [POL-1994-3-017];
- Decision of 11.09.1995 (P 1/95);
- Decision of 27.11.1997 (U 11/97), *Bulletin* 1997/3 [POL-1997-3-025];
- Decision of 15.12.1997 (K 13/97);
- Decision of 03.10.2001 (K 27/01), *Bulletin* 2002/1 [POL-2002-1-005].

Languages:

Polish.



Identification: POL-2003-3-031

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 23.09.2003 / **e)** K 20/02 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2003, no. 170, item 1660; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 7A, item 76 / **h)** CODICES (Polish).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
 3.20 **General Principles** – Reasonableness.
 5.3.16 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Damage, compensation, limitations / Damage, fair compensation.

Headnotes:

The scope of compensation for an unlawful act of a public authority, including the components of the damage subject to indemnification, are to be decided on the basis of the appropriate provisions of the Civil Code and be governed by the principle of full compensation for actual damage suffered and benefits lost.

The adoption of the principle of full indemnification in the cases in question does not limit the legislator's freedom to set out a different scope of indemnification in special situations, providing it is justified by other constitutional values.

Summary:

The Constitutional Tribunal examined a case brought before it in an application filed by the Ombudsman and a referral by the Court of Appeals in Rzeszów, I Civil Law Division.

The unlawful causing of damage by public authorities gives rise to the right to compensation. The Constitution does not indicate in an exhaustive manner the kind of damage that is subject to redress. Nor does it specify the decisive factors as to such unlawfulness or the procedure under which indemnification may be claimed. These issues should be regulated at the legislative level.

Article 160.1 of the Code of Administrative Procedure and Article 260.1 of the Tax Ordinance Act in the part limiting compensation for an unlawful act of a public authority to the actual damage incurred are contrary to the principle of just compensation for damage caused by an unlawful act of a public authority (Article 77.1 of the Constitution). This applies to damage caused from 17 October 2003 onwards, i.e. the date of entry into force of the Constitution of the Republic of Poland.

There is need for a constitutional assessment as to whether other mechanisms of ordinary legislation for redressing damage caused by an unlawful act of the state authorities are still in accordance with each other.

Those mechanisms, such as the determination of the extent of the damage subject to redress, are to be assessed from a point of view of the observance of proportionality (Article 31.3 of the Constitution) and rationality by the legislator.

Cross-references:

- Decision of 27.04.1999 (P/98);
- Decision of 04.12.2001 (SK 18/00), *Bulletin* 2002/2 [POL-2002-2-012].

Languages:

Polish.



Identification: POL-2003-3-032

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 29.10.2003 / **e)** K 53/02 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2003, no. 51, item 797; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 8A, item 83 / **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.
- 3.19 **General Principles** – Margin of appreciation.

Keywords of the alphabetical index:

Law, amendment, consecutive / Taxation, legal basis.

Headnotes:

The principle of the rule of law requires the legislator to ensure that all adopted legislative acts comply with the standards of good legal drafting, jointly referred to in the Polish doctrine as the principle of appropriate legislation. It is functionally tied to the substantive principles of legal certainty, legal security and protection of trust in the State and its laws. All enacted provisions must be precise and comprehensible to their addressees, without raising doubts as to the scope of duties imposed or rights granted thereby. Where legal provisions exceed a certain degree of ambiguity, this in itself may constitute independent justification for finding that they do not conform to Article 2 of the Constitution.

The principle of appropriate legislation should be especially scrupulously adhered to in the field of tax legislation. The legislator may not leave the authorities responsible for applying such provisions unwarranted discretion in the determination of their subjective and objective scope due to the ambiguous formulation of their content, and thereby subject taxpayers to uncertainty.

Summary:

Article 11 of the Sea Ports and Harbours Act 1996 prescribed a reduced rate of real property tax for property located in ports and harbours. On 30 October 2002 Parliament adopted the Local Taxes and Fees Amendment Act 2002, by which the aforementioned article was repealed. This amendment was presented for the President's signature and signed. It was to take effect as of 1 January 2003. Just three weeks after adopting this amendment, Parliament adopted another one regarding that article – the Sea Ports and Harbours Amendment Act 2002. Article 1.3 of that Act added the hitherto wording of Article 11 of the Sea Ports and Harbours Act as Section 1. Article 1.3 of that Act also added Section 2 to Article 11 of the Sea Ports and Harbours Act. The new section determined the subjective scope of real property tax. Upon receiving this second amending Act, the President, acting in accordance with Article 122.4 of the Constitution, refrained from signing it and referred it to the Constitutional Tribunal for adjudication on its constitutional conformity. The President alleged that simultaneously adopting two different amendments of Article 11 made it impossible to interpret its content correctly, for the reason that the time of entry into force of the consecutive amendments was such that Article 11 would be firstly repealed, and then amended. The effect of such a series of events was not clear, as three interpretations were possible. According to the first, it was impossible to amend a provision that had already been repealed; therefore, the second amendment would have no legal effect. In light of the second interpretation, only Article 11.2 would be inserted, while the hitherto wording of the article would cease to exist. The third interpretation alleged that the legislator's aim was to reinstate the binding force of the original Article 11 as Section 1, in accordance with the rule of *lex posterior derogat legi priori*. It was not possible to remove that discrepancy between the two amendments by using valid rules of legal interpretation. The President claimed that enacting two contradictory provisions at almost the same time left addressees uncertain as to the existence of the lower tax rate; that situation violated the principle of appropriate legislation and trust in the State and its laws, stemming from Article 2 of the Constitution, and also the rules governing the enactment of tax legislation, set out in Article 217 of the Constitution.

The Constitutional Tribunal agreed with the claim concerning the first of the impugned provisions, which was supposed to add the hitherto wording of Article 11 as Section 1. In its reasoning, the Tribunal stated that Article 1.3 of the Sea Ports and Harbours Amendment Act 2002 was a flagrant example of inappropriate legislative technique. As Article 11

would no longer exist at the time that provision was to enter into force, there was no way to add its hitherto wording as "Section 1". There was also no inherent connection between the contents of the "hitherto wording of Article 11" (reduced tax rate) and the new Section 2 (subjects liable to pay the tax). The legislator's aim was not to reinstate the lower tax rate, but to close a lacuna in respect of the subjects liable to pay real property tax.

The Tribunal agreed with the applicant's claim that more than one interpretation of the effect Article 1.3 of the amending Act would have on Article 11 of the Sea Ports and Harbours Act 2002 was viable. The legal uncertainty that would be created by the amendment, though not entirely impossible to eliminate through interpretation, would unavoidably lead to confusion on the part of the addressees. As legal certainty in the sphere of tax law is under special protection, the Tribunal found the aforementioned legal uncertainty to be sufficient reason to declare the provision unconstitutional.

The Tribunal went on to recommend that the Act be returned to Parliament and the defects in the formulation of Article 1.3 be remedied in accordance with the procedure laid down by Article 122.4 of the Constitution. In terms of its substance, the Act was not disputed. The alternative would be for the President to sign the Act with the omission of the unconstitutional provisions (it would enter into force without them).

The claims concerning Article 1.5 and 1.6 of the Sea Ports and Harbours Amendment Act 2002, which regulated matters concerning the entities responsible for port management and the date of entry into force of these provisions, were found by the Tribunal to be unsubstantiated.

By delivering this judgment, the Constitutional Tribunal expressed its profound disapproval of the practice of introducing multiple consecutive amendments of the same provisions, thereby creating a state of legal uncertainty that could only be removed by excessively elaborate legal interpretational techniques. The legal requirements for enactments stemming from Articles 2 and 217 of the Constitution were breached.

Cross-references:

- Decision of 08.11.1994 (P 1/94), *Bulletin* 1994/3 [POL-1994-3-018];

- Decision of 08.03.1995 (W 13/94);
- Decision of 11.01.2000 (K 7/99), *Bulletin* 2000/1 [POL-2000-1-004];
- Decision of 21.03.2001 (K 24/00), *Bulletin* 2001/2 [POL-2001-2-012];
- Decision of 03.04.2001 (K 32/99), *Bulletin* 2001/2 [POL-2001-2-014];
- Decision of 30.10.2001 (K 33/00), *Bulletin* 2002/1 [POL-2002-1-007];
- Decision of 09.04.2002 (K 21/01);
- Decision of 11.02.2003 (K 28/02).

Languages:

Polish.



Romania Constitutional Court

Important decisions

Identification: ROM-2003-3-004

a) Romania / **b)** Constitutional Court / **c)** / **d)** 16.09.2003 / **e)** 342/2003 / **f)** Decision on the plea of unconstitutionality in respect of Article 84.2 of Government Emergency Order no. 194/2002 on the rules governing foreigners in Romania / **g)** *Monitorul Oficial al României* (Official Gazette), 755/28.10.2003 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
 3.22 **General Principles** – Prohibition of arbitrariness.
 5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
 5.2 **Fundamental Rights** – Equality.
 5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
 5.3.13.25 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to be informed about the charges.
 5.3.23 **Fundamental Rights** – Civil and political rights – Right to information.

Keywords of the alphabetical index:

Foreigner, undesirable / National security, protection / Information, secret, prohibition on communication to the person concerned.

Headnotes:

The difference between the situation of foreigners declared undesirable for the purpose of protecting national security and of safeguarding classified information and the situation of other foreigners is justified by the existence of certain distinct rules which does not impinge on the principle of equal rights.

A measure taken by the State Counsel which has the consequence that a foreigner is declared undesirable ensures free access to the courts, as it may be challenged before a judicial body.

Summary:

A question was referred to the Constitutional Court on the plea of unconstitutionality in respect of Article 84.2 of Government Emergency Order no. 194/2002 on the rules governing foreigners in Romania. The plea was raised by A.S.R.A.A. in proceedings against the State Counsel attached to the Bucharest Court of Appeal, the Directorate-General for Computerised Personal Evidence and the Romanian Information Service.

Article 84.2 of Government Emergency Order no. 194/2002 provides: The data and information constituting the grounds on which a decision declaring [a foreigner] undesirable for reasons of national security may be communicated only on the conditions established and to the persons expressly defined in normative acts governing the regime of activities relating to national security and the protection of classified information. Such data and information shall not be brought either directly or indirectly to the knowledge of the foreigner declared undesirable.

The party raising the plea maintained that when a court adjudicated on his appeal against the order of the State Counsel declaring him undesirable, that court was unable to review the grounds on which the order was made, as the relevant information was secret. Nor, according to the law, could those grounds be revealed in the text of the order whereby the competent State Counsel took the administrative measure declaring the foreigner undesirable. There had thus been a violation of Articles 16.1, 20, 21 and 123.2 of the Constitution and also of Article 6.1 ECHR and Articles 9 and 10 of the Universal Declaration of Human Rights, which provide that no one may be arbitrarily arrested or expelled.

As regards the unconstitutionality of Article 84.2 in relation to Article 16.1 of the Constitution, the Constitutional Court has consistently held that the principle of equality before the law presupposes equal treatment in situations which, according to the aim pursued, are not different. Generally, a breach of the principle of equality and of non-discrimination is established where differentiated treatment is applied to equal cases without objective and reasonable grounds or where the means employed are disproportionate to the aim pursued by the unequal treatment.

The European Court of Human Rights reached a similar decision in *Marckx v. Belgium*, where it applied Article 14 ECHR. In the present case, the real difference between the situation of foreigners declared undesirable and other foreigners justified the existence of certain distinct rules.

At the same time, the Court held that the prohibition imposed by the legislature on providing foreigners declared undesirable with the data and information on the basis of which such a decision was taken was consistent with Article 31.3 of the Constitution.

The Court found that Article 84.2 of the Order did not infringe the principle of free access to the courts enshrined in Article 21 of the Constitution, because in accordance with Article 85.1 of the Order, a foreigner declared undesirable is able to seek a judicial review of the measure declaring him undesirable taken by the State Counsel.

The judgment is consistent with Article 6.1 ECHR, Articles 9 and 10 of the Universal Declaration of Human Rights and also with the case-law of the European Court of Human Rights, for example the judgment of 5 October 2000 in *Maaouia v. France*.

Cross-references:

European Court of Human Rights:

- Case of *Marckx v. Belgium*, 13.06.1979, Vol. 31, Series A of the Publications of the Court; *Special Bulletin ECHR* [ECH-1979-S-002];
- Case of *Maaouia v. France*, 05.10.2000, *Reports of judgments and decisions* 2000-X.

Languages:

French.



Identification: ROM-2003-3-005

a) Romania / **b)** Constitutional Court / **c)** / **d)** 04.12.2003 / **e)** 464/2003 / **f)** Decision on the plea of unconstitutionality in respect of Article 55.2.d points (IV)-(V) and of Article 82.1, final sentence, of Government Emergency Order no. 194/2002 on the rules governing foreigners in Romania, approved,

with amendments, by Law no. 357/2003 / **g) Monitorul Oficial al României** (Official Gazette), 3/05.01.2004 / **h) CODICES** (French).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.

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

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

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

5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.

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

Keywords of the alphabetical index:

Foreigner, difference in treatment / Residence, permit, extension, conditions.

Headnotes:

The legal rules governing foreigners in Romania whose right of temporary residence is being extended cannot be compared with the situation of Romanian citizens from the viewpoint of the principle of equal rights enshrined in Article 16.1 and 16.2 of the Constitution.

The introduction of certain conditions applicable to the subsequent extension of the right of temporary residence in Romania does not impinge on the general protection of persons and property but corresponds to the State's obligation to protect national interests and economic, financial and currency activities.

The final and irrevocable nature of the judicial decision relating to an application against an order to leave Romanian territory does not restrict access to justice, for that principle does not presuppose access to all the procedural means whereby justice is dispensed.

Summary:

A question was referred to the Constitutional Court on the plea of unconstitutionality of Article 55.2.d points (IV)-(V) and Article 82.1, final sentence, of Government Emergency Order no. 194/2002 on the rules governing foreigners in Romania. The objection was raised by K.D. and G.A.R.

In the grounds of the objection, it was alleged that Article 55.2.d points (IV)-(V) infringed Articles 16.1.2 and 18.1 of the Constitution, since it gave rise to discrimination between Romanian citizens and foreigners wishing to establish trading companies. Unlike Romanian citizens, foreigners are required to seek a subsequent extension of the right of residence, to prove that they have created at least 10 jobs or have made a capital contribution of at least 500 euros or to present documents showing that they obtain a personal income of at least 500 euros per month from activities carried out in Romanian territory.

As regards the unconstitutionality of Article 82.1, final sentence, of the order, it was maintained that the judgment was irrevocable and that the parties were unable to appeal to a higher court by means of an ordinary appeal or an appeal in cassation against any unjustified or unlawful grounds in the judgment of the Court.

In examining the objection relating to Article 55.2.d points (IV)-(V), the Court held that the provisions of the contested emergency order applied only to foreigners and that the normative act in question was designed to regulate foreigners, which precluded any possibility of a comparison with the situation of Romanian citizens in relation to Article 16.1.2 of the Constitution (republished). From that aspect, it was clear that the impugned conditions applied equally to all foreigners in the situation of seeking to extend their temporary residence.

There could be no violation of the constitutional principle in relation to the protection of foreigners, nor, rationally, could it be held that the measures introduced were prejudicial to the general protection of persons and assets enjoyed by foreigners and stateless persons in Romania. In introducing the two conditions (Article 18.1 of the Constitution: protection of the person and protection of assets), the legislature had in mind the natural protection of economic interests and of the native workforce, which corresponds to the obligation placed on the State under Article 135.2.b of the Constitution (republished).

As regards the unconstitutionality of Article 82.1 of the order, which provides that the judgment of the Court of Appeal on the application for annulment of the decision requiring a person to leave the territory was final and irrevocable, the case-law of the Constitutional Court established that access to the courts did not presuppose access to all the procedural means whereby justice is dispensed, and the introduction of

rules on the procedure before the courts, and therefore also the regulation of remedies, fell within the exclusive competence of the legislature, in accordance with Articles 129 and 126.2 of the Constitution (republished).

Languages:

French.



Russia

Constitutional Court

Statistical data

1 January 2003 – 31 December 2003

Total number of decisions: 20

Categories of cases:

- Rulings: 20
- Opinions: 0

Categories of cases:

- Interpretation of the Constitution: 0
- Conformity with the Constitution of acts of state bodies: 20
- 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: 4
- Individual complaints: 15
- Referral by a court: 6
(Some proceedings were joined with others and heard as one set of proceedings)

Important decisions

Identification: RUS-2003-3-001

a) Russia / **b)** Constitutional Court / **c)** / **d)** 19.03.2003 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 02.04.2003 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Sentence, tailoring to the individual situation of the perpetrator of the offence / Sentence, determination / Recidivism.

Headnotes:

The “*ne bis in idem*” principle precludes taking account of the same circumstance, which can include the existence of a previous conviction, for the purposes of both the legal classification of the offence and the determination of the type and extent of criminal responsibility. This does not necessarily prevent the legislative body and the courts from considering the nature of the offence in question, the danger it poses to the values upheld by the Constitution and criminal law, as well as any relevant data on the individual who committed the offence, provided that the resulting measures are decided and applied in conformity with the constitutional principles of legal responsibility and the protection of human rights.

The fact that criminal law provides for different means of taking account of previous convictions, including repeat offences (recidivism), does not mean that the same circumstances can be taken into account in both the legal classification of an offence and the determination of the sentence.

Summary:

Further to appeals lodged by several members of the public, and at the request of a district court, the Constitutional Court examined the constitutionality of the provisions of the Criminal Code governing the legal effects of a prior conviction and repeat offences (recidivism).

The appellants considered that the challenged provisions allowed harsher sentences to be handed down if the offender had a previous conviction and had not been rehabilitated, and permitted account to be taken of the conviction as an aggravating circumstance for the purposes of both the legal classification of the offence and the determination of the sentence. This meant that criminal responsibility could be assigned more than once for the same offence, which violated the principle of equality before the law and the courts.

The Constitutional Court noted that a conviction determines a person's legal status following his/her conviction and the determination of the sentence for the offence committed. Where a person who has been convicted and not rehabilitated commits further

offences, the previous conviction provides the basis for assessing whether or not his/her personality and the offences he/she committed pose a serious danger to society, and allows the court to impose more severe criminal sanctions.

The challenged provisions of the Criminal Code on “previous convictions”, “repeat offences” and “commission of an offence by a person who has already committed the same offence” provide for aggravating circumstances in connection with the legal classification of offences committed by repeat offenders. Consideration is also given to whether the fact that the person in question has reoffended is grounds for increasing the sentence. In particular, provision is made for mandatory consideration of previous convictions when determining the minimum sentence to be imposed in cases of recidivism, dangerous recidivism or extremely dangerous recidivism.

The constitutional prohibition of repeat convictions for the same offence and the equivalent international undertakings are echoed by a principle set out in the Criminal Code to the effect that the sentence must be fair, i.e. it must reflect the nature and degree of the danger posed to society by the offence, the circumstances of its commission and the offender's personality. The courts must not impose a criminal sentence twice for the same offence.

This means that the “*ne bis in idem*” principle precludes the repeat conviction and punishment of an individual for the same offence and the legal classification of the same offence in accordance with different criminal-law provisions, where the latter stem from one general and one special law or where one provision can be considered a sub-section of the other. It also precludes the simultaneous consideration of a circumstance for the purposes of both the legal classification of the offence and the determination of the nature and extent of the criminal responsibility it entails.

The Constitutional Court held that according to criminal law, it is not possible to take a prior conviction into account more than once for the purposes of determining a sentence in cases where the conviction is an aggravating circumstance unconnected with the legal classification of the offence. Similarly, a prior conviction cannot be taken into account again where the concept of “repeat offence” or “commission of an offence by a person who has already committed an offence” is used as an argument in support of conviction.

No other interpretation of the corresponding provisions is acceptable, and erroneous decisions

taken by courts on the basis of any other interpretation must be rectified by the higher courts.

At the same time, these provisions do not prevent the court, when it determines the nature and extent of the sentence to be imposed on a previously convicted individual who has committed a further offence, from taking account of mitigating circumstances surrounding the offence itself or connected with the individual who committed it, and from handing down a sentence less severe than the statutory minimum set out in the Criminal Code, where exceptional circumstances so permit.

The criminal-law implications, as set out in the Criminal Code, of the previous conviction for the sentencing of a person found guilty of committing a further offence must not therefore exceed the limits of the general criminal-law measures which the Federal legislative body is entitled to take in the pursuit of constitutionally justified objectives.

This in no way undermines the Federal legislative body's right to lay down different rules on convictions and repeat offences (recidivism) and their criminal-law consequences, with due regard for the constitutional safeguards enjoyed by individuals in their public relations with the State.

The Court considered that the challenged provisions were not contrary to the Constitution if they were interpreted in the manner specified by the Court.

Languages:

Russian.



Identification: **RUS-2003-3-002**

a) Russia / **b)** Constitutional Court / **c)** / **d)** 01.04.2003 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 09.04.2003 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
3.25 **General Principles** – Market economy.
4.15 **Institutions** – Exercise of public functions by private bodies.

5.2 Fundamental Rights – Equality.

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

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

Keywords of the alphabetical index:

Audit, mandatory / Audit, performance, authorised auditor.

Headnotes:

The requirement that audits must be performed exclusively by audit organisations and not by individual auditors is designed to uphold the public interest and guarantee the authenticity of official accountancy. It cannot in itself be considered as an excessive restriction on freedom of business, as provided for in the Constitution.

Summary:

Further to an appeal lodged by a member of the public, an individual auditor, the Constitutional Court considered the constitutionality of a provision of the Federal Law on “auditing” to the effect that mandatory audits must be carried out by audit organisations.

The appellant contended that this provision unjustifiably restricted freedom of business, as provided for in the Constitution and exercised on the basis of the equality of all before the law and the courts.

The Court noted that, in accordance with the Constitution, freedom of business is governed by the law. Since this freedom is not absolute, it may be restricted by the law, but solely for the purposes set out in the Constitution. This is also in line with Article 1 Protocol 1 ECHR.

The challenged law describes auditing as a business activity carried out by audit organisations acting as legal entities and by directors of companies where no legal entity exists (individual auditors). Auditing is carried out either on the basis of a contract or on a mandatory basis, within the time-limits provided for by law.

The need for mandatory audits depends on the legal and institutional status of the entities being audited (open public companies), the nature of their functions (credit and insurance organisations, stock exchanges, investment funds), or the volume of their receipts. These circumstances are taken into account with the aim of defending the rights and legitimate interests of other persons and ensuring the economic security of

the State. This necessitates establishing high-level guarantees of the authenticity of the relevant financial accounting system. One such guarantee is a mandatory audit carried out by independent audit organisations in the public interest.

Given that mandatory audits are designed to uphold the public interest and ensure the authenticity of official accountancy, the Federal legislative body is entitled to define the legal and institutional form to be taken by such independent mandatory audits.

The challenged law stipulates that a mandatory audit by an audit organisation should be conducted by individual auditors holding an auditor's qualification, who carry out the audit as employees of the audit organisation or as persons engaged by the latter on the basis of a civil-law contract. The auditor in question may also be the founder or joint founder of the audit organisation.

Accordingly, the challenged provision does not prevent an individual auditor from performing a mandatory audit in his/her capacity as employee of an audit organisation or from being its founder or joint founder. It cannot be considered as an excessive restriction on constitutional rights and freedoms, and is therefore not contrary to the Constitution.

Languages:

Russian.



Identification: RUS-2003-3-003

a) Russia / **b)** Constitutional Court / **c)** / **d)** 27.05.2003 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 03.06.2003 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

4.10.7.1 **Institutions** – Public finances – Taxation – Principles.

5.2 **Fundamental Rights** – Equality.

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

5.3.41 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Tax, criminal legislation / Tax, evasion / Criminal responsibility, establishment.

Headnotes:

The establishment of criminal responsibility for tax evasion is not contrary to the Constitution if such responsibility is provided for only in respect of actions deliberately committed for the immediate purpose of avoiding payment of a lawfully established tax.

Summary:

Further to an appeal lodged by a number of members of the public, the Constitutional Court considered the constitutionality of a provision of the Criminal Code establishing criminal responsibility for tax evasion through falsification of accounts or by other means.

The appellants argued that the uncertainty surrounding the words “other means” exposed the expression to arbitrary interpretation and application, in violation of the constitutional principles of the rule of law and the equality of all before the law and the courts.

According to the case-law of the Constitutional Court, taxes may be considered lawfully imposed only if the law clearly specifies what is taxable, the tax base, the amount of the tax, the categories of taxable persons and the other vital components of the fiscal obligations in question. Only if these conditions are observed may the corresponding obligation be imposed on the taxpayer and the latter be held responsible for failure to comply with it.

Where a law provides for tax privileges, the obligation to pay taxes necessitates their payment only to the extent that such privileges do not apply. It is only to this extent that responsibility may be incurred for failure to pay the taxes in question.

Consequently, it is unacceptable to attribute responsibility to taxpayers for actions which consist in taking advantage of lawful privileges, even though they result in failure to pay a tax.

Tax legislation stipulates that one precondition for the commission of tax evasion is criminal negligence, which may involve criminal intent or mere negligence.

Similarly, the Criminal Code provides that an individual is criminally responsible only for actions (or omissions) in which criminal negligence can be proved to have taken place. No objective culpability (including criminal responsibility for failure to pay resulting from an innocent act) can be found.

The word “evasion” is used in one provision of the challenged law, with reference to a specific intention, namely that of avoiding paying lawfully imposed taxes. But the fact is that the definition of the offence presupposes the existence of criminal intent in the actions of the guilty person.

Consequently, the only act which can be acknowledged as an offence, as set out in one of the challenged provisions, is that committed intentionally with view to tax evasion. This requires the criminal courts not only to establish the actual fact of failure to pay a tax in a specific case, but also to prove the unlawfulness of the taxpayer's actions (or omissions) and the existence of criminal intent.

Furthermore, the courts must determine the circumstances precluding criminal prosecution (including a major catastrophe or other exceptional circumstances or cases of *force majeure*, as well as the taxpayer's compliance with written recommendations from the tax authorities).

Lastly, the Court concluded that the challenged provision is not contrary to the Constitution when interpreted in the manner specified in by the Court.

Languages:

Russian.



Identification: RUS-2003-3-004

a) Russia / b) Constitutional Court / c) / d) 11.06.2003 / e) / f) / g) *Rossiyskaya Gazeta* (Official Gazette), 19.06.2003 / h) CODICES (Russian).

Keywords of the systematic thesaurus:

3.3.1 **General Principles** – Democracy – Representative democracy.

3.3.2 **General Principles** – Democracy – Direct democracy.

3.16 **General Principles** – Proportionality.

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

4.9.2 **Institutions** – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy.

5.3.40.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.

Keywords of the alphabetical index:

Referendum, national / Referendum, period for initiation / Referendum, period for holding / Election, campaign.

Headnotes:

The establishment by law of periods for the presentation and holding of referendums outside election campaigns does not infringe the basic principles of the constitutional system that the people exercise their power directly and the referendum is a supreme direct expression of the power of the people.

The legislature is entitled to establish different periods for referendum campaigns and election campaigns, on the basis that each of these forms of democracy pursues different aims. The Constitution does not ascribe a priority role to either the referendum or free elections.

Summary:

Upon application by a group of deputies of the State Duma, the Constitutional Court reviewed the constitutionality of the amendments to the Federal Constitutional Law “On the referendum”. According to those amendments, a national referendum may not be initiated or even held during a national election campaign. Nor can a referendum be held during the final year of the term of office of the President or of other federal organs of State power.

In the applicants' submission, those provisions infringe the basic principles of the constitutional system that the people exercise their power directly and the referendum is a supreme direct expression of the power of the people. They also constitute a disproportionate restriction of the right of citizens to take part in a referendum.

The Court noted first of all that, according to the Constitution, the holder of sovereignty and the only source of power in the Federation is its multinational people; the people exercise their power directly and also through the organs of state power and local self-

government; the referendum and free elections are the supreme direct manifestation of the power of the people. While each of the above forms of democracy has its own purpose, they are of the same value, are closely correlated and complement each other. The Constitution does not ascribe a priority role either to the referendum or to free elections.

At the same time, the Constitution lays down the principle that the President and the State Duma are to be elected at regular intervals and the frequency with which the elections are to be held (once every four years). The Constitution does not specify that referenda are to be held at regular intervals, the frequency with which they are to be held or the circumstances which preclude their being held. The Constitution merely requires that the legislature ensure the free manifestation of the will of citizens in elections and referenda.

The legislature must establish the dates on which elections and referenda are held, on the basis that each of these forms of democracy seeks to attain independent ends. Since, owing to objective circumstances, the simultaneous organisation of elections and a referendum may impede the proper manifestation of the will of the people and reduce the effectiveness of both forms of democracy, the legislature is entitled to prescribe different periods for referendum campaigns and election campaigns.

The legislature is also entitled to take account of other constitutional considerations. Thus, according to the provisions of the Constitution which are not at present challenged, a referendum cannot be held where martial law or a state of emergency has been declared or during the three months following the lifting of such measures; during the period between the fixing of a referendum and the official publication of its results, an initiative to hold a new referendum is not permitted.

Thus, the contested regulations cannot be interpreted as giving priority to free elections by comparison with a referendum. They seek to ensure that elections and referenda are held in such a way that neither form operates to the detriment of the other.

It is for that reason that the periods during which citizens may freely manifest their will in one form or the other must be proportionate. In any event, the period during which citizens are entitled to intervene in order to initiate and participate in a referendum must not be less than one half of a four-year election cycle; thus at least two referenda can be held during that cycle. The provisions challenged in the present case provide in effect that the period during which a

referendum may be initiated and held will be more than two years.

Therefore the constitutional right to a referendum can be properly exercised without any obstacle in the period established by the contested law.

The Court held that by virtue of the content of these rules the contested law is not contrary to the Constitution.

Languages:

Russian.



Identification: RUS-2003-3-005

a) Russia / **b)** Constitutional Court / **c)** / **d)** 18.07.2003 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 29.07.2003 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

1.2.1.7 **Constitutional Justice** – Types of claim – Claim by a public body – Public Prosecutor or Attorney-General.

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

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

1.3.5.8 **Constitutional Justice** – Jurisdiction – The subject of review – Rules issued by federal or regional entities.

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

4.8.1 **Institutions** – Federalism, regionalism and local self-government – Federal entities.

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

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

Keywords of the alphabetical index:

Federation, entity, constitution / Federation, entity, constitution, review.

Headnotes:

The constituent nature and the constitutional and special legal status of the constitutions (statutes) of the subjects of the Federation require that their control is carried out only within the framework of the constitutional procedure by the Federal Constitutional Court.

Summary:

Upon application by the parliaments of the Republic of Bashkortostan and the Republic of Tatarstan, subjects of the Federation, and also by the Supreme Court of the Republic of Tatarstan, the Constitutional Court reviewed the constitutionality of the provisions of the legislation on civil procedure and of the law 'on the prokuratura', which confer on the ordinary courts the power to review the conformity with the federal laws of the legal measures adopted by the subjects of the Federation.

The applicants maintained that those provisions allow the ordinary courts to review the Constitutions of the subjects of the Federation, which are amenable to review only within the framework of constitutional proceedings before the Federal Constitutional Court.

The Court noted that, unlike the other legal normative measures which the subjects of the Federation adopt, their Constitutions have a special relationship with the Federal Constitution. They cannot be regarded as a type of act, subject to review in civil or administrative proceedings.

For the purposes of the Federal Constitution, the Constitutions of the subjects of the Federation are of a constituent nature; they define the organisation of the subjects of the Federation and form the basis of the legislation and other regulations relating to matters within their exclusive competence. The constitutional principles of the federal structure, the constituent nature of the Constitution of the Federation and the Constitutions of its subjects ensure the organic unity of the federal and regional constitutional regulations and also the unity of the constitutional and legal area of the Federative State.

The complicated procedure for the adoption and revision of the Constitutions of the subjects of the Federation also has a special legal nature by comparison with ordinary laws. Apart from that, the subjects of the Federation may themselves make provision for review of the conformity of their legal acts with their Constitutions and for the establishment for those purposes of (statutory) constitutional courts in the subjects of the Federation. In turn, the Federal

Constitutional Court is entitled to review the Constitutions of the subjects of the Federation exclusively in plenary sessions, while most other acts are examined in sessions before chambers.

Likewise, it follows from the Federal Constitution that unlawful interference by the federal legislature in the area in which the subjects of the Federation have exclusive competence is not permissible, particularly as regards the adoption and revision of their Constitutions.

The federal legislature must take account of these considerations when granting the courts the power to review the acts of the subjects of the Federation, including their Constitutions. The provisions of the law reviewed in the present case do not contain a list of the normative acts of the subjects of the Federation which may be examined by an ordinary court. Furthermore, the practice of the application of legal acts does not preclude those courts from examining the Constitutions of the subjects of the Federation.

However, the fundamental criterion in any examination of the Constitutions of the subjects of the Federation, having regard to their direct normative connection with the Federal Constitution, is their conformity with that Constitution. That also concerns the examination of those Constitutions' conformity with the federal law, since in that case it may prove necessary to examine the constitutionality of the federal law itself. Questions of that type can be resolved only within the framework of constitutional proceedings before the Federal Constitutional Court.

Nor is review of the Constitutions of the subjects of the Federation by the ordinary courts consistent with the constitutional principles of justice, in particular with the need for the law to determine a competent court for each case.

The Court held that the contested provisions were contrary to the constitution in so far as they allow the Constitutions of the subjects of the Federation to be reviewed by the ordinary courts.

At the same time, the Court concluded that the corresponding provision of the law 'On the prokuratura' does not preclude the possibility for the State Attorney to petition the Federal Constitutional Court, even though the law 'On the Constitutional Court' makes no provision for such a right of petition.

Languages:

Russian.



Identification: RUS-2003-3-006

a) Russia / **b)** Constitutional Court / **c)** / **d)** 30.10.2003 / **e)** / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 31.10.2003 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

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

3.16 **General Principles** – Proportionality.

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

4.9.8 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material.

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

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

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

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

5.3.40.3 **Fundamental Rights** – Civil and political rights – Electoral rights – Freedom of voting.

Keywords of the alphabetical index:

Propaganda, election / Election, campaign, media coverage.

Headnotes:

In limiting the right of the media to publish election propaganda during the election campaign, the legislature must retain the balance between the constitutional values protected, in particular the right to free elections and freedom of speech and information. Only the inherence in the material of a special aim – to win voters over to a cause – may serve as a criterion on which to distinguish election propaganda and information.

Where the existence of a special aim of making propaganda has not been established through judicial channels, the actions of the media cannot be regarded as constituting propaganda or as a violation of a corresponding prohibition.

Summary:

Upon application by a group of deputies in the State Duma and the petitions of a number of citizens, the Constitutional Court examined the constitutionality of certain provisions of the federal law 'On the main guarantees of election rights'.

According to Article 45.5 of the law, communications on electoral activities in radio and television broadcasts and in the press must be disseminated exclusively by a separate information broadcast, without commentary; they must not give preference to any candidates whatsoever.

Article 48.2 of the law recognises as election propaganda during the election campaign:

- the expression of a preference for any candidates;
- a description of the possible consequences should candidates be elected or not be elected;
- the dissemination of information with a clear preponderance of information about specific candidates;
- activities tending to create a positive or negative attitude among voters towards candidates; and
- other activities intended to invite or inviting voters to vote for candidates.

Article 48 of the law also prohibits representatives of the media from engaging in election propaganda in the course of their professional activities.

The applicants maintain that those provisions constitute a disproportionate restriction of the right to free elections, freedom of speech and the right to information, and violate the guarantees of the freedom of mass media.

The Court noted that for the purposes of the Constitution, the Federal legislature, in order to guarantee free elections, is entitled to establish the procedures and the conditions of their informational security. At the same time, elections cannot be regarded as free unless freedom of information and freedom of expression are guaranteed. It is for that reason that the legislature must guarantee the rights of citizens while maintaining a balance between the constitutionally protected values, in particular the right to free elections and freedom of speech and information, without allowing either inequality or disproportionate restrictions.

The performance by the media of the social function of ensuring the informational security of elections is

destined to foster the manifestation of the intentional will of the citizens and the public nature of elections. Since the enjoyment of the freedom of mass information places special obligations and particular responsibility on the media, the media must adopt ethical and considered positions and treat election campaigns in a fair, balanced and impartial manner.

The contested law delimits in election information electoral propaganda and information for voters. In carrying out their professional activities, media representatives must not engage in propaganda; where they infringe this prohibition they incur administrative liability.

The purpose of delimiting information for voters and electoral propaganda is to ensure the free manifestation of the will of citizens and the public nature of elections: that corresponds to the constitutional requirements. The freedom of the media to express opinions cannot be identified with the freedom to engage in election propaganda, for which the requirements of objectivity are not essential. Accordingly, in order to defend the right to free elections, federal law may in principle restrict the freedom of media representatives to express opinions.

Furthermore, the restrictions on constitutional rights must be necessary and proportionate to the constitutionally recognised aims of such restrictions. Nor can the legislature impair the very essence of such a right.

In assessing the constitutionality of the contested provisions in the light of those considerations, the Constitutional Court made the following observations.

Since propaganda as well as information, whatever its nature, may cause the voters to make a particular choice, only the inherence in the material of a special aim, namely to win voters over to a cause, may serve as a criterion for distinguishing election propaganda from information. Otherwise, all activities involving the provision of information to the voters would constitute propaganda, which, by virtue of the prohibition in force for the media, would constitute a disproportionate restriction of the constitutional guarantees of freedom of speech and information and would violate the principles of free and public elections. The consequences of propaganda as an infringement on the part of the media are not an objective element of the offence, which is made out only by an unlawful act. Therefore, intention, as a necessary and subjective element of such an offence, cannot relate to the consequences and consists only in awareness of the direct aim of the unlawful act in question. It is for that reason that the provision of information to

voters by the media cannot be recognised as (an exercise in) propaganda unless it is found by the courts to be intended as such.

Therefore it is not permissible to give a broad interpretation to the actions of the public media indicated in Article 48.2 of the law as offences, without establishing that they incline particularly to propaganda.

In turn, Article 45.5 of the law cannot be interpreted broadly as prohibiting the media from expressing their own opinion and commenting in programmes other than the separate broadcasts, since it is only these broadcasts that must not contain commentaries or express a preference for particular candidates.

Finally, the Court recognised that the provisions in issue are not contrary to the Constitution if its interpretation is followed.

At the same time, the Court held that the provision of Article 48.2, which regards propaganda as 'other acts intended to invite or inviting the voters to vote for certain candidates' was not compatible with the Constitution.

In the Court's opinion, the use of the expression 'other acts' permits a broad interpretation and arbitrary application of the provision. Furthermore, the legislature's use of the concept of 'acts (...) inviting to vote' leads to an assessment of the consequences of the propaganda instead of revealing an aim – to invite the voters to vote in a specific way.

Languages:

Russian.



Slovenia

Constitutional Court

Statistical data

1 September 2003 – 31 December 2003

The Constitutional Court held 23 sessions (8 plenary and 15 in chambers) during this period. There were 423 unresolved cases in the field of the protection of constitutionality and legality (denoted U- in the Constitutional Court Register) and 860 unresolved cases in the field of human rights protection (denoted Up- in the Constitutional Court Register) from the previous year at the start of the period (1 September 2003). The Constitutional Court accepted 80 new U- and 251 Up- new cases in the period covered by this report.

In the same period, the Constitutional Court decided:

- 114 cases (U-) in the field of the protection of constitutionality and legality, in which the Plenary Court made:
 - 27 decisions and
 - 87 rulings;
- 35 cases (U-) cases joined to the above-mentioned cases for joint treatment and adjudication.

Accordingly the total number of U- cases resolved was 149.

In the same period, the Constitutional Court resolved 317 (Up-) cases in the field of the protection of human rights and fundamental freedoms (28 decisions issued by the Plenary Court, 289 decisions issued by a Chamber of three judges).

Decisions are published in the Official Gazette of the Republic of Slovenia, whereas the rulings of the Constitutional Court are not generally published in an official bulletin, but are handed over to the participants in the proceedings.

However, decisions and rulings are published and submitted to users:

- in an official annual collection (Slovenian full text versions, including dissenting/concurring opinions, and English abstracts);

- in the *Pravna Praksa* (Legal Practice Journal) (Slovenian abstracts, with the full-text version of the dissenting/concurring opinions);
- since 1 January 1987 via the on-line STAIRS database (Slovenian and English full text versions);
- since June 1999 on CD-ROM (complete Slovenian full text versions from 1990 onwards, combined with appropriate links to the text of the Slovenian Constitution, Slovenian Constitutional Court Act, Rules of Procedure of the Constitutional Court and the European Convention for the Protection of Human Rights and Fundamental Freedoms – Slovenian translation);
- 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 <http://www.us-rs.si>; <http://www.us-rs.com> (mirror);
- since 2000 in the JUS-INFO legal information system on the Internet, full text in Slovenian, available through <http://www.ius-software.si>; and
- in the CODICES database of the Venice Commission.

Important decisions

Identification: SLO-2003-3-003

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 11.09.2003 / **e)** U-I-319/00 / **f)** / **g)** *Uradni list RS* (Official Gazette RS), no. 92/03 / **h)** *Pravna praksa, Ljubljana, Slovenia* (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

- 1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.
- 3.18 **General Principles** – General interest.
- 4.7.15 **Institutions** – Judicial bodies – Legal assistance and representation of parties.
- 5.3.13.27.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel – Right to paid legal assistance.

Keywords of the alphabetical index:

Legal representative, attorney / Defence, right to choose.

Headnotes:

The statutory regulation setting out the manner in which the right to defence is to be exercised where an accused does not defend himself or herself but seeks the assistance of a legal representative is not inconsistent with the Constitution. The legislature's decision that a legal representative may only be chosen from among attorneys falls within the legislature's discretion. The legislation was based on the finding that being defended by an attorney is not only in the interest of the accused, but also increases the quality of adjudication, contributes to the development of case-law, eases the burden on the courts and also accelerates proceedings thereby decreasing court delays. That being so, the matter also concerns objectives going beyond the immediate interests of the parties to the proceedings and that can be designated as the general or public interest.

The Constitutional Court rejects a petition where the petitioner fails to show his or her legal interest in filing it.

Summary:

Article 67.4 of the Code of Criminal Procedure, hereinafter – CCP reads as follows: “Only an attorney, who may be replaced by a trainee lawyer, may be chosen as a legal representative. Only an attorney can be a legal representative before the Supreme Court.”

Article 79.3 of the Minor Offences Act, hereinafter – MOA reads as follows: “An accused may during the proceedings choose a legal representative. He or she may choose for a legal representative a person who is entitled to offer legal assistance according to statute. A legal representative must submit evidence of his or her power of attorney to the body conducting the proceedings.”

Article 181.2 MOA reads as follows: “An appeal may be filed for the benefit of an accused by the accused, by his or her legal representative, by his or her spouse or a person with whom he or she lives in cohabitation, his or her blood relative in lineal consanguinity, his or her statutory representative, adoptive parent, adopted child, brother, sister or foster parent. On behalf of a legal entity, an appeal may be filed by its representative or its legal representative.”

Article 200.1 MOA reads as follows: “A request for judicial protection may be filed against a decision reached at the second instance with the Supreme Court of the Republic of Slovenia in cases determined by this Act. The request may be filed by sentenced persons, their statutory representative or legal representative.”

According to Article 29 of the Constitution (legal guarantees in criminal proceedings), anyone charged with a criminal offence must, in addition to absolute equality, be guaranteed the following rights:

1. the right to have adequate time and facilities to prepare his or her defence;
2. the right to be present at his or her trial and to conduct his or her own defence or to be defended by a legal representative;
3. the right to present all evidence assisting his or her case; and
4. the right not to incriminate him- or herself, or his or her family or friends, or not to be compelled to plead guilty.

The Constitutional Court had already in Order no. U-I-345/98 of 19 November 1998 (OdIUS VII, 208) stated that given a proper interpretation, the free choice of a legal representative, explicitly provided for in Article 19 of the Constitution, was to be also understood as an element of the general right to defence under Article 29 of the Constitution. This interpretation is supported by Article 6 ECHR and Article 14 ICCPR, which lay down the right to a legal representative of one's own choice among the minimal rights of an accused in criminal proceedings. Pursuant to Article 6.3.c ECHR, “everyone charged with a criminal offense has the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”. Furthermore, Article 14.3.d ICCPR contains a similar provision. The fact that the right of an accused to a legal representative of one's free choice is recognised in our legal system, also follows from the provisions of CCP, which has set out among the basic principles of criminal procedure the right of an accused to a defence with expert assistance by a legal representative chosen by himself or herself from among attorneys (Article 12.1 CCP).

The impugned provisions of the CCP and MOA provide for the manner in which the right to defence is to be exercised where an accused does not defend himself or herself but seeks the assistance of a legal representative. The legislature's decision that a legal representative may only be chosen from among attorneys falls within its discretion. The legislation

was based on the finding that being defended by an attorney is not only in the interest of the accused but also increases the quality of adjudication, contributes to the development of case-law, eases the burden on the courts and also accelerates proceedings, thereby decreasing court delays. That being so, the matter also concerns objectives going beyond the immediate interests of the parties to the proceedings and that can be designated as the general or public interest. Moreover, the European Court of Human Rights, for example, stated in case *Correia de Matos v. Portugal* of 15 November 2001 that there was no violation of Article 6.1 and 6.3.c ECHR if a legal system determined, in the interest of the judiciary, that a legal representative had to be chosen from among attorneys. In that case, the fact that the accused was once an attorney did not change anything. According to the European Court of Human Rights, the statutory provisions requiring a legal representative to be an attorney still fall within the discretion of each state.

Accordingly, the legislature had sound reasons to entrust the exercise of the right to defence by a legal representative to attorneys. Therefore, the impugned statutory provisions are not inconsistent with the Constitution.

Supplementary information:

Legal norms referred to:

- Articles 14, 15, 19, 22, 23 and 29 of the Constitution; and
- Articles 21 and 25 of the Constitutional Court Act (CCA).

On 6 February 2003 the Constitutional Court ordered Cases nos. U-I-57/01, U-I-46/02 and U-I-359/02 to be joined with the case considered above for the purposes of joint consideration and determination.

Cross-references:

European Court of Human Rights:

- Case *Correia de Matos v. Portugal* of 15.11.2001, *Reports of Judgments and Decisions*, 2001-XII.

Languages:

Slovenian, English (translation by the Court).



South Africa Constitutional Court

Important decisions

Identification: RSA-2003-3-008

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 14.10.2003 / **e)** CCT 19/2003 / **f)** Alexkor Limited and the Government of the Republic of South Africa v. The Richtersveld Community and Others / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

2.3.6 **Sources of Constitutional Law** – Techniques of review – Historical interpretation.

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

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

5.5.5 **Fundamental Rights** – Collective rights – Rights of aboriginal peoples, ancestral rights.

Keywords of the alphabetical index:

Land, compensation / Land, right of use / Resources, mineral, right to exploit / Property, restitution / Law, indigenous, recognition.

Headnotes:

The Constitution intends to extend jurisdiction of the Court to matters that stand in a logical relationship to those matters that are primarily subject to the Court's jurisdiction.

The nature and content of the rights that the Richtersveld Community (Community) held in the land that formed the basis of the dispute (the subject land) prior to annexation by the British Crown must be determined by reference to indigenous law and not the common law.

The Community possessed a right of communal ownership under indigenous law in the subject land. The content of the right included the right to exclusive

occupation and use of the land (including the right to exploit its mineral resources).

Annexation by the British Crown in 1847 did not extinguish this right in land.

The Community was dispossessed of its right in the subject land in a racially discriminatory manner and as a result the restitution claim was successful.

Summary:

Section 25.7 of the Constitution together with the Restitution of Land Rights Act 22 of 1994, provides that a community that has been dispossessed of a right in land after 13 June 1913 as a result of past racially discriminatory laws or practices is entitled to restitution of that right in land.

It also stipulates that an Act of parliament should provide for restitution of that property or to equitable redress. As a result, the Restitution of Land Rights Act 22 of 1994 (the Act) was passed. Section 2.1 of the Act permits a community to restitution of a right in land where it has been dispossessed of their right in land after the 19 June 1913 as a result of past racially discriminatory laws or practices. 19 June 1913 was the date on which the Native Land Act 27 of 1913 came into operation. This Act deprived black South Africans of the right to own land in the vast majority of the South African land mass.

The land that is the subject matter of the dispute (the subject land) is situated in the far north western corner of the Northern Cape Province, and is an area which is arid and remote yet rich in diamonds. The Richtersveld Community (the Community) launched proceedings in the Land Claims Court for restitution of their rights in the subject land and were unsuccessful. They appealed the decision to the Supreme Court of Appeal where they were successful. It is against this decision that Alexkor Limited and the government (the first and second appellants) appealed to this Court.

The Court, in a unanimous decision, found that the case raised a constitutional matter because it involved the interpretation and application of an Act which gives effect to a constitutional right (Section 25.7 of the Constitution). The Court also has jurisdiction to deal with all issues related to the interpretation and application of the Act, as these are issues connected with decisions on constitutional matters.

The Court held that under indigenous Nama law (i.e. the law of the Community) the subject land was

owned by the Community. The undisputed evidence showed that there was a history of prospecting for minerals by the Community and the ownership of the minerals vested in the Community. Therefore the Community possessed a right of communal ownership under indigenous law which included the right to exclusive occupation and use of the subject land by members of the Community.

The Court held that indigenous law must not be viewed through a common law lens but should rather be seen as an integral part of our law depending on its ultimate force gained from the Constitution. Indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its nature, it evolves as people who live by its norms change their patterns of life.

Annexation by the British Crown in 1847 of territory which included the subject land did not extinguish the indigenous rights of the Community. The Annexation Proclamation did not purport to terminate any right over the annexed territory, and the majority of colonial decisions dealing with indigenous rights to private property in a conquered territory recognised that a mere change in sovereignty did not disturb the rights of private owners. Therefore the Community's indigenous rights to private property were recognised and protected after the acquisition of sovereignty by the British Crown.

In 1926, a series of legislative and executive acts took place after the discovery of diamonds in the subject land. Cumulatively understood, these acts dispossessed the Community of their rights in the subject land. One such Act, the Precious Stones Act 44 of 1927, stipulated that all occupants of the land, except those who were registered owners or those who occupied at the instance of the surface owner, lost their right to occupy and exploit the land. In terms of this Act, registered owners of land (who were for the most part white people) were recognised as owners, while black people (who for the most part held land under indigenous law) were not recognised as owners. As a result, the state's failure to recognise indigenous law ownership was racially discriminatory.

Consequently, the Community was excluded from the subject land and from the right to exploit its mineral wealth. Therefore it met the requirements of Section 2.1 of the Act and was entitled to restitution of the right of ownership of the subject land (including its minerals and precious stones) and to the exclusive beneficial use and occupation thereof.

Cross-references:

- *National Education Health and Allied Workers Union v. University of Cape Town and Others* 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC); *Bulletin* 2002/3 [RSA-2002-3-019];
- *Amodu Tijani v. The Secretary, Southern Nigeria* 2 AC [1921] 399 (PC);
- *Oyekan and Others v. Adele* [1957] 2 All ER 785.

Languages:

English.

*Identification: RSA-2003-3-009*

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 15.10.2003 / **e)** CCT 5/2003 / **f)** *Tasco Luc De Reuck v. Director of Public Prosecutions (Witwatersrand Local Division) and Others* / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
- 5.3.30 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.
- 5.3.43 **Fundamental Rights** – Civil and political rights – Rights of the child.

Keywords of the alphabetical index:

Child, pornography, protection / Pornography, child, possession, prohibition / Pornography, child, possession for a bona fide purposes.

Headnotes:

An essential element of the definition of child pornography is the stimulation of erotic rather than aesthetic feeling.

The criminalisation of the importation and possession of child pornography limits the rights to freedom of expression and privacy.

The limitation of the rights is reasonable and justifiable because the purpose of the Act in protecting children outweighs the infringement of the rights.

Summary:

The applicant, a film producer, was charged with possession and importation of child pornography in contravention of Section 27.1 of the Films and Publications Act 65 of 1996 (the Act). The Film and Publications Act 65 of 1996 (the Act) defines child pornography and prohibits the importation, distribution and possession of material containing child pornography, except in cases where a person wishing to possess child pornography for a bona fide purpose applies for permission for such possession from the Film and Publications Board.

The Act defines child pornography as including “any image, real or simulated, however created, depicting a person who is or who is shown as being under the age of 18 years, engaged in sexual conduct or a display of genitals which amounts to sexual exploitation, or participating in, or assisting another person to engage in sexual conduct which amounts to sexual exploitation or degradation of children”.

Section 27.1 of the Act creates a number of offences in relation to publications and films. A person who knowingly creates, produces, imports or is in possession of a publication which contains a visual presentation of child pornography shall be guilty of an offence. A person who knowingly creates, distributes, produces, imports or is in possession of a film which contains a scene or scenes of child pornography shall be guilty of an offence. Schedules to the Act provide for an exemption for bona fide scientific, documentary, and literary material and an artistic exemption for all materials other than child pornography. Section 22 of the Act requires persons who wish to possess child pornography for bona fide purposes to apply to the Films and Publications Board for an exemption.

The criminal trial was postponed to allow the applicant to challenge the constitutionality of the offence under which he was charged. In the High Court his challenge was dismissed and he appealed to this Court. The applicant argued that the offence of possession of child pornography, as defined by the Act, infringed the rights of freedom of expression and privacy (Section 16 and 14 of the Constitution respectively). He also argued that his right to equality (Section 9 of the Constitution) was infringed by the fact that the offence of possession is defined in terms

different from other offences relating to distribution and broadcasting under the Act.

Central to this case was the question whether the definition of child pornography is overbroad in two respects: first, as to the materials it proscribes and, secondly, as to the persons who may import or possess materials caught by the definition. There was also the question of whether such persons would include researchers, doctors, film producers or lawyers who may possess child pornography for professional purposes. Such persons, it was argued, should not have to apply for an exemption from the Film and Publication Board in order to possess child pornography.

Deputy Chief Justice Langa, in a unanimous judgment of the Court, found that an essential element of the definition of child pornography was the stimulation of erotic rather than aesthetic feeling in the target audience. An image viewed objectively and as a whole, that predominantly stimulates aesthetic feeling is not caught by the definition. Moreover, the image will not be child pornography unless it explicitly depicts a child engaged in sexual conduct; a child engaged in a display of genitals; a child participating in sexual conduct; or a child assisting another person to engage in sexual conduct for the purposes of stimulating sexual arousal in the target audience.

The Court found that the criminalisation, in terms of Section 27.1, of the importation and possession of the material that falls within the definition of child pornography, limits the rights to freedom of expression and privacy.

However, the Court held that Section 27.1 constitutes a law of general application and its limitation of the rights is reasonable and justifiable. Its purpose is to curb child pornography which is seen as an evil in all democratic societies. The degradation of children through child pornography is a serious harm which is likely to impair their dignity and contribute to a culture which devalues the child. The harm of child abuse is real and ongoing and the state is under a constitutional obligation to combat it.

The Court concluded that the state established three legitimate objectives which the limitation aims to serve, namely, protecting the dignity of children, stamping out the market for photographs made by abusing children, and preventing a reasonable risk that images will be used to harm children. The objective of stamping out the market remains valid in respect of researchers or film-makers who import and possess child pornography. Moreover, Section 22 of the Act makes provision for an exemption procedure

which permits possession of child pornography where good cause is shown.

The Court found no merit in the equality challenge advanced by the applicant.

The Court dismissed the appeal.

Languages:

English.



Identification: RSA-2003-3-010

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 02.12.2003 / **e)** CCT 34/2003 / **f)** Schabir Shaik v. The Minister of Justice and Constitutional Development and Others / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
 3.18 **General Principles** – General interest.
 5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.
 5.3.13.23 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent.

Keywords of the alphabetical index:

Corruption, investigation / Summons, procedure / Suspect, questioning / Investigator, powers.

Headnotes:

The power of the investigating director to summon “any person” for questioning established by Section 28.6 of the National Prosecuting Authority Act 32 of 1998 (the Act) does not apply to accused persons because it could not have been the purpose of the Act to cut across well-established rules of criminal procedure and evidence in South African law.

It is incorrect to focus exclusively on the state’s interest in prosecuting serious crimes when examining

the limitation of the applicant's right to silence. The principle of "objective constitutional invalidity" must be applied when conducting a justification analysis of an infringement of a right.

Since the wrong subsection of the Act was challenged, it was not in the interests of justice to grant the application for leave to appeal.

Summary:

Mr Shaik, the applicant in this matter, was summoned under Section 28.6 and 28.7 of the National Prosecuting Authority Act 32 of 1998 (the Act), which empowers the investigating director to summon "any person", who is believed to have information on the subject of an investigation, for questioning. When the summons was issued, the respondents were investigating allegations of corruption in relation to the South African government's arms deal. Although the applicant had not been charged with an offence, he was a suspect in the investigation. When the applicant appeared for questioning, he raised objections regarding the constitutional validity of the questioning proceedings and the inquiry was adjourned to enable him to bring legal proceedings in relation to his objections.

The application was subsequently heard in the High Court. The main issues before the Court were whether Section 28.6 of the Act was unconstitutional because it compelled the applicant to answer all questions put to him at the inquiry, and whether the questioning procedure was constitutionally valid as it did not provide for an independent arbiter at the inquiry. The High Court held that although Section 28.6 violated the applicant's right to silence in terms of Section 35.1.a of the Constitution, such infringement was justified under Section 36 of the Constitution. The Act serves a crucial role in the fight against organized crime and corruption and if the right to silence were extended to a person in the applicant's position, the object of the section would be defeated. The High Court also found that the Act affords a person in the applicant's position sufficient protection by providing that evidence given at an inquiry by such person, cannot be used in criminal proceedings against him or her. The High Court further held that the proceedings at the inquiry were not of a judicial or administrative nature and that, therefore, the applicant's demand for an independent arbiter at the inquiry was ill-founded. The application was accordingly dismissed with costs.

The applicant then appealed to this Court against portions of the High Court judgment. After the application had been lodged, the applicant was charged with certain of the offences that had been

the subject of the Section 28.6 inquiry. In opposing the application, the respondents contended that the application was moot because the applicant had, subsequent to the lodging of the application for leave to appeal, been formally charged and was therefore an accused person, who could no longer be interrogated under the Act. Argument on appeal was limited to the constitutionality of Section 28.6 of the Act because of its alleged incompatibility with the right to a fair trial, and in particular with the rights of arrested and accused persons to remain silent.

Ackermann J, writing for a unanimous Court, held that the reference to "any person" in Section 28.6 does not apply to accused persons because it could not have been the purpose of the Act to cut across well-established rules of criminal procedure and evidence in South African law. Therefore, the applicant could no longer be questioned because he had become an accused in respect of the offences that were the subject of the Section 28.6 inquiry.

The Court further held that, although the issues were effectively moot between the parties, there were persons similarly placed to the applicant, before he was charged, who would benefit from a ruling by the Court. Nevertheless, the Court found that the wrong section of the Act had been challenged. The kernel of the applicant's attack was that the Section 28 procedure empowers the prosecuting authority to require a suspect to answer questions without giving the suspect full immunity in respect of such answers. The applicant's attack focused exclusively on Section 28.6 of the Act. However, it is not Section 28.6, but rather Section 28.8 of the Act, that limits an examinee's protection in respect of compelled evidence. The Court emphasized that it is constitutionally a serious matter for any court to declare legislation invalid because it constitutes a serious invasion by one arm of the state into the sphere of another. It is therefore essential, in order to ensure fairness to the state and other interested parties, that litigants identify accurately the statutory provisions they are attacking on constitutional grounds.

The parties, and the High Court, restricted the justification inquiry to the serious offences which formed the subject matter of the Section 28 inquiry instead of considering all the offences that could be the subject of examination under the section. The principle of objective constitutional invalidity should have been applied. This means that not only should the offences referred to in the applicant's summons have been considered but also any offence whereof a summons could have been issued. Accordingly, a proper justification inquiry under Section 36.1 of the Constitution had not been conducted by the High Court.

Viewing all the above factors collectively, the Court concluded that it was not in the interests of justice to grant the application for leave to appeal.

Languages:

English.



Switzerland Federal Court

Important decisions

Identification: SUI-2003-3-009

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 04.07.2003 / **e)** 1P.373/2002 / **f)** X., Y. and Z. v. Public Attorney of the District of Zurich and Public Attorney of the Canton of Zurich / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 129 I 302 / **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.

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

Keywords of the alphabetical index:

Autopsy, order / Deceased, personality, protection / Deceased, representation / Suicide, assisted, autopsy.

Headnotes:

Articles 31.1 and 11 of the Swiss Civil Code, Sections 84 *et seq.* of the Judicature Act; protection of personality after death, challenge against an autopsy order, capacity to be a party to proceedings.

The deceased does not have the capacity to be a party to proceedings and no one can bring a public-law appeal on his behalf (confirmation of the case-law).

Summary:

X. (born in 1971) and his sister Y. (born in 1973) were French nationals living in France. Both had suffered since childhood from a serious incurable psychological disease. In 2001 they contacted the association “Dignitas – to live in dignity – to die in dignity” with the intention of committing suicide. They went to Zurich on 11 February 2002 and each gave a special power of

attorney authorising a Zurich lawyer to act, in particular, vis-à-vis the police, the investigating judge, the registry office and the undertaker's office following his or her voluntary death. On the same day they went to a flat belonging to the association and took their own lives by taking a lethal substance in the presence of two attendants from the association. Their bodies were then taken to the forensic medical institution.

On the morning of 12 February 2002, the district public attorney ordered an autopsy. On the same day the lawyer representing the two deceased appealed to the Attorney-General; he challenged the autopsy order and requested that it be suspended. On 13 February 2002 the Attorney-General refused to suspend the order. The autopsy was performed on the same day.

By decision of 6 June 2002, the Attorney-General dismissed the appeal. The lawyer brought a public-law appeal on behalf of the two deceased and requested the Federal Court to declare that the autopsy had not had a sufficient legal basis, that the deceased had been deprived of an effective remedy against the autopsy order and, last, that the autopsy had been unlawful. The Federal Court did not entertain those arguments.

Personality ends with death: Article 31.1 of the Swiss Civil Code. The case-law infers from that provision that the deceased ceases to enjoy his civil rights and loses capacity to bring or defend legal proceedings. Consequently, no one may act on behalf of the deceased and claim an unlawful violation of his personality. It followed that the lawyer could not bring an appeal on behalf of the two deceased and that the public-law appeal was inadmissible in this case. On the other hand, the case-law accepted that a close relative might sustain damage to his own interests as a result of the conduct of a third party vis-à-vis the deceased and might therefore bring proceedings on his own behalf.

The lawyer claimed that the theory of protection of personality after death, supported by certain German courts and writers, should be examined in Switzerland and adopted by the Federal Court. He submitted that it had the advantage, in particular, that the deceased could enjoy protection of his personality even if he had no relatives or if his family did not concern themselves with him. He therefore maintained that the public-law appeal to the Federal Court was admissible.

From various aspects, the case-law has recognised that the rights to personality and to personal freedom may remain after death. The authorities are thus responsible for ensuring that every person has a decent burial. While alive, a person may decide what

is to happen to his remains and exclude an autopsy or the removal of organs. The deceased also enjoys protection under the criminal law against certain interferences. Those particular situations notwithstanding, the case-law has never recognised that a third party has capacity to act on behalf of a deceased, and Swiss legal opinion does not support the theory that personality is to be protected after death. Nor does that theory succeed in resolving all the procedural problems; on the other hand, public law and criminal law already provide sufficient protection in the situations mentioned.

For those reasons, the Federal Court declared the public-law appeal brought on behalf of X. and Y. inadmissible.

Languages:

German.



Identification: SUI-2003-3-010

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 09.07.2003 / **e)** 1P.1/2003 / **f)** Schweizerische Volkspartei der Stadt Zürich (SVP), Meier and Tuena v. Executive Council of the City of Zurich, Zurich District Council and Cantonal Government of Zurich / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 129 I 232 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

4.9.2 **Institutions** – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy.

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

5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to a hearing.

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

5.3.31.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.

5.3.40.3 **Fundamental Rights** – Civil and political rights – Electoral rights – Freedom of voting.

Keywords of the alphabetical index:

Referendum, request, political right, violation / Naturalisation, referendum / Referendum, vote, secrecy, no possibility of stating reasons.

Headnotes:

Nullity of a request to submit applications for naturalisation to a referendum (Articles 29.2, 34.2 and 13 of the Federal Constitution).

Decisions refusing naturalisation are subject to the obligation to state reasons under Article 29.2 (right to be heard) in conjunction with Article 8.2 of the Federal Constitution (prohibition of all discrimination; points 3.3 and 3.4).

A referendum does not guarantee a statement of reasons that satisfies the constitutional requirements (points 3.5 and 3.6). A request to submit applications for naturalisation to a referendum thus infringes the constitutional right to a decision stating reasons.

Conflict between the duty to inform the authorities about the personal situation of applicants, inferred from the freedom to vote (Article 34.2 of the Federal Constitution; point 4.2) and the right to protection of their private and secret sphere (Article 13 of the Federal Constitution; point 4.3). Those conflicting fundamental rights appear to be impossible to reconcile in this particular case (point 4.4).

The defects in the request for a referendum, from the viewpoint of a State governed by the rule of law, cannot be justified by the democratic principle (point 5).

Summary:

The Democratic Union of the Centre, a political party, lodged a request for a referendum with the authorities of the City of Zurich. The request sought an amendment of certain municipal provisions with a view to submitting requests for naturalisation to a referendum. The city parliament declared the request void and refused to put it to a referendum. That decision was upheld by the Cantonal Government of Zurich.

Claiming that there had been a violation of their political rights, the Democratic Union of the Centre and a number of citizens brought a public-law appeal; they requested the Federal Court to declare the request for a referendum valid and to put it to the vote. The Federal Court dismissed the appeal.

The right to be heard is guaranteed by Article 29.2 of the Federal Constitution. It follows that the authorities are under an obligation to state the reasons for their decisions so that the individual is able to determine the scope of a decision and the reasons on which it is based and, if appropriate, mount an effective challenge by bringing an appeal. The right to be heard and to receive a decision stating reasons is applicable in any procedure capable of affecting the individual in his legal position as a party. In the past, decisions on naturalisation (whether granting or rejecting an application) were regarded as purely political acts, issuing from a body by virtue of a discretionary power and not requiring a statement of reasons. Nowadays, on the other hand, decisions on naturalisation are regarded as specifically affecting the status of foreigners and as concerning them in the same way as any other administrative decision. A foreigner is therefore entitled to be given a hearing in the naturalisation procedure and to receive a decision stating reasons.

The obligation to state reasons for decisions on naturalisation may also be inferred from the constitutional prohibition on all discrimination. There is discrimination within the meaning of Article 8.2 of the Federal Constitution where a person (or group of persons) is placed at a disadvantage on the grounds, in particular, of origin, race, language or religious or political convictions. In order that the persons concerned may know whether or not a naturalisation measure is discriminatory, the relevant decision must contain a statement of reasons.

The obligation to state the reasons on which an administrative decision is based does not depend on the body taking the decision. It applies equally to the administration, the parliament or the people voting in a referendum. Every body that and every person who exercises a function of the State is required under Article 35.2 of the Federal Constitution to respect fundamental rights and to guarantee the right to be heard.

For those reasons, decisions on naturalisation must state reasons. The referendum procedure does not satisfy that requirement. Owing to the principle of the secrecy of the vote, it is not possible to know the reasons which led to the acceptance or rejection of an application for naturalisation. There are no valid alternative methods. It follows that the procedure of submitting applications for naturalisation to a referendum infringes constitutional law.

In the case of a referendum, there is also a contradiction between the citizen's right to vote within the meaning of Article 34 of the Federal Constitution and the foreigner's right to protection of his private sphere

within the meaning of Article 13 of the Federal Constitution. The guarantee of political rights requires that citizens have the necessary information to form an opinion and to express it by voting. In the case of applications for naturalisation, that information concerns very personal data relating to the applicants, in particular indications of origin, personal and family situation, second occupations, mastery of the local language, etc. The disclosure of that information may be inconsistent with the protection of the private sphere enjoyed by the applicants, who would thus be exposed to wide publicity. That conflict cannot be resolved satisfactorily.

For those reasons, the request for a referendum at issue was not consistent with constitutional law and could not be declared valid.

Languages:

German.



Identification: SUI-2003-3-011

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 21.11.2003 / **e)** 1P.665/2002 et 1P.27/2003 / **f)** A. and associates v. Executive Council of the City of Zurich, Zurich District Council and Cantonal Government of Zurich / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 129 I 392 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

4.9.2 **Institutions** – Elections and instruments of direct democracy – Referenda and other instruments of direct democracy.

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

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

5.2.3 **Fundamental Rights** – Equality – Affirmative action.

Keywords of the alphabetical index:

Referendum, request, positive discrimination of nationals, introduction.

Headnotes:

Articles 8.1 (equality before the law), 8.2 (prohibition of discrimination) and 34.1 (political rights) of the Federal Constitution; request for a municipal referendum entitled “Swiss First!” in Zurich.

The purpose of the request for a referendum was to favour the Swiss and thus to place foreigners at a disadvantage, including where a difference in treatment was not justified on objective grounds. It violated the Federal constitutional guarantees of equality before the law and the prohibition of discrimination (point 3).

Summary:

The Swiss Democrats political party requested the authorities of the City of Zurich to hold a referendum entitled “Swiss First!” It was intended to supplement the institutional regulation of the municipality by the following provisions: the municipal authorities were to ensure that the City of Zurich would retain its Swiss character: it would favour the needs of the Swiss within the limits imposed by superior law. The reasons stated by those submitting the request were that the proportion of aliens had continued to increase in recent years and had now reached 30%. Swiss children were in the minority in many schools. The continuous increase in the numbers of aliens who found it difficult to assimilate placed an excessive burden on the social services and led to an increase in crime. For those various reasons, the City of Zurich was in the process of losing its Swiss character. It was therefore time to give priority to the Swiss.

The Parliament of the City of Zurich declared the request void, on the ground that it was contrary to constitutional law, in particular the prohibition of discrimination. The Cantonal Government of Zurich upheld that decision.

Those requesting the referendum brought a public-law appeal alleging breach of their political rights and requested the Federal Court to annul the cantonal decisions and to declare their request valid. The Federal Court dismissed their appeal.

Article 34 of the Federal Constitution guarantees political rights both at federal level and at cantonal and municipal level. A request for a cantonal or municipal referendum must not contain anything which infringes superior law. The question arose, therefore, whether the request for a referendum was compatible with constitutional law.

According to Article 8.1 of the Federal Constitution, all human beings are equal before the law. That provision applies equally to the Swiss and to aliens. Article 8.2 of the Federal Constitution also contains the principle of the prohibition of discrimination: no one must be subject to discrimination on grounds, in particular, of origin, race, language or way of life. Discrimination – which is an aggravated form of unequal treatment – exists where a person is treated differently solely because he belongs to a specific group. In addition to the Swiss Constitution, the Agreement on the Free Movement of Persons between the Swiss Confederation and the European Community and its Member States prohibits all discrimination between nationals of the contracting parties on grounds of nationality. Non-discrimination is also the consequence of the European Convention on Human Rights and the United Nations Covenant on Civil and Political Rights. However, unequal treatment does not constitute discrimination where there are objective reasons for differentiation; that applies in relation to the enjoyment of political rights or access to certain public posts.

The request for a referendum could produce effects only at municipal level. The area of law on foreigners which is governed by federal law was therefore excluded. The request could therefore result in the limitation by a municipal authority of the number of aliens in the City of Zurich. However, the request asked the authorities that, in all areas governed by the principle of equal treatment, the Swiss be given favourable treatment by comparison with foreigners. Foreigners would therefore suffer discrimination solely because of their origin or their nationality. That requirement of the request for a referendum was not compatible with constitutional law and violated the guarantee of non-discrimination. The Zurich authorities thus declared the request invalid without violating political rights.

Languages:

German.



“The former Yugoslav Republic of Macedonia” Constitutional Court

Important decisions

Identification: MKD-2003-3-003

a) “The former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 05.11.2003 / e) U.br. 42/2003 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 73/2003 / h) CODICES (Macedonian).

Keywords of the systematic thesaurus:

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

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

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.

Keywords of the alphabetical index:

Education, religion / Minister, exceeding of power / Religion, neutrality of the state / School, religion, option.

Headnotes:

Bearing in mind the freedom of religious belief and the separation of the Church and the State, neither the state, nor any governmental institutions and bodies may take actions or undertake activities by which they impose any kind or form of religious activity on citizens. The freedom of religious belief and the separation of the Church and the State incorporate the freedom of citizens to determine themselves whether they wish to study the religious books of a religion. The Minister may not adopt a ruling introducing religion as an optional subject for the third grade in elementary schools.

Summary:

After examining the arguments and facts in a petition lodged by a citizen from the city of Bitola, the Court allowed the petition challenging the constitutionality and legality of a ruling issued on 3 October 2002 by the Minister of Education and Science. The aim of the ruling in question was to adopt the curriculum for religion, which was to be an optional subject for third grade pupils in elementary schools. The petition raised two major issues. The first issue: was the act in question, as argued by the petitioner, administrative in nature and did it amount to open interference of the state with religious beliefs and the citizens' freedom of religion? Did it violate the constitutional guarantee of the separation of the Church and the State? The second issue: did the act, as argued by the petitioner, fail to comply with the Law on the Organisation and Work of Public Administration Bodies for the reason that curricula could be introduced only by way of a programme of study and not by way of an individual ruling passed by the minister?

Examining the facts of the case, the Court found that the ruling in question had been adopted by the Minister for Education and Science during October 2002. The objective of the act was to introduce a religious curriculum for third grade pupils in elementary school as an optional subject.

Article 16.1 of the Constitution guarantees the freedom of belief, conscience, thought and public expression of thought.

As distinct from the freedom of belief and conscience, the provisions of Article 19.1 and 19.2 of the Constitution guarantee freedom of religion and freedom of public, individual or joint expression of religion.

Amendment VII replaced Article 19.3 of the Constitution. Thus, the Macedonian Orthodox Church, as well as the Muslim community in the country, the Roman Catholic Church, Evangelist-Methodist Church, the Jewish community and other religious communities and groups are separate from the State and equal before the law. Amendment VII.2 replaced Article 19.4 and provides that the above-mentioned churches, religious communities and groups are free to set up religious schools and social and humanitarian institutions in accordance with the procedure prescribed by law.

Article 13 of the Law on Elementary Schools prohibits any political or religious activity in elementary schools. According to Article 26.1 of that Law, the Bureau for Educational Development prepares the plans and programmes of study, and the Minister

adopts them on a proposal made by the Pedagogue's Office.

Article 55.1 of the Law on the Organisation and Work of Public Administration Bodies provides that the Minister, where authorised by law, adopts regulations, orders, guidelines, plans, programmes, rulings and other acts necessary for the implementation of laws.

In reaching its decision, the Court took into consideration the freedom of religious belief, freedom of religion, as well as the principle of separation of the state from religious communities and groups. Those guiding principles mean that neither the state nor its institutions and bodies may, either inside or outside of institutional frameworks, pass acts or undertake actions whose objective is to impose religious activity of any kind or form on citizens. The state and its bodies, without any exception, must remain neutral in order to allow a citizen to choose freely whether or not to accept a certain religion, to profess it and to take part in religious rituals. It was within those boundaries that the Court placed the freedom of the citizen to determine whether or not to study the religious books of the religion to which he/she is affiliated as well as those of other religions. According to Amendment VII.2, a citizen may undertake any actions concerning religious self-determination and the study of the religious books of any religious community or group within religious communities and groups, but not within state bodies or public schools, which are public institutions.

According to the Minister's ruling, religious curricula were foreseen as a process continuing throughout the whole school year. That was found by the Court to be a religious activity taking place in elementary schools introduced by virtue of an act of a state body: the Minister of Education and Science.

Moreover, the introduction of a curriculum in any educational field may be done by way of a programme of study adopted by the Minister and by a ruling for adoption of the programme. The Court found that no statutory provision provided for a ruling as a legal instrument through which a programme of study could be introduced. Consequently, the provision in question manifestly did not conform to the Law on the Organisation and Work of Public Administration Bodies.

For the reasons mentioned above, the Court found the act of the Minister of Education and Science was unconstitutional and illegal.

Languages:

Macedonian.



Identification: MKD-2003-3-004

a) “The former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 12-13.11.2003 / **e)** U.br. 2/2003 / **f)** / **g)** / **h)** CODICES (Macedonian).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.10 **General Principles** – Certainty of the law.
- 3.13 **General Principles** – Legality.
- 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.
- 3.22 **General Principles** – Prohibition of arbitrariness.
- 4.7.4.3.1 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel – Powers.
- 5.2 **Fundamental Rights** – Equality.
- 5.3.5.1.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Non-penal measures.

Keywords of the alphabetical index:

Offence, criminal / Sanction, alternate measures / Prosecution, criminal, withdrawal, conditions / Prosecution, criminal, postponement, conditions / Prosecution, mandatory, principle / Prosecution, discretionary, principle.

Headnotes:

The principle of mandatory prosecution is not an absolute one. The public prosecutor may postpone, not initiate or discontinue criminal prosecution in cases strictly laid down by the law. The application of the principle of discretionary prosecution, as an exception to the principle of mandatory prosecution, neither confers discretionary powers on the public prosecutor nor violates the principle of the rule of law.

Summary:

The Court did not allow a petition lodged by an individual from the city of Stip alleging the unconstitutionality of Articles 145 and 146 of the Code of Criminal Procedure. According to the petitioner, the provisions at issue introduced a new principle in criminal procedure, i.e., the postponement and

discontinuance of criminal prosecution, which violated the principle of the rule of law. It conferred discretionary rights on the public prosecutor and introduced discretion in criminal proceedings. The principle of withdrawing from criminal prosecution suspended the principle of mandatory prosecution and allowed the public prosecutor to judge whether or not the accused has behaved properly, and on that basis, the public prosecutor could continue or discontinue the prosecution.

According to Article 145 of the Code of Criminal Procedure, upon agreement with the victim, the public prosecutor may postpone the prosecution of an offence punishable by fine or up to three years' imprisonment. This is conditional on the accused being prepared to follow the prosecutor's instructions and fulfil certain conditions aimed at reducing or eliminating the negative consequences caused by the offence, such as restitution, reparation, compensation of damage, donations for humanitarian purposes or payment of a subsistence allowance. If the perpetrator duly fulfils that obligation (no later than 6 months), the prosecutor may discontinue the criminal proceedings against him/her.

Article 146 provides that public prosecutor is not under an obligation to initiate criminal proceedings or may discontinue them in two cases. The first case is one where the court may release the perpetrator from the penalty and the prosecutor concludes that conviction without a penalty is unnecessary. The second case is one involving offences punishable by fine or up to three years' imprisonment where firstly, the accused shows real remorse; secondly, the accused avoids the negative consequences of the offence from occurring or compensates the entire damage; and thirdly, the prosecutor concludes that a criminal sanction is unjustified. In such cases, discontinuing prosecution aims at avoiding a situation where the perpetrator completes an offence that he or she has already started to commit, and to encourage him or her to make reparation before criminal proceedings are opened. This applies to minor criminal offences.

Article 106 of the Constitution defines the Public Prosecutor's Office as the single and autonomous state body for prosecuting persons who have committed criminal and statutory offences. It also performs other duties determined by law and carries out its duties on the basis of and within the framework of the Constitution and laws. The prosecutor plays a significant role in criminal prosecution in general and, in particular, as the initiator of and party to criminal proceedings.

In carrying out his/her duties, the public prosecutor is governed by the principle of mandatory prosecution. According to that principle, the public prosecutor is obliged to initiate the prosecution of offences that are defined as those that must be prosecuted *ex officio* whenever the statutory conditions are met, irrespective of the public prosecutor's personal conviction in the objectiveness and utility of such prosecution. That means that whenever there is a possibility of imposing a criminal penalty for an offence that is to be prosecuted *ex officio* and where there are no statutory obstacles, the prosecutor is obliged to initiate such prosecution. The application of this principle guarantees the equality of citizens as to criminal prosecution and safeguards against arbitrariness. It also strengthens the citizens' legal certainty.

In reviewing the constitutionality of the impugned provisions, the Court found that the principle of mandatory prosecution is not an absolute one. The Code of Criminal Procedure also provides for the principle of discretionary prosecution. According to that principle, the public prosecutor is not obliged to initiate prosecution where he/she concludes that commencing criminal proceedings against and penalising an accused in a particular case would not be meaningful. Meaningfulness is governed by certain criteria: the public interest in prosecuting; the seriousness and significance of the offence itself; the amount of damage caused; the compensation of that damage etc. Consequently, the principle of discretionary prosecution takes into consideration not only individual, but also general public interests. Moreover, that principle is known in other situations, such as proceedings against minors, extradition, reclassification of an offence from a criminal one to a disciplinary one as well as abolished and obsolete offences.

The Court considered that the application of that principle allows for the introduction of alternatives to the penalty of deprivation of liberty. Measures that partly or entirely substitute deprivation of liberty are the most acceptable solutions for overcoming the one of consequences of exaggerated retribution: lack social adjustment. The introduction of alternatives derives from the UN minimum rules on non-institutional measures adopted by the UN General Assembly in 1990, and the European rules on community sanctions and measures adopted by Recommendation no. R (92) 16 of the Council of Europe in 1992.

Languages:

Macedonian.



Identification: MKD-2003-3-005

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 17.12.2003 / **e)** U.br. 37/2003 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 84/2003 / **h)** CODICES (Macedonian).

Keywords of the systematic thesaurus:

4.6.9.1 **Institutions** – Executive bodies – The civil service – Conditions of access.

5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.

5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.

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

Keywords of the alphabetical index:

Public service, job announcement, obligatory / Employment law / Employment, hiring preference, selected posts / Cabinet, civil servant, recruitment procedure.

Headnotes:

Civil servants employed in the President's Cabinet, the Office of the Prime Minister of the Government and the President's Cabinet of the National Assembly are not a distinct category of civil servants. Therefore, they may only be employed by virtue of public job announcement, that is to say, by the same method and procedure laid down for civil servants employed in other bodies of public administration. Distinguishing them from the rest of the civil service and providing for their employment without the publication of a job announcement in daily newspapers puts citizens in a different (unequal) position in relation to access to a job in the civil service on the basis of the body or service in which they might be employed.

Summary:

The Court struck the following part from Article 11.2 of the Law on Civil Servants: "and civil servants employed in the President's Cabinet, the Office of the Prime Minister of the Government and the National Assembly President's Cabinet". The provision in its entirety regulates the recruitment of civil servants.

According to its wording, civil servants are employed by virtue of a job announcement published in at least two daily newspapers, provided that the announcement is published in at least one newspaper in the Macedonian language and one in the language spoken by at least 20% of citizens using an official language other than Macedonian. The impugned part provided for an exception to the general rule for civil servants employed in the above-mentioned bodies and offices. That meant that civil servants in those bodies and offices could be employed without following the standard procedure set out for the recruitment of every civil servant, that is to say, by virtue of a public job announcement.

In reaching its decision, the Court took into particular consideration Article 32 of the Constitution, which deals with the right to work. That provision is found among the economic, social and cultural rights and provides for the right to work, free choice of employment, protection while working and financial security during temporary unemployment. According to its second paragraph, each job is accessible to everyone under equal conditions. Paragraph 5 states that the exercise of employees` rights and their position are regulated by law and collective agreements.

The Law on Civil Servants provides for a three-fold classification of civil servants. The first group embraces chief civil servants; the second includes expert civil servants; and the third encompasses administrative civil servants. The classification is made on the basis of the official responsibilities exercised by each of these groups. Article 9 of the Law regulates the general conditions for employment in the public service. According to Article 11 of the Law, state bodies should lodge their request for new employees with the National Agency for Civil Servants, an independent state body with the status of a separate legal entity. Article 11.2, reviewed by the Court, regulates the procedure for recruiting civil servants in general (by way of public job announcement) and provides for certain exceptions in connection to civil servants working in strictly defined bodies or offices. The Court considered that there were no constitutional grounds for distinguishing civil servants employed in those bodies and offices and to offer them preferential conditions of access to the service (without a public job announcement). Since the provision in question allowed certain citizens to be employed in those bodies and offices without the prior publication of a public job announcement as determined by law, the Court found it incompatible with Article 32.2 of the Constitution. In the Court's opinion, such distinction in employment put citizens in different legal positions as to access to a job on the

basis of the type of state body or office with which they sought employment.

Languages:

Macedonian.



Turkey

Constitutional Court

Important decisions

Identification: TUR-2003-3-005

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 21.11.2002 / **e)** E.2001/408, K.2002/191 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 25247, 02.10.2003 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Contract, obligation, failure to fulfil / Cheque, issued, non-sufficient funds.

Headnotes:

Imprisonment for the inability to fulfil a contractual obligation is contrary to the Constitution. However, where a drawer of a cheque does not deposit an amount to cover the cheque in the bank, or where that person does not duly return a chequebook to the bank in spite of being asked to do so and warned, or where that person commits similar acts, imprisonment for those acts is not contrary to the Constitution.

Summary:

A number of First Instance Courts applied to the Constitutional Court seeking the annulment of some articles of the Law on Cheques (Law no. 3167). The applicant courts noted that a cheque is a method of payment that is commonly used in contracts. In contracts that are freely entered into by the parties, a debtor is under an obligation to pay the amount appearing on the cheque at the date indicated on the cheque. Articles 13 and 16 of the Law on Cheques provide for the imprisonment of the drawer of the cheque where he/she does not deposit an amount to cover the cheque in his/her bank account. Since Article 38 of the Constitution stipulates that no one

shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation, the impugned provisions are contrary to the Constitution.

The impugned provisions of the Law on Cheques envisage imprisonment for drawers of cheques who breach the rules laid down in the Articles 13 and 16 of the Law on Cheques.

According to Article 818 of the Code of Obligations, contracts may be concluded upon the mutual and corresponding declarations of the will of the parties. Cheques have the nature of negotiable instruments and are payable upon presentation. They are a special kind of bill of exchange. Under Article 38 of the Constitution, no one may be deprived of his/her liberty merely on the ground of inability to fulfil a contractual obligation. A similar provision is found in Article 1 Protocol 4 ECHR.

Since the holder of the cheque has a right deriving from the cheque rather than one deriving from a contract concluded between the drawer of the cheque and the holder of the cheque, the impugned articles provide for imprisonment in order to secure public order and the right of cheque holder. Therefore, the relation between the drawer of the cheque and the holder of the cheque does not arise from a contractual relationship, and it is not necessary to have a contractual relationship concerning the cheque. Where there is a contractual relationship between the drawer of the cheque and the bank, the drawing of the cheque is independent of the initial contract. On the other hand, where the cheque drawer draws a cheque in spite of the fact that the amount is not covered by the funds in his/her account, it should not be construed as the inability to fulfil a contractual obligation.

It is impossible to regard the acts of the drawer of a cheque as being unable to fulfil a contractual obligation where that person merely fails to duly return the chequebook to the bank in spite of receiving a request to do so and a warning, or where that person fails to deposit funds in the bank account to cover the cheque, or where that person does not deposit the relevant amount and default interest in the name of the holder of the cheque.

For these reasons, the impugned provisions are not contrary to the Constitution. The application was rejected. Justice K yl y c dissented.

Languages:

Turkish.



Identification: TUR-2003-3-006

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 27.12.2002 / **e)** E.2002/146, K.2002/201 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 25313, 11.12.2003 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

- 3.1 **General Principles** – Sovereignty.
- 3.6.1 **General Principles** – Structure of the State – Unitary State.
- 3.7 **General Principles** – Relations between the State and bodies of a religious or ideological nature.
- 3.8.1 **General Principles** – Territorial principles – Indivisibility of the territory.
- 4.3.3 **Institutions** – Languages – Regional language(s).
- 4.3.4 **Institutions** – Languages – Minority language(s).
- 4.7.2 **Institutions** – Judicial bodies – Procedure.
- 5.3.13.14 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Independence.
- 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.
- 5.3.38 **Fundamental Rights** – Civil and political rights – Right to property.
- 5.3.44 **Fundamental Rights** – Civil and political rights – Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Terrorism, death penalty, abolition / Death penalty, abolition, terrorist act / Language, minority, education / Language, regional, minority, use in broadcasting / European Court of Human Rights, decision, effects in national law / Minority, community, property, right to manage.

Headnotes:

The Constitutional amendments of 3 October 2001, made by Law no. 4709, established the competence of the legislative power as to whether the death penalty may be imposed in the appropriate cases in times of war, imminent threat of war and terrorist crimes. Abolishment of the death penalty for terrorist crimes is therefore not contrary to the Constitution.

Law no. 4771 established the right of foundations belonging to religious minority communities to possess and freely manage real property in order to fulfil their religious, charitable, social, educational, health and cultural objectives.

Procedural laws were also amended, and judgments of the European Court of Human Rights finding violation of fundamental rights and freedoms are listed among the reasons for the retrial of a case. Since the laws provide that the judges examining cases upon retrial must rule according to their conscience, the impugned provision does not provide for the delegation of sovereignty to other bodies or interference with judicial proceedings, and the principle of the independence of the courts is not violated.

Another amendment by Law no. 4771 concerns broadcasting in traditional languages and dialects other than Turkish. According to the Constitutional Court, that provision is not contrary to the constitutional principles on the indivisibility of the State, national language and education.

Summary:

More than one-fifth of the members of the Parliament brought Law no. 4771 before the Constitutional Court alleging its unconstitutionality. The Law amended a number of laws on different subjects. In order to harmonise the provisions of the Constitution with those of other Laws, the death penalty was abolished except in times of war and imminent threat of war.

A. Article 1/A-1 and provisional Article 1 of Law no. 4771

Article 1/A-1 of Law no. 4771 provides that excluding times of war and imminent threat of war, the death penalty laid down by the Criminal Code (Law no. 765), by Law no. 1918, and by the Forestry Law (Law no. 6831) has been commuted to life imprisonment. The provisional Article 1 of Law no. 4771 provided rules for cases pending in the ordinary courts and in the Court of Cassation for which the death penalty was provided.

Article 1 states that the amendment broadens the scope of fundamental rights and freedoms and thereby aims at harmonising the Constitutional amendments made in 2001 with the Universal Declaration of Human Rights and the European Convention on Human Rights and its Protocols.

It is doubtless that criminal codes are governed by the fundamental principles of the Constitution and criminal law in order to fulfil the political, social and

economic needs of the country. In that respect, the Criminal Code must conform to the rule of law as set out in Articles 2 and 5 of the Constitution. The State has discretionary power as to which actions are to be deemed as crimes on the basis of the State's observation of the nature of crimes, the way they are committed and their danger to society. The State may amend the Criminal Code to include new situations.

According to the Constitutional amendment of 2001, the death penalty may be imposed in three cases (that is to say, in cases in times of war, imminent threat of war and terrorist crimes) on the basis of social requirements. The impugned provision transformed the death penalty into life imprisonment in a number of Laws. As a result, the lawmaker preserved the death penalty for the appropriate cases in time of war and imminent threat of war, and excluded it for cases related to terrorist activities.

The Court concluded that the commutation of the death penalty into life imprisonment for sentenced persons could not be deemed to be amnesty. Therefore, the application on that point was rejected.

B. Article 4/A of Law no. 4771

Article 4/A of Law no. 4771 introduced provisions relating to the capacity of foundations of minority communities to possess and manage real property. According to those provisions, the foundations of religious minority communities are able to possess and manage real property in order to fulfil their religious, charitable, social, educational, health and cultural objectives. In Turkey, the foundations of minority communities belong to religious communities whose members have Turkish citizenship. Those foundations have legal personality and have been preserved since 1923 by the Lausanne Treaty.

Article 35 of the Constitution provides: "Everyone has the right to own and inherit property. These rights may be limited by law only in view of public interest. The exercise of the right to own property shall not be in contravention of the public interest." The impugned provision provides that the minority community foundations must register with the registry office the real property possessions used by them to fulfil the above-mentioned objectives, if those possessions have not yet been registered because of obstacles originating from statutory provisions or judicial decisions. Consequently, the Court found that the impugned provision was not contrary to the right to own property as regulated in Article 35 of the Constitution.

C. Article 6/A and 7/A of Law no. 4771

This provision stipulates that the retrial of a case may be requested by the Ministry of Justice, by the Chief Public Prosecutor attached to Court of Cassation, by the person who has applied to the European Court of Human Rights or his/her legal representative where the human right violation found by the European Court does not lend itself to reparation by just satisfaction under Article 41 ECHR.

In the application to the Constitutional Court, it was alleged that that regulation delegated the right of the Turkish Nation to exercise its sovereignty partly to the European Court of Human Rights.

Article 6 of the Constitution provides: "Sovereignty is vested fully and unconditionally in the nation. The Turkish Nation shall exercise its sovereignty through the authorised organs as prescribed by the principles laid down in the Constitution. The right to exercise sovereignty shall not be delegated to any individual, group or class. No person or agency shall exercise any state authority which does not emanate from the Constitution." In a country governed by the rule of law, the independence of the courts, as regulated by Article 138 of the Constitution, means that the courts are independent from the legislative and executive power. Independence of the judges means that they should perform their duties according to their conscience in conformity with the Constitution, other legal provisions and the law.

The reasons for the retrial of a case are listed in the relevant articles of the laws, and the impugned provision has been added as a new reason for the retrial of a case. The Constitutional Court found that that provision was not a delegation of the judicial power to the European Court of Human Rights and that it did not infringe the independence of the courts. The application on that point was rejected.

D. Article 8 of Law no. 4771

Article 8 of Law no. 4771 permits broadcasting in languages and dialects other than Turkish. However, such broadcasting may not be carried out in such a way so as to be contrary to the principles of the Republic listed in Constitution or the indivisibility of the State with its territories and its nation.

The applicants alleged that that provision was contrary to Articles 3, 4, 5, 14 and 42 of the Constitution.

According to Article 3 of the Constitution, the language of the Turkish State is Turkish. In 2001, Article 26 of the Constitution was amended, and the expression of ideas was expanded. After that amendment, it was

possible to use different languages and dialects in daily life. Allowing broadcasting in languages and dialects other than Turkish is in conformity with the Constitutional amendments made in 2001 to Articles 26 and 28 of the Constitution. However, it is clear that in the application of the impugned provision, activities against indivisibility of the State with its territory and its nation shall not be permitted.

Article 42.9 of the Constitution provides: "No language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education". It is certain that this rule is valid for educational programs broadcast on radio and television or found in other kinds of media.

Consequently, the Court found that Article 8 of Law no. 4771 was not contrary to the Constitution. The application on that point was rejected.

Justices Hüner and Ersoy dissented.

E. Article 11/A and B of Law no. 4771

Article 11/A of Law no. 4771 changed the name of Law no. 2923 from the Law on Foreign Language Education and Training to the Law on Foreign Language Education and Training and the Teaching of Different Languages and Dialects to Turkish Citizens.

Article 11/B 4771 added a paragraph to Article 1 of Law no. 2923 permitting courses on different traditional languages and dialects to be offered.

It was asserted that Article 11/A-B was contrary to Articles 3, 4, 5, 14 and 42 of the Constitution.

This new regulation permits the offering of courses teaching different languages and dialects traditionally used by the citizens in daily life. However, these courses are under the supervision and observation of the Ministry of National Education. Since that Ministry may not permit any activities against the fundamental principles of the Republic listed in Articles 3, 4, 5 and 14 or the indivisibility of the State with its territories and nation, the impugned provision is not contrary to the Constitution. The application on that point was rejected.

Justices Hüner, Ersoy and Tuđcu delivered dissenting opinions.

Languages:

Turkish.



Identification: TUR-2003-3-007

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 10.04.2003 / **e)** E.2002/112, K.2003/33 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 25279, 04.11.2003 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.

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

Keywords of the alphabetical index:

Expropriation, compensation, obligatory / Possession, right to claim, time-limit.

Headnotes:

It is contrary to the right to property for the limitation period to start running from the date of the beginning of de facto expropriation. The illegal deprivation of property by way of de facto expropriation infringes Articles 36 and 46 of the Constitution.

The provision infringing the essence of the right of possession is contrary to the Constitution. The right of possession may not expire even in a case where no claim has been raised during the twenty-year period after the de facto expropriation of real property.

Summary:

Four lower courts made a reference to the Constitutional Court as to constitutionality of Article 38 of the Law on Expropriation.

Under Article 38, where real property has been expropriated but the legal procedures are not yet completed and where that property is allocated to public service or construction has started on that real property, the owner or possessor of that real property or his/her heirs may not raise any claims after the twenty-year limitation period. That period starts running on the day the public authorities take possession of the real property in question.

According to Article 35 of the Constitution: "Everyone has the right to own and inherit property. These rights may be limited by law only in view of public interest.

The exercise of the right to own property shall not be in contravention of the public interest.” The right of possession gives the individual the right to use and enjoy his possessions provided that he/she does not infringe the rights of others and complies with the legal rules.

The concept “possession” as regulated in Article 38 of the Law on Expropriation envisages the exercise of control over real property for twenty years without interruption or challenge.

Article 13 of the Constitution provides that fundamental rights and freedoms may be restricted only by law, in accordance with the reasons set out in the relevant articles of the Constitution, and without infringement of their essence.

Contemporary democracies are regimes within which fundamental rights and freedoms are secured within their broadest meaning. Restrictions severely limiting fundamental rights and freedoms breach the essence of those rights and freedoms, which may only be restricted to the extent that is necessary for the continuity of the social order and for the reasons set out in the Constitution.

The fundamental element of expropriation is the public interest, and it means that the right of possession is transferred to the administration provided that compensation is paid. Another definition of expropriation is the confiscation of real property in the public interest against the will of the possessor provided that compensation is paid in advance.

Expropriation is regulated in Article 46 of the Constitution, which entitles the State and public corporations, where required by the public interest, to expropriate privately-owned real property wholly or in part and to impose public servitude on it in accordance with the principles and procedures prescribed by law, provided that actual compensation is paid in advance.

The competence to determine the limits and content of the right of possession is given to the legislator; however, this competence is not absolute. The administration may not take action contrary to the expropriation principles unless those actions are in accordance with the essentials of the Constitution.

De facto possession by the administration has the same results as ordinary expropriation where twenty years have passed since the taking of *de facto* possession. At the end of the twenty-year period, the real property is registered in the registry in the name of the administration, even though no compensation has been paid to the former possessor. After the expiry of the twenty-year period, all rights of the former possessor

lapse. In such cases, the provision in question is more than a restriction of the right of possession; it is an infringement of the essence of the right of possession. Consequently, the impugned provision is contrary to Articles 13, 35 and 46 of the Constitution.

Moreover, the Court found that Article 38 of the Law on Expropriation was also contrary to Article 2 of the Constitution. In its judgement, the Court referred to some judgements taken by the European Court of Human Rights under Article 1 Protocol 1 ECHR.

For these reasons, the Court struck down Article 38 of Law on Expropriation.

Supplementary information:

The Constitutional Court was called upon to decide whether the twenty-year limitation period terminating the right of access to the courts, laid down by Article 38 of the Expropriation Law, was compatible with the Constitution. The applicants who had brought the matter before the lower courts complained that because of the twenty-year limitation period, it had become impossible to recover their lands or to receive compensation.

The plaintiffs argued in the lower courts that the interference with their rights to peaceful enjoyment of their possessions was not compatible with, *inter alia*, Article 36 of the Constitution, which lays down the right to a fair trial and Article 46 of the Constitution, which sets out the procedure for expropriation.

In three out of four cases, the military authorities became the owners of the land through unlawful conduct, namely, by taking possession without title. Since there was no formal expropriation, the landowners did not know that they would one day lose their title to the land. The Expropriation Law (Law no. 2942) was enacted during the Military Coup period, which lasted from 12 September 1980 to 6 December 1983. The last paragraph of Provisional Article 15 of the Constitution previously provided that the constitutionality of the laws enacted during that period could not be challenged. However, that provision was repealed on 17 October 2001 for the purpose of enhancing civil and political rights. After that amendment to the Constitution, the applicants succeeded in having the Constitutional Court strike down that provision.

Languages:

Turkish.



Ukraine

Constitutional Court

Important decisions

Identification: UKR-2003-3-016

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 14.10.2003 / **e)** 16-rp/2003 / **f)** Official interpretation of the provisions of Articles 84.2, 85.1.34, 86.1 and 91 of the Constitution, Article 15.2, 15.3 and 15.4 of the Law on the Status of a Deputy of Ukraine (case on submitting an enquiry to the President) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 46/2003 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.5 **Institutions** – Legislative bodies.

4.5.2.2 **Institutions** – Legislative bodies – Powers – Powers of enquiry.

4.5.7 **Institutions** – Legislative bodies – Relations with the executive bodies.

Keywords of the alphabetical index:

Parliament, act / Deputy, enquiry.

Headnotes:

The term “decision of the parliament (*Verkhovna Rada*)” used in Article 84.2 of the Constitution should be understood as the declaration of the will of the parliament concerning matters falling under its competence. The term “acts” used in Article 91 of the Constitution should be understood as decisions of the parliament in the form of laws, resolutions etc. that have been adopted by the parliament by a majority of votes of the deputies, as set out in the Constitution.

The provisions of Article 86.1 of the Constitution and the relevant provisions of Article 15.2 and 15.3 of the Law on the Status of a Deputy of Ukraine (referred to as “the Law”) should be understood as meaning that an enquiry put forward by a deputy and presented at a session of the parliament to the bodies of the parliament, the Cabinet of Ministers, heads of other bodies of state power and bodies of local self-government, and also to the chief executives of enterprises, institutions and organisations located on

the territory, irrespective of their subordination and forms of ownership, does not require a decision to be taken by the parliament.

The provisions of Article 85.1.34 of the Constitution and Article 15.4.2 of the Law should be understood as meaning that a decision concerning forwarding an enquiry presented by a deputy, a group of deputies or a committee of the parliament to the President is to be adopted by the parliament by a majority of its constitutional composition.

Summary:

The parliament (*Verkhovna Rada*) is the sole body of legislative power in Ukraine and exercises its powers as laid down by the Constitution. For the purposes of exercising its powers, the parliament adopts decisions. Adoption of decisions by the parliament takes place only at its plenary meetings and represents the process of the formation and declaration of the will of the parliament. Decisions of the parliament are the result of a declaration of its will and are adopted on a majority basis. Deputies implement the declaration of the will of the parliament on issues related to its competence by means of voting.

The acts of the parliament are adopted on the basis of the number of votes of deputies specified in the Constitution. The results of the declaration of the will of the parliament attain official status by adoption of acts, i.e. they become decisions of the parliament. The legal forms of the acts of the parliament are, first and foremost, laws and resolutions.

In accordance with Article 86.1 of the Constitution, at a session of the parliament a deputy has the right to present an enquiry to the bodies of the parliament, the Cabinet of Ministers, heads of other bodies of state power and bodies of local self-government, and also to the chief executives of enterprises, institutions and organisations located in the territory, irrespective of their subordination and forms of ownership.

An examination of the provisions in Article 86.1 supports the conclusion that the presentation of an enquiry by a deputy to a relevant body or an official amounts to power exercised by the deputy personally. This personal nature of the presentation of an enquiry by a deputy to a relevant body or an official is also provided for in part two of the same article pointing out that heads of bodies of state power and bodies of local self-government, chief executives of enterprises, institutions and organisations are obliged to disclose the results of the consideration of the enquiry only to the deputy. An enquiry by a deputy is a result of his/her personal declaration of will, a form of exercise of the powers delegated to him/her.

The issue of presentation of enquiry to the President – as follows from Article 85.1.34 of the Constitution – may be resolved by Article 91 of the Constitution, i.e. by means of adopting a legal act with the majority of the parliament's constitutional composition. In accordance with the practice of the parliament, such an act is called a resolution.

Languages:

Ukrainian.



Identification: UKR-2003-3-017

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 23.10.2003 / **e)** 17-rp/2003 / **f)** The constitutionality of Article 30.3 of the Law on the Election of Deputies to Local Councils and the Principal Administrative Officer of a Village, Settlement or City / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 46/2003 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Local council, deputy, elections / Candidate, self-nomination, registration.

Headnotes:

Citizens are entitled to freely elect and be elected to bodies of state power and local self-government (Article 38.1 of the Constitution). There cannot be any privileges or restrictions on the basis of certain attributes such as, in particular, residence.

The requirement that a self-nominated candidate reside or work on the territory of a given constituency

in order to be able to register his/her candidacy for deputy of a local council is unconstitutional on the ground that it restricts his/her right to be elected.

Summary:

The Authorised Human Rights Representative of the parliament (*Verkhovna Rada*) applied to the Constitutional Court for a ruling on the constitutionality of the provisions of Article 30.3 of the Law on the Election of Deputies to Local Councils and the Principal Administrative Officer of a Village, Settlement or City providing that the registration of self-nominated candidates for deputies of local councils and principal administrative officer of a village, settlement or city is subject to their residence or place of work being located on the territory of the relevant district.

In examining the dispute, the Constitutional Court recalled that in accordance with Article 140.1 and 140.3 of the Constitution, local self-governance is the right of a territorial community – residents of a village or a voluntary association of residents of several villages into one village community, residents of a settlement, and of a city – to independently resolve issues of a local nature within the limits of the Constitution and the laws. Local self-governance is exercised by a territorial community under the procedure established by law, both directly and through bodies of local self-government: village, settlement and city councils, and their executive bodies.

Elections to bodies of state power and local self-government are free and held on the basis of universal, equal and direct suffrage, by secret ballot (Article 71.1 of the Constitution).

Article 30.3 of the impugned law contains a provision providing that decisions allowing the registration of self-nominated candidates in a constituency are conditional on the candidate's residing or working on the territory of the constituency whereas no such condition exists for the registration of candidates that are nominated by others.

A systematic analysis of Articles 24, 38 and 71 of the Constitution led to the conclusion that the conditions for the registration of all candidates should not restrict passive suffrage (that is to say, the right to run for office) on the basis of the method chosen for exercising the right in question.

Languages:

Ukrainian.



Identification: UKR-2003-3-018

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 30.10.2003 / **e)** 1-v/2003 / **f)** The conformity of the Draft Law on Introducing Amendments to the Constitution of Ukraine to the requirements of Articles 157 and 158 of the Constitution (case on introducing amendments to Articles 29, 59, 78 and other articles of the Constitution) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 2003 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

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

4.5.4 **Institutions** – Legislative bodies – Organisation.

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

4.7.4.3 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel.

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

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

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

Keywords of the alphabetical index:

Constitution, amendments, proposal, constitutional review.

Headnotes:

Inter alia, the following amendments to the Constitution do not provide for the abolishment or limitation of the rights and freedoms of individuals and citizens:

- the amendments envisaging establishing at the constitutional level a wider circle of activities and offices in compliance with the mandate of a deputy and the termination of the mandate of deputies prior to the expiry of the term according to a decision of the parliament (*Verkhovna Rada*);
- the revised wording of Article 82.5 of the Constitution providing that the procedures and organisation of the activity of the parliament be determined, in particular, by the Rules of Procedure of the parliament rather than the Law on the Rules of Procedure of the parliament, i.e. by the act not requiring the signature and formal publication by the President in accordance with Article 94 of the Constitution;
- the new wording of Article 89.2 of the Constitution, according to which the Committees of the parliament may carry out supervisory functions on delegation by the parliament. The formation of special or investigation commissions or the delegation to certain committees of the task of performing relevant inspections is deemed a matter of expediency;
- the provisions on the need to arrange preliminary consultations on the dissolution of the parliament before the expiry of its term (Article 90.3 of the Constitution);
- the amendments to Article 94 of the Constitution on the obligation of the President to sign a law amending the Constitution adopted by the parliament on the day following the date of receipt thereof, at the latest. However, the wording in accordance with which the aforementioned laws should be signed “on the day following the date of receipt and formal promulgation thereof, at the latest” provides for the promulgation of laws amending Chapter I “General Principles”, Chapter III “Elections, Referendum” and Chapter XIII “Introducing Amendments to the Constitution of Ukraine” of the Constitution, which should be approved by an all-Ukrainian referendum;
- the new wording of part one of paragraphs 8, 9, 10, 11, 15, 16, 25 and 30 of Article 106 of the Constitution correlates with the amendments to Article 85 of the Constitution; however, paragraph 16 of Article 106 contradicts Article 137.2 of the Constitution;
- the supplements to Article 121 of the Constitution determining the functions of the Procuracy
- the amendments to the wording of Article 29.3 of the Constitution to reduce the amount of time a person may be held in custody without a court decision with reasons, where such a measure is necessary to prevent or stop a crime;
- the supplement to Article 59 of the Constitution providing that procedures and methods of rendering legal assistance are to be regulated by law;

have not been brought into line with paragraph 9 of Chapter XV “Transitional Provisions” of the Constitution. Moreover, the proposed general provision on oversight in the observance of human and citizens’ rights and freedoms requires legislative specification;

- the new wording of part one of Article 122 of the Constitution on the redistribution of powers between the parliament and the President provided for in the draft law;
- the exception to part four of Article 126 of the Constitution, according to which judges hold their offices for indefinite terms, except judges of the Constitutional Court and judges appointed to the office for the first time;
- the proposed amendments to Article 133 of the Constitution aimed at reforming the system of the administrative and territorial structure;
- the proposed amendments to Articles 140, 142.1 and 142.2 of the Constitution concerning a new definition of a community in proposals to Article 133 of the Constitution and the need to change the names of bodies of local self-government and relevant administrative and territorial units;
- the new wording of Article 143 of the Constitution, which preserves the definition of a community as a population with the right of self-government rather than an administrative and territorial unit; and
- the amendments of Article 150.1.5 of the Constitution extending the circle of legal acts subject to constitutional review by the Constitutional Court.

The above-mentioned amendments are similar to the following amendments: Articles 98, 111.6, 112, 113.2, 113.3, 114.1, 115.3, 116.10, 116.12, 118 of the Constitution, which have already been examined by the Constitutional Court and recognised as conforming to the requirements of Article 147 of the Constitution (Conclusion of the Constitutional Court no. 1-v/2002 of 16 October 2002).

The proposed amendments to Articles 85.1.3 and 150.1.2 of the Constitution provide for the restraint of the right of an individual to appeal to the Constitutional Court and, consequently, the right of protection by the court established by Article 55.1 of the Constitution. Other amendments to Article 85.1 of the

Constitution and its supplements, which are found in new paragraph 37, concern the redistribution of powers among bodies of the state power as well as the procedures of appointment and dismissal of certain officers. The aforementioned amendments do not abolish or restrict human and citizen’s rights and freedoms.

Judges V.Vozniuk, V. Ivaschenko and V. Skomorokha delivered dissenting opinions.

Languages:

Ukrainian.



Identification: UKR-2003-3-019

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 30.10.2003 / **e)** 18-rp/2003 / **f)** Official interpretation of Article 164.2 of the 1960 Criminal Code (case on officers of enterprises, institutions and organisations) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

2.3.6 **Sources of Constitutional Law** – Techniques of review – Historical interpretation.

Keywords of the alphabetical index:

Enterprise, officer, interpretation.

Headnotes:

The term “officer” used in Article 164.2 of the 1960 Criminal Code, as amended, should be understood as covering officers of enterprises, institutions and organisations including commercial banks, irrespective of the form of ownership.

Summary:

Amendments to the Constitution (the Fundamental Law) of the Ukrainian SSR, in particular, the repeal of the preamble, the redrafted Article 1.4, the repeal of Chapter 2 etc., and the adoption of the Ownership Law, the Entrepreneurship Law, the Law on

Enterprises in Ukraine, the Law on Companies, the Law of 17 June 1992 amending the Criminal Code, the Code of Criminal Procedure of the Ukrainian SSR, the Code of Administrative Offences of the Ukrainian SSR and the Customs Code, all resulted in changes to the 1960 Criminal Code of the Ukrainian SSR (hereinafter referred to as “the 1960 CC”).

After the introduction of the relevant changes in the 1960 CC, the concept “public enterprises, institutions and organisations”, contained in Article 164.2 of the 1960 CC (as amended by the 12 January 1983 Decree of the Presidium of the Supreme Council of the Ukrainian SSR amending the Criminal Code of the Ukrainian SSR – hereinafter referred to as “the Decree”), was elaborated by the legislators to encompass non-governmental enterprises, institutions and organisations, irrespective of the form of ownership.

Article 164.2 of the 1960 CC (as redrafted in accordance with the Law of 28 January 1994 amending the Criminal Code, the Code of Criminal Procedure of the Ukrainian SSR, the Code of Administrative Offences of the Ukrainian SSR and the Customs Code) did not, in fact, change the concept of “officer” in relation to the unlawful acts set out in Article 164.2 of the 1960 CC (as amended by the Decree and the Law of 17 June 1992). Rather, it elaborated on the terminology used in the Article. In accordance with this norm, “for the purposes of the articles of this chapter, officers should be understood as persons who permanently or temporarily discharge functions of representatives of power as well as those who permanently or temporarily hold offices in enterprises, institutions or organisations, irrespective of the form of ownership, where those functions are related to the carrying out of organisational and managing or administrative and economic duties, or who carry out such duties under specially delegated powers”. That definition of officer is also used in the Criminal Code currently in force.

Accordingly, since the Law of 17 June 1992 has entered into effect, officers of enterprises, institutions and organisations, irrespective of the form of ownership, have been covered by the concept of “officer” as determined by Article 164.2 of the 1960 CC (as amended by the Decree). In accordance with the Law on Banks and Banking of 20 March 1991, the banking system is two-tier one and consists of the National Bank and institutions (legal entities) that are commercial banks of various types and forms of ownership (Articles 1.2, 2.2 and 2.3).

Supplementary information:

Judge V. Vozniuk delivered a dissenting opinion.

Languages:

Ukrainian.



Identification: UKR-2003-3-020

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 05.11.2003 / **e)** 2-v/2003 / **f)** Opinion on the conformity to the requirements of Articles 157 and 158 of the Constitution of the Draft Law introducing amendments to the Constitution of Ukraine, delivered on the basis of the draft law being forwarded by the Chairman of the parliament (*Verkhovna Rada*) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 46/2003 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

- 4.4.1 **Institutions** – Head of State – Powers.
- 4.5.2 **Institutions** – Legislative bodies – Powers.
- 4.5.2.2 **Institutions** – Legislative bodies – Powers – Powers of enquiry.
- 4.5.3 **Institutions** – Legislative bodies – Composition.
- 4.5.3.3.1 **Institutions** – Legislative bodies – Composition – Term of office of the legislative body – Duration.
- 4.5.11 **Institutions** – Legislative bodies – Status of members of legislative bodies.
- 4.6.4 **Institutions** – Executive bodies – Composition.
- 4.7.4.1.5 **Institutions** – Judicial bodies – Organisation – Members – End of office.
- 4.7.4.3 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel.
- 4.7.5 **Institutions** – Judicial bodies – Supreme Judicial Council or equivalent body.
- 5.3.13.14 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Independence.

Keywords of the alphabetical index:

Constitution, proposed amendments.

Headnotes:

The Constitutional Court delivered specific comments on a number of proposed changes:

- the revised version of Article 76.5 of the Constitution providing for a five-year parliamentary term for the parliament (*Verkhovna Rada*) is not in accordance with the provisions of the current Article 77.1 of the Constitution, which state that the term is four years;
- the use of the expression "a representative mandate of a deputy of Ukraine" in Article 120 is tautological;
- Article 121 of the Constitution should be supplemented with a new paragraph 5 contemplating provisions on the supervision by the Procuracy of the "observance of human and citizens' rights and liberties" and Article 5 of the Constitution now in force;
- new Articles 83.5, 83.6 and 90.2.1 of the draft provide for a formation of a "coalition of deputy factions and groups" in the parliament, which may include the majority of deputies representing the constitutional composition of the parliament, regardless of the results of the elections. Such a formation is a precondition to the exercise of authority by the parliament. However, it is possible that the results of elections to the parliament may be such that the majority may be made up of deputies belonging to one faction, which would be capable of independently establishing the composition of the Cabinet of Ministers and could, among other things, put forward proposals concerning the nominee for the office of Prime Minister;
- the draft law does not reproduce the provisions of Article 89.4 of the Constitution in force according to which the parliament – for the purposes of the investigation of issues of public interest – sets up temporary investigation commissions, where a proposal to do so is voted for by at least one-third of the constitutional composition of the parliament. The ability to set up temporary investigation commissions in that way is a guarantee of the rights of the opposition in the parliament and, at the same time, it fosters parliamentary control by the parliament;
- the election of judges for a term of ten years by the parliament rather than for a permanent one – as the Constitution provides – may lead to a deterioration of the guarantees of independence of judges, as established by the Fundamental Law. The Constitution (Article 126.1) and laws guarantee the independence and immunity of judges. As a guarantee, the Constitution lays down that judges hold their offices permanently, with the exception of judges of the Constitutional Court and judges appointed to their offices for the first term; and
- the termination of the participation of the Congress of Judges – the supreme body of judicial self-government – in the appointment of judges to the Constitutional Court amounts to removing the judicial branch from the process of setting up the sole body of constitutional jurisdiction, a situation which hardly strengthens the foundations of constitutional judicial proceedings in Ukraine.

As to the proposal to introduce a new Chapter XVI, the Court considered that the title of that Chapter "Final Provisions Concerning the Amendment of the Constitution of Ukraine" would be difficult to include in the Constitution in its existing form, especially in Chapters XIV "Final provisions" and XV "Transitional provisions" of the Constitution.

Summary:

The Constitutional Court examined the Draft Law introducing amendments to the Constitution of Ukraine in light of the requirements of Articles 157 and 158 of the Constitution.

The Constitutional Court found that the Draft Law, which was submitted to the parliament (*Verkhovna Rada*) by 223 deputies, conformed to the requirements of Articles 157 and 158 of the Constitution.

Supplementary information:

Judges V. Skomorokha and V. Ivaschenko delivered dissenting opinions.

Cross-references:

- Opinion of the Constitutional Court no. 1-v/99 of 25.03.1999;
- Opinion of the Constitutional Court no. 4-v/2000 of 21.12.2000;
- Opinion of the Constitutional Court no. 1-v/2002 of 16.10.2002;
- Opinion of the Constitutional Court no. 3-v/2003 of 10.12.2003, [UKR-2003-3-021].

Languages:

Ukrainian.



Identification: UKR-2003-3-021

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 10.12.2003 / **e)** 3-v/2003 / **f)** Conformity of the Draft Law introducing amendments to the Constitution of Ukraine with the requirements of Articles 157 and 158 of the Constitution (case on introducing amendments to Articles 76, 78, 80, 81, 82, etc. of the Constitution) /

g) *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 2003 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.4.2.4 **Institutions** – Head of State – Appointment – Indirect election.

4.5.3.3.1 **Institutions** – Legislative bodies – Composition – Term of office of the legislative body – Duration.

Keywords of the alphabetical index:

Constitution, amendments, proposal.

Headnotes:

The Chairman of the parliament (Verkhovna Rada) forwarded to the Constitutional Court the Draft Law amending the Constitution of Ukraine (hereinafter referred to as “the draft law”), which proposes amending Articles 76, 78, 81, 82, 83, 85, 87, 88, 89, 90, 93, 94, 98, 703, 706, 112, 113, 114, 115, 116, 118, 120, 121, 122, 126, 128, 141 and 148 of the Constitution and supplementing it with Chapter XVI “Final Provisions Concerning Amending the Constitution of Ukraine” (hereinafter referred to as “Chapter XVI”). The Constitutional Court reviewed and reached a conclusion concerning the draft law’s conformity with the requirements of Articles 157 and 158 of the Constitution (Conclusion of the Constitutional Court no. 2-v/2003 dated 5 November 2003, [UKR-2003-3-020]).

The Constitutional Court concluded that paragraph 2 of Chapter XVI (which in relation to the next election of deputies in 2007 provides for the extension of the term of the current parliament for another year) and the provisions of paragraphs 3 and 4 of the same Chapter do not envisage the repeal or restriction of human and citizens’ rights and freedoms. At the same time, the Constitutional Court pointed out that although amending the Fundamental Law, in particular, Chapter IV “Verkhovna Rada”, is a prerogative of the parliament, the adoption of aforementioned amendments to the Constitution extending the term of the parliament elected in 2002 would set a precedent, which in the future may entail the parliament’s loss of its attributes of an elected representative body.

The Constitutional Court found that the provision of the draft law concerning election of the President by the parliament did not envisage the repeal or restriction of human and citizens’ rights and freedoms and was not directed at undermining independence or violating territorial integrity. At the same time, the

Constitutional Court noted the lack of harmonisation of the time for the commencement of the term of the President, the parliament, the Cabinet of Ministers and the Prime Minister, as proposed by provisions of Chapter XVI. In particular, according to contents of that Chapter, the parliament, the Cabinet of Ministers and the Prime-Minister commence their term four months after the adoption of the draft law (paragraph 1), while the President – in accordance with the draft law – commences his/her term upon filling the office in accordance with results of the presidential elections by the parliament in 2004 (paragraphs 3.1 and 4.1). Those facts lead to conflict. Since the various terms of office of the aforementioned bodies are interrelated (decisions concerning appointments to the Cabinet of Ministers, formation and dissolution of central bodies of executive power, appointment and dismissal of chief officers of those bodies, heads of local state administrations, etc.) and the terms of those offices would commence at different times under the proposed amendments to the Constitution, problems might arise during the exercise of powers during those terms.

The Draft Law introducing amendments to the Constitution conforms to the requirements of Articles 157 and 158 of the Constitution.

Supplementary information:

Judges V. Vozniuk and V. Shapoval delivered dissenting opinions.

Languages:

Ukrainian.



Identification: UKR-2003-3-022

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 10.12.2003 / **e)** 19-rp/2003 / **f)** Official interpretation of Articles 105.1 and 111.1 of the Constitution (case on immunity and impeachment of the President) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 2003 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.4.4.1.1.1 **Institutions** – Head of State – Status – Liability – Legal liability – Immunity.

4.4.4.1.1.3 **Institutions** – Head of State – Status – Liability – Legal liability – Criminal liability.

Keywords of the alphabetical index:

President, impeachment / President, criminal proceedings.

Headnotes:

A deputy's privilege of immunity has certain limitations, while the President's right of immunity may be neither abolished nor suspended. Nor may it be limited by means of the institution of criminal proceedings against the President or the carrying out of any steps related to prosecution with the framework of criminal procedure.

The President's right of immunity should be understood as an integral component of his/her constitutional status designed to secure the proper conditions for the exercise of the authority vested in the President. The content of this right may not be changed unless the relevant amendments are made to the Constitution.

At the same time, the Constitutional Court points out that the President's right of immunity is limited in time, and it stays in effect – in accordance with the Constitution – only for the term of authority of the President.

Within the system of constitutional institutions, impeachment is by its legal nature an extra-judicial constitutional process whose purpose it is to enable the Parliament to terminate the President's powers, in the event that the President has committed a crime, by removing him/her from his/her office.

Summary:

The President is not subject to criminal liability during the term of his/her authority, and criminal proceedings cannot be instituted against him/her (Article 105.1 of the Constitution). The Constitutional procedure for the investigation and examination of a case relating to the removal of the President from his/her office by means of the impeachment procedure is implemented without the initiation of criminal proceedings against the President (Article 111.1 of the Constitution).

The terms "the right of immunity of a person" and "the right of immunity of the President of Ukraine" denote

two different constitutional concepts. The essential properties of the right of the President lend it the attributes of official functional immunity, which is dictated by the public status of the President that is exceptionally established by the Constitution.

The institution of President is based on the cumulative rules laid down by Chapter V of the Constitution, in accordance with which the President is defined, in particular, as the Head of the State who acts in its name, the guarantor of state sovereignty, territorial indivisibility, the observance of the Constitution, and human and citizens' rights and freedoms. In consideration of the above, the President also requires an appropriate level of legal protection. Such protection is provided, firstly, by the prescriptions of Article 105.1 of the Constitution stating that the President enjoys the right of immunity during the term of authority. This article also provides for the title of President of Ukraine to be protected by law, to be reserved for the President for life, and that persons guilty of offending the honour and dignity of the President are to be held responsible under the law.

Article 108 of the Constitution sets out, in particular, four reasons for the pre-term termination of the powers of the President. In cases of resignation and inability to exercise powers for reasons of health, he/she is to leave his/her office in accordance with procedures provided for in Articles 109 and 110 of the Constitution. At the same time, in accordance with provisions of Article 111 of the Constitution, the President may be removed from his/her office by the parliament (*Verkhovna Rada*) by way of the procedure of impeachment, if he/she commits state treason or another crime.

The procedure of impeachment established by the Constitution is the only way of bringing the President to constitutional account. The legal nature of that procedure is not similar to that of criminal charges being brought against a person under the Code of Criminal Procedure. Therefore, there are no grounds for equating an investigation by a provisional investigating commission set up by the parliament with a pre-trial investigation. If a criminal investigation were initiated against the Head of the State, he/she would be subject to the jurisdiction of authorised bodies during the entire period of pre-trial investigation and examination of the case in court, which would deprive him/her of the right to immunity and the possibility of properly exercising the powers vested in him/her in accordance with the Constitution.

Cross-references:

- Decision of the Constitutional Court no. 9-rp/99 in the case of the constitutional petition of the Minis-

try of Internal Affairs as to the official interpretation of the provisions of Article 80.3 of the Constitution (case on the immunity of the deputies) of 27.10.1999, *Bulletin* 2000/1 [UKR-2000-1-001].

Languages:

Ukrainian.



Identification: UKR-2003-3-023

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 11.12.2003 / **e)** 20-rp/2003 / **f)** On the conformity to the Constitution (constitutionality) of Articles 18.3.2, 32, 33, 34, 35, 36, 37 and Chapter VII.5.3 “Final and Transitional Provisions” of the Law on the Ukrainian Judicial System (on the Court of Cassation) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 2003 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.7.4 **Institutions** – Judicial bodies – Organisation.
4.7.7 **Institutions** – Judicial bodies – Supreme court.
4.7.13 **Institutions** – Judicial bodies – Other courts.

Keywords of the alphabetical index:

Cassation, court, establishment.

Headnotes:

The Constitutional Court declared that the provisions of the Law on the Ukrainian Judicial System did not comply with Articles 125 and 131 of the Constitution in relation to: the introduction and setting up of a Court of Cassation within the system of courts of general jurisdiction (Article 18.2.3 of the law); the composition of the Court of Cassation, its jurisdiction, the powers of its judges, the status of its Chief Justice and Presidium of the Court of Cassation (Articles 32, 33, 34, 35, 36 and 37 of the law); and the amount of time needed to introduce and set up a Court of Cassation and the commencement of its exercise of jurisdiction over cases (Chapter VII.5.3 “Final and Transitional Provisions of the law”).

Summary:

The Constitutional Court examined a constitutional petition brought by 63 deputies seeking a declaration of the unconstitutionality of Articles 18.2.3, 32, 33, 34, 35, 36 and 37, and Chapter VII.5.3 “Final and Transitional Provisions” of the Law on the Ukrainian Judicial System.

Article 18.2.3 of the impugned law provides for the introduction and setting up of a Court of Cassation as a constitutive part of the system of courts of general jurisdiction, and lays down rules for determining its composition and the commencement of its exercise of jurisdiction over cases (Chapter VII.5.3 “Final and Transitional Provisions”).

The Constitution lays down the system of courts of general jurisdiction and lists them as follows: the Supreme Court of Ukraine and other types of courts, including the high courts of the specialised courts, courts of appeal and local courts. This system of courts is founded on the territorial and specialisation principals (Article 125.1, 125.2, 125.3 and 125.4 of the Constitution).

Article 131.1.3 of the Constitution confirms the existence of the system of courts of general jurisdiction set out in the Constitution. That article provides that the High Council of Judges exercises disciplinary jurisdiction over and examines complaints on the execution of disciplinary measures against judges of the courts specified in Article 125 of the Constitution.

The structure of the system of courts of general jurisdiction is in accordance with the stages of judicial proceedings and relevant forms of proceedings (in particular, in instances of appeal and cassation). The contents of those provisions provide for the courts of appeal as the appellate instance, while cassation proceedings may take place in the relevant courts set out in the Constitution.

Consequently, a Court of Cassation is not foreseen by the Constitution of Ukraine.

Article 92.1.14 of the Constitution provides that the following are to be determined exclusively by law and on the basis of the constitutional principles: the internal organisation and operation of the courts as well as their competences, their qualities and their composition, etc.

Judge V. Skomorokha delivered a dissenting opinion.

Languages:

Ukrainian.

*Identification:* UKR-2003-3-024

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 25.12.2003 / **e)** 21-rp/2003 / **f)** Official interpretation of Articles 118.1, 118.2, 118.3 and 118.4, 133.3, 140.1, 140.2, 140.3 and 141.2 of the Constitution; Articles 23 and 30.1.3 of the Law on the Civil Service; Articles 12 and 79 of the Law on Local Self-Government in Ukraine; Articles 10, 13 and 16.2, Chapter VII “Final Provisions” of the Law on the Capital City of Kyiv – a Hero-City; Articles 8 and 10 of the Law on Local State Administrations; Article 18 of the Law on the Public Service in Bodies of Local Self-Government (case on the particularities of the administration of executive power and local self-government in the City of Kyiv) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 2003 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

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

4.8.6.2 **Institutions** – Federalism, regionalism and local self-government – Institutional aspects – Executive.

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

Keywords of the alphabetical index:

Local government, head, appointment / Civil service, age-limit / Mayor, cumulative functions.

Headnotes:

From an organisational point of view, the Kyiv City State Administration is the sole body exercising the functions of the executive body of the Kyiv City Council and, at the same time, the functions of the local body of executive power. Regarding issues related to the administration of local self-government,

this body is subordinate to and supervised by the Kyiv City Council, while regarding issues of authority in the sphere of the executive power, it is subordinate to and supervised by the Cabinet of Ministers.

Kyiv City State Administration may be headed only by a person elected as the Kyiv City Head and appointed by the President to the office of the Chairman of the Kyiv City State Administration. As the Chairman of the Kyiv City State Administration, the Kyiv City Head when exercising executive power is accountable to the President and the Cabinet of Ministers, and reports to and is supervised by the Cabinet of Ministers.

The age-limit requirements that apply to civil servants do not apply to the officer who is simultaneously the Kyiv City Head and the Chairman of the Kyiv City State Administration.

Summary:

The Constitution lays down the foundations for the exercise of executive power in oblasts and districts by local state administrations as well as the foundations of local self-government, in particular, in inhabited localities (villages, settlements, cities). The relevant constitutional provisions elaborated on in the Law on Local Self-Government in Ukraine, the Law on Local State Administrations and the Law on the Public Service in Bodies of Local Self-Government, etc.

The executive power in oblasts, districts and the cities of Kyiv and Sebastopol is exercised by local state administrations (Article 118.1 of the Constitution).

Articles 118.2 and 140.2 of the Constitution establish that the particular aspects of the exercise of executive power in the cities of Kyiv and Sebastopol, which have special status in accordance with provisions of Article 133.3, are determined by special laws. The relevant state administration exercises executive power in those cities prior to adoption of such laws (paragraph 10 of Chapter XV “Transitional Provisions”).

The Law on the Capital City of Kyiv – a Hero City grants special status to the City of Kyiv as the capital and sets out particular aspects of the exercise of executive power and local self-government in the city in accordance with the Constitution and laws.

One such particular aspect of executive power and local self-government in the City of Kyiv is a concentration within the Kyiv City State Administration of functions falling within the spheres of both executive power and local self-government. Functions in the sphere of executive power are exercised directly by specially authorised officers of the Kyiv

City State Administration. Functions of local self-government are exercised by officers, in particular, substitutes of the Kyiv City Head in relation to issues concerning the exercise of powers of self-government etc. (Articles 14 and 16 of the Law on the Capital City of Kyiv – a Hero-City).

When exercising functions in the sphere of executive power, the Kyiv City State Administration reports to and is supervised by the Cabinet of Ministers. When exercising powers of self-government, the Kyiv City State Administration, as an executive body, reports to, is supervised by and accountable to the Kyiv City Council (Article 118.7 of the Constitution; Article 11.2 of the Law on Local Self-Government in Ukraine).

The setting up in the City of Kyiv of a sole organisational body simultaneously exercising the functions of the executive body of the Kyiv City Council and the functions of the local body of the executive power, which regarding issues of local self-government, reports to and is supervised by the relevant council and, which regarding the exercise of authority in the sphere of the executive power, is supervised by the relevant bodies of executive power (the Cabinet of Ministers) conforms to provisions of Articles 118.1, 118.2, 140.1 and 140.2 of the Constitution. The setting up of such a body is also in accordance with the European Charter of Local Self-Government that sets out local self-government as the right of and ability of bodies of local self-government to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population, within the limits of the law (Article 3.1 of the European Charter of Local Self-Government).

The Kyiv City Head exercises the functions of the Chairman of the Kyiv City State Administration by law. The particularity of the status of the Kyiv City Head is also reflected in acts carried out by the President vis-à-vis the Chairman of the Kyiv City State Administration.

The newly elected Kyiv City Head, in connection with his/her election to the office, is to be appointed in accordance with provisions of Article 118.4 of the Constitution by the President to the office of the Chairman of the Kyiv City State Administration. That act of the President is necessary in order for the Kyiv City Head to exercise authority in the sphere of executive power.

According to provisions of Article 118.5 of the Constitution, the Kyiv City Head in his/her capacity of the Chairman of the Kyiv City State Administration and when exercising his/her authority in the sphere of executive power, is accountable to the President and

the Cabinet of Ministers and also reports to and is supervised by the Cabinet of Ministers.

Requirements as to the age-limit provided for in the Law on the Civil Service for civil servants do not apply to the officer who is simultaneously the Kyiv City Head and the Chairman of the Kyiv City State Administration. The Kyiv City Head is an officer of local self-government. According to provisions of Article 18.1 of the Law on the Public Service in the Bodies of Local Self-Government, the age-limit for civil servants in bodies of local self-government does not apply to officers of local self-government who are elected to their offices.

Languages:

Ukrainian.



Court of Justice of the European Communities and Court of First Instance

Important decisions

Identification: ECJ-2003-3-018

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 04.07.2000 / **e)** C-352/98 P / **f)** Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v. Commission of the European Communities / **g)** *European Court Reports*, I-5291 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

1.4.6 **Constitutional Justice** – Procedure – Grounds.

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

Keywords of the alphabetical index:

Public health, cancerous substance, maximum concentration allowed / Liability, non contractual, Community, criteria / Damage, compensation, conditions.

Headnotes:

1. It follows from Article 168.A of the Treaty (now Article 225 EC), Article 51.1 of the Statute of the Court of Justice and Article 112.1.c of the Rules of Procedure that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal. That requirement is not satisfied by an appeal which, without even including an argument specifically identifying the error of law allegedly vitiating the contested judgment, confines itself to reproducing the pleas in law and arguments previously submitted to

the Court of First Instance. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the Court of First Instance, which the Court of Justice does not have jurisdiction to undertake (see paras 34-35).

2. The conditions under which the Community may incur non-contractual liability for damage caused by its institutions or by its servants in the performance of their duties cannot, in the absence of particular justification, differ from those governing the liability of the State for damage caused to individuals by a breach of Community law. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage.

Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach and the damage sustained by the injured parties.

As to the sufficiently serious breach of Community law, as regards both Community liability under Article 215 of the Treaty (now Article 288 EC) and Member State liability for breaches of Community law, the decisive test for finding that there has been such a breach is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where the Member State or the institution in question has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach. The general or individual nature of a measure taken by an institution is not, in that regard, a decisive criterion for identifying the limits of the discretion enjoyed by the institution in question (see paras 41-44, 46).

Summary:

Laboratoires Pharmaceutiques Bergaderm SA, a company which had been placed in liquidation, and Mr J.-J. Goupil, its Chief Executive Officer, submitted an appeal under Article 49 of the Statute (EC) of the Court of Justice against the judgment of the Court of First Instance of 16 July 1998, Bergaderm and Goupil/Commission [T-199/96, *European Court Reports* p. II-2805] dismissing the company's claim for damages arising out of the preparation and adoption of the 18th Directive 95/34 adapting to technical progress specified appendices to Directive 76/768 on the approximation of the laws of the member States relating to cosmetic products.

The Bergaderm company specialises in the manufacture and marketing of sun creams and oils. Its flagship product, Bergasol, contains not only vegetable oil and filters but also bergamot essence. One of the molecules contained in this essence is potentially carcinogenic. After a long series of studies and consultations, and despite ongoing controversy in scientific circles, the Commission decided to set a maximum level on the concentration of this molecule in sun oils. Bergaderm considered that its liquidation had been due to this restriction on the use of the molecule, and so the company and its Chief Executive Officer lodged an appeal for compensation for the damage suffered. Having observed that as regards liability arising from legislative measures, the conduct with which the Community is charged must constitute a breach of a higher-ranking rule of law for the protection of individuals, the Court of First Instance held that in the instant case the Commission had violated none of the provisions governing the procedure for adopting the directive in question. Similarly, it ruled that the Commission had committed no manifest error of assessment, no breach of the principle of proportionality, and no misuse of powers. It therefore rejected the appeal in its entirety.

In support of their appeal the applicants rely on two main pleas. First of all they argue that the Court of First Instance committed an error of law by considering Directive 95/34 as a legislative measure. Secondly, they adduce that it committed a manifest error of assessment by holding that the Commission had properly appraised the available relevant scientific data. According to the applicants all the research carried out demonstrates Bergasol's safety and effectiveness, contrary to the Commission's assessment. The Commission replies that the applicants are merely reiterating the arguments already submitted to the Court of First Instance and that, for that reason, the appeal is inadmissible. In the alternative, the Commission contends that the criticised Directive is of general legislative scope and concerns the appellants as manufacturers of sun protection products, that is to say by reason of a business activity which may be pursued at any time by any person. It also points out that in so far as the appellants challenge the findings of fact of the Court of First Instance, their argument is manifestly inadmissible in the context of the appeal.

The Court did not uphold the objection of inadmissibility raised by the Commission. While agreeing that requests for mere re-examination of an application submitted to the Court of First Instance lay outside its jurisdiction, it pointed out that this did not apply to the present case. It therefore went on to consider the pleas put forward by the appellants. It mentioned the regulations on Community responsibility for damage

caused to individuals, noting that the general or individual nature of a measure taken by an institution was not a decisive criterion for identifying the limits of the discretion enjoyed by the institution in question. Consequently, the first ground of appeal, which was based exclusively on the categorisation of the Directive in question as an individual measure, was dismissed. Going on to consider the second ground of appeal, the Court noted that the appellants had by no means demonstrated that the Court of First Instance had distorted the evidence submitted to it. It therefore dismissed the appeal.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2003-3-019

a) European Union / **b)** Court of Justice of the European Communities / **c)** Sixth Chamber / **d)** 06.07.2000 / **e)** C-356/97 / **f)** Molkereigenossenschaft Wiedergeltingen eG v. Hauptzollamt Lindau / **g)** *European Court Reports*, I-5461 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.

Keywords of the alphabetical index:

Council of ministers, powers / European Community, Community policy, application / Sanction, mechanism.

Headnotes:

Although, in applying Articles 145 and 155 of the Treaty (now Articles 202 EC and 211 EC), a distinction is drawn in case-law between essential rules, which are the Council's preserve, and those which, being merely of an implementing nature, may be delegated to the Commission, only provisions intended to give concrete shape to the fundamental guidelines of Community policy must be classified as

essential rules. Since the essential rules of the additional milk levy scheme have been fixed by the Council in the basic regulation, it is sufficient for a general power to be delegated to the Commission to adopt the implementing measures. In those circumstances, Article 11 of Regulation no. 3950/92, which authorises the Commission to adopt all the measures which are necessary for the implementation of that regulation, must be regarded as constituting a valid delegation to the Commission to lay down the penalty referred to in the second subparagraph of Article 3.2.2 of Regulation no. 536/93 (see paras 21-24, 32).

Summary:

The Court answers, under the powers conferred on it by Article 177 of the EC Treaty (now Article 234 EC), a preliminary question from the *Finanzgericht München* concerning the validity of Commission Regulation n° 536/93 of 9 March 1993 laying down detailed rules on the application of the additional levy on milk and milk products. This levy was established under the Council's essential rule on this matter, viz Regulation no. 3950/92 of 28 June 1992.

The Wiedergeltingen dairy purchases milk from the producers for processing. It was penalised under the aforementioned implementing Regulation for a delay in communicating statements of the quantities of milk delivered by each producer.

The national court expressed doubts as to whether the essential rule comprises a valid legal basis for delegating to the Commission the power to impose such penalties.

On this point the Court stresses that only provisions intended to give concrete expression to the fundamental guidelines of Community policy should be classified as essential rules and could not be delegated to the Commission, but holds that this does not apply to such sanctions as those at issue in the present case, which are designed to ensure implementation of those fundamental guidelines.

However, in view of the fact that no necessary or appropriate implementing measures ought to contradict the essential rules, the Court considered the sanction mechanism in the light of the principles set out in the essential rule. It noted that the latter provided that the purchaser had to impose the additional levy on the producers. However, it also clearly stated that the purchaser was the main party liable for the said levies. The Commission was therefore right to impose this penalty on the purchaser. Contrary to the dairy's contentions, there

is no incompatibility at this level between the implementing regulations and the essential rule.

Nevertheless, the financial sanction provided for did not allow any account to be taken of the seriousness of the delay or of the impact which it may have on the attainment of the aim pursued by that legislation, which is punctual payment of sums due in terms of additional levies on milk. To that extent the relevant article of the implementing regulation is invalid.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2003-3-020

a) European Union / **b)** Court of First Instance / **c)** Fourth Chamber / **d)** 14.07.2000 / **e)** T-82/99 / **f)** Michael Cwik v. Commission of the European Communities / **g)** *European Court Reports*, FP-IA-0155; FP-II-0713 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
 3.18 **General Principles** – General interest.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Civil servant, publication, authorisation, refusal.

Headnotes:

1. Freedom of expression, enshrined in Article 10 ECHR, is one of the fundamental rights which, as the Court of Justice has consistently held and as is reaffirmed by the preamble to the Single European Act and by Article F.2 of the Treaty on European Union (now, after amendment, Article 6.2 EU), are protected in the Community legal order and apply *inter alia* to Community officials. However, fundamental rights do not constitute an unfettered prerogative but may be subject to restrictions, provided that the

latter in fact correspond to objectives of general interest and do not constitute, in relation to the objective pursued, a disproportionate and intolerable interference in a democratic society, which infringes upon the very substance of the rights safeguarded.

Considered in the light of those principles, Article 17.2 of the Staff Regulations gives expression to the permanent need to strike a fair balance between ensuring that a fundamental right may be exercised and protecting a legitimate objective of general interest. Hence, that objective may justify restricting the exercise of such a right only if the actual circumstances require it and only in so far as necessary. According to that provision, an official is obliged to request permission to publish an article but the obligation is limited to articles dealing with the work of the Communities and permission may be refused only 'where the proposed publication is liable to prejudice the interests of the Communities' (see paras 50 to 52).

2. In a democratic society founded on respect for fundamental rights, the fact that an official publicly expresses points of view different from those of the institution for which he works cannot, in itself, be regarded as liable to prejudice the interests of the Communities for the purposes of Article 17.2 of the Staff Regulations. Clearly, the purpose of freedom of expression is precisely to enable expression to be given to opinions which differ from those held at an official level. To accept that freedom of expression could be restricted merely because the opinion at issue differs from the position adopted by the institutions would be to negate the purpose of that fundamental right. Likewise, Article 17.2 of the Staff Regulations would be rendered nugatory, since, as is apparent from its wording, it clearly lays down the principle on which permission for publication is granted, specifically providing that such permission is to be refused only where the proposed publication is liable to prejudice the interests of the Communities.

Consequently, the mere fact that there is a difference of opinion between an official and his institution does not justify refusing a request under Article 17.2 of the Staff Regulations for permission to publish, in so far as there is no evidence that making that difference public would be liable to prejudice the interests of the Communities (see paras 57 to 60).

Summary:

Under proceedings relating to the Community civil service, an application was lodged with the Court of First Instance to set aside a Commission decision to

prohibit a member of its staff from publishing the text of a lecture which he had delivered.

The applicant had originally been authorised to deliver a lecture on an economic subject. His superiors subsequently refused him permission to publish the text of the lecture on the grounds that it was liable to prejudice Community interests. In support of his claims the applicant points out that in accordance with Article 17.2 of the EC Staff Regulations all staff must enjoy freedom of expression in the framework of their statutory obligations, and that by refusing him authorisation to publish his text on the grounds that such publication would reduce the Community's room for manoeuvre the Commission had committed an error of law in interpreting the Staff Regulations and misused the discretionary powers conferred by the latter text. The applicant disputes the fact that publication of the text in question would be liable to reduce the Commission's room for manoeuvre, thus removing any justification for such a restriction on his freedom of expression.

The Court of First Instance observed that although the fundamental rights, which include freedom of expression, were protected by the Community legal system, restrictions could be placed on the exercise of these rights for reasons of protecting a legitimate general interest. The Court of First Instance then considered whether the refusal to authorise publication in the instant case was really necessitated by the concern to avoid jeopardising Community interests. It noted that according to the Commission's decision to prohibit publication, the sole threat to the Community's interest was that the member of staff might publicly express viewpoints different from those of the institution. Given the inextricable link between freedom of opinion and freedom of expression, the Court of First Instance held that this argument could not be used to justify a restriction on the exercise of freedom of expression, and that the refusal to authorise the publication was without legal foundation and should be set aside.

Languages:

French.



Identification: ECJ-2003-3-021

a) European Union / **b)** Court of Justice of the European Communities / **c)** Fifth Chamber / **d)** 19.09.2000 / **e)** C-177/99 and C-181/99 / **f)** Ampafrance SA v. Director of the Tax Office of Maine-et-Loire and Sanofi Synthelabo v. Director of the Tax Office of Val-de-Marne / **g)** *European Court Reports*, I-7013 / **h)**.

Keywords of the systematic thesaurus:

1.6.5.5 **Constitutional Justice** – Effects – Temporal effect – Postponement of temporal effect.

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

3.16 **General Principles** – Proportionality.

5.1.1 **Fundamental Rights** – General questions – Entitlement to rights.

5.3.41 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Tax, deduction, right.

Headnotes:

The principle of the protection of legitimate expectations, which is the corollary of the principle of legal certainty and which is generally relied upon by individuals (traders) in a situation where they have legitimate expectations created by the public authorities, cannot be relied on by a Member State in order to avoid the consequences of a decision of the Court declaring a Community provision invalid, since it would jeopardise the possibility for individuals to be protected against conduct of the public authorities based on unlawful rules (see para. 67).

Summary:

Under Article 177 of the EC Treaty (now Article 234 EC) two preliminary rulings were sought from the Court, the first by the Nantes Administrative Court (C-177/99) and the second by the Melun Administrative Court (C-181/99) – France, concerning the validity of Council Decision 89/487/EEC authorising the French Republic to apply a measure derogating from Article 17.6.2 of the Sixth Directive 77/388/EEC on the harmonisation of the laws of the member states relating to turnover taxes. These rulings were sought in connection with two sets of proceedings, respectively between Ampafrance SA (C-177/99) and Sanofi Synthelabo (C-181/99) and the French tax authorities, concerning tax adjustments applied to those companies based on the exclusion of the right to deduct value added tax (VAT) on expenditure in

respect of accommodation, food, hospitality and entertainment. The two companies argued that Decision 89/487, on which the national regulations excluding the right to deduct VAT on the expenditure in question were founded, was invalid. They submitted that the decision, which authorised the French government to introduce special measures derogating from the Directive, could not be regarded as merely enabling the national authorities to pursue the objectives of simplifying the procedure for charging the tax or preventing certain types of tax evasion and avoidance and that it breached the proportionality principle, since the means implemented were disproportionate to the end pursued. Accepting the arguments advanced by the plaintiffs in the main proceedings, the Court held Decision 89/487/EEC to be invalid. The Court disallowed a request for limitation of the temporal effects of the invalidity ruling, lodged by the French government on the ground that it was entitled to entertain a legitimate expectation as to the compatibility with Community law of Decision 89/487, the first instance of reliance on the principle of protection of legitimate expectations by a member state's government in support of such a request. In this connection, the Court pointed out that a decision to limit the temporal effect of a judgment, in application of the general principle of legal certainty inherent in the Community's legal order, could be envisaged only in respect of individuals finding themselves in a situation where they had legitimate expectations. The protection that must be afforded to individuals did not, however, mean that public authorities could invoke the same principle to avoid the consequences of their unlawful action.

Languages:

Danish, Finnish.

*Identification:* ECJ-2003-3-022

a) European Union / **b)** Court of First Instance / **c)** / **d)** 31.10.2000 / **e)** T-84/00 / **f)** Laboratórios Roussel Lda and Laboratoires Roussel Diamant SARL v. Commission of the European Communities / **g)** *European Court Reports*, II-3591 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

- 1.4.10 **Constitutional Justice** – Procedure – Interlocutory proceedings.
 3.16 **General Principles** – Proportionality.
 3.17 **General Principles** – Weighing of interests.

Keywords of the alphabetical index:

Drug, authorisation, withdrawal / Drug, public health, danger / European Commission, decision, execution.

Headnotes:

1. The damage which might be occasioned by the immediate operation of a decision of the Commission concerning the withdrawal of marketing authorisations for certain medicinal products is serious and irreparable, for the holder of a marketing authorisation for a medicinal product concerned, where it is shown, first, that the complete withdrawal from the market of the medicinal product in question entails the risk that substitute medicinal products will very probably take its place and that it will be impossible for the holder of the authorisation to restore confidence in the product even if the statements that the product withdrawn presents a danger to patients are subsequently disproved and, second, that if the decision were to be annulled by the court hearing the main application, the financial damage suffered by the holder because of a fall in sales as a result of loss of confidence in the product could not be quantified sufficiently completely (see paras 42-44).

2. Where, on an application for suspension of the operation of a measure, the judge hearing the application balances the various interests involved, he must determine whether later annulment of the contested measure by the Court when ruling on the main application would allow the situation which would have been brought about by the immediate operation of the measure to be reversed, and, conversely, whether suspension of operation of the measure would prevent it from being fully effective in the event of the main application being dismissed.

In the context of an application for suspension of the operation of a Commission decision concerning the withdrawal of marketing authorisation for certain medicinal products, while the requirements of the protection of public health must unquestionably be given precedence over economic considerations when balancing the competing interests, mere reference to the protection of public health cannot exclude an examination of the circumstances of the case, in particular of the relevant facts.

The balance of interests favours suspension of the operation of such a decision where, first, it appears highly probable that its operation would entail the definitive loss of the applicant's position in the market even if the court hearing the main application were to annul the decision and, second, the Commission has not been able to show why the protective measures contained in a previous decision based on identical data, and consisting solely in a change to the compulsory information which must be included in national authorisations, have proved to be insufficient to protect public health (see paras 46-51).

Summary:

The applicants had been granted marketing authorisations for medicinal products containing clobenzorex. In a decision of 9 December 1996 [C(1996) 3608] the Commission, on the basis of Council Directive 75/319/EEC of 20 May 1975 on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products (OJ L 147, p. 13), as amended by Council Directive 93/39/EEC of 14 June 1993 (OJ L 214, p. 22), had instructed member states to vary certain clinical information which had to appear in the national marketing authorisations for such products. In 1999, in response to requests by certain member states, the Committee for Proprietary Medicinal Products (CPMP) of the European Agency for the Evaluation of Medicinal Products had recommended withdrawing the marketing authorisations for the products in question, since they had an unfavourable benefit/risk balance. On 9 March 2000 the Commission adopted a decision ordering the withdrawal of the marketing authorisations [C(2000)608].

The applicants brought an action before the Court for annulment of that decision and, by separate document, requested suspension of its operation.

The judge hearing that application for interim relief deemed that the pleas raised by the applicants did not *prima facie* appear to be entirely unfounded and that the condition requiring a *prima facie* case to be made out (*fumus boni juris*) was satisfied.

Firstly, the Commission's competence to adopt the contested decision was challenged. The applicants considered that the authorisations they had been granted were national authorisations, the withdrawal of which could not be ordered by the Commission. Conversely, the Commission argued that the decision of 1996 in fact constituted a marketing authorisation granted in accordance with Directive 75/319. That decision accordingly resulted in harmonisation of the

national marketing authorisations, and the Commission was competent to adopt the contested decision.

Secondly, the judge found that the Commission had failed to show conclusively why the decision of 1996 and the contested decision led to fundamentally different results.

Moreover, if operation of the contested decision were not suspended, substitute medicinal products would very probably take the place of the products withdrawn from the market. Following such a withdrawal it would not be possible to restore confidence in the products. The financial damage suffered as a result could in practice not be quantified sufficiently completely for the purpose of making reparation. The judge accordingly considered that the damage caused would indeed be serious and irreparable.

On balancing the competing interests involved, the judge suspended the operation of the contested decision. In principle, the requirements of the protection of public health must unquestionably be given precedence over economic considerations, such as, in the instant case, the applicants' loss of their position in the market. However, that did not suffice to exclude an examination of the circumstances of the case. In the present case, although there was indeed uncertainty as to the risks associated with the medicinal products, the Commission was obliged to show that the protective measures taken in 1996 had proved to be insufficient and that the measures it had adopted in the contested decision were not manifestly excessive.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2003-3-023

a) European Union / **b)** Court of Justice of the European Communities / **c)** First Chamber / **d)** 28.11.2000 / **e)** C-88/99 / **f)** Roquette Frères SA v. Tax Office of Pas-de-Calais / **g)** *European Court Reports*, I-10465 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

3.26 **General Principles** – Principles of Community law.

3.26.2 **General Principles** – Principles of Community law – Direct effect.

4.17.2 **Institutions** – European Union – Distribution of powers between Community and member states.

Keywords of the alphabetical index:

Effectiveness, community law, principle / Equivalence of community law, principle.

Headnotes:

In the absence of Community rules on reimbursement of national charges levied though not due, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to determine the procedural conditions governing legal proceedings for safeguarding rights which individuals derive from the direct effect of Community law, it being understood that such rules cannot be less favourable than those governing similar actions of a domestic nature (principle of equivalence), and may not make it impossible or excessively difficult in practice to exercise rights which national courts have a duty to protect (principle of effectiveness).

First, as regards the principle of effectiveness, the establishment of reasonable limitation periods for bringing proceedings satisfies that requirement in principle inasmuch as it constitutes an application of the fundamental principle of legal certainty. Such limitation periods cannot be regarded as rendering virtually impossible or excessively difficult the exercise of rights conferred by Community law, even if the expiry of those periods necessarily entails the dismissal, in whole or in part, of the action brought. In that respect, a national limitation period of up to a minimum of 4 years and a maximum of 5 years preceding the year of the judicial decision finding the rule of national law establishing the tax to be incompatible with a superior rule of law must be considered reasonable.

Secondly, observance of the principle of equivalence implies that the national procedure applies without distinction to actions alleging infringements of Community law and to those alleging infringements of national law, with respect to the same kind of charges or dues. That principle cannot, however, be interpreted as obliging a Member State to extend its most favourable rules of limitation to all actions for repayment of charges or dues levied in breach of

Community law. Thus, Community law does not in principle preclude the legislation of a Member State from laying down, alongside a limitation period applicable under the ordinary law to actions between private individuals for the recovery of sums paid but not due, special detailed rules, which are less favourable, governing claims and legal proceedings to challenge the imposition of charges and other levies. The position would be different only if those detailed rules applied solely to actions based on Community law for the repayment of such charges or levies.

It follows that Community law does not preclude legislation of a Member State laying down that, in tax matters, an action for recovery of a sum paid but not due based on a finding by a national or Community court that a national rule is not compatible with a superior rule of national law or with a Community rule of law may only relate to the period following 1 January of the fourth year preceding that of the judgment establishing such incompatibility (see paras 20-24, 29-30, 37 and operative part).

Summary:

The *Roquette Frères* judgment, delivered in response to a request for a preliminary ruling by the Béthune *Tribunal de grande instance*, was a further opportunity for the Court to reiterate the case-law it had established in its *Edis* judgment of 15 September 1998 (C-231/96, *European Court Reports*, I-4951) regarding the procedural autonomy of the member states and, in particular, the conditions of admissibility of national limitation periods for actions for recovery of sums paid but not due, brought by individuals in order to safeguard the rights they derived from the direct effect of Community law.

Following a merger operation in June 1987, Roquette Frères SA had paid the tax authorities registration duty on transfers of movable assets made in the context of that operation, as required under a provision of the General Tax Code. That provision was revoked as from 1 January 1994. In its judgment of 13 February 1996, *Bautiaa and Société française maritime* (C-197/94 and C-252/94, *European Court Reports*, I-505), the Court had ruled that Community law obliged the member states to exempt from all transfer duties capital increases implemented through one company's contributing all of its assets to another. In view of that decision, Roquette disputed its liability to pay the sum handed over in 1987 and applied to the tax authorities for a refund. On 3 April 1997 that application was rejected on the ground that, pursuant to the third paragraph of Article L. 190 of the Book of Tax Procedure, where a judgment had found a tax to be unlawful, claims for recovery of sums paid

but not due could relate only to tax paid after 1 January of the fourth year preceding that of the judgment establishing unlawfulness. The matter was then brought before the Béthune *Tribunal de grande instance*, which decided to stay the proceedings and to request a preliminary ruling from the Court of Justice.

After having reformulated the question referred to it, so as to provide an answer of use in determining the case on the merits, the Court reiterated that, in the absence of Community rules concerning the refunding of domestic taxes which have been wrongly levied, it is for the domestic legal system of each member state to designate the courts having jurisdiction and to determine the procedural conditions governing legal proceedings seeking to safeguard the rights which citizens derive from the direct effect of Community law, subject to observance of the principles of equivalence and effectiveness. At the same time, it noted that establishment of reasonable limitation periods for bringing proceedings constituted an application of the fundamental principle of legal certainty. Accordingly, a limitation period such as that applicable in the case before it could not be regarded as incompatible with the principle of effectiveness of Community law. Similarly, the principle of equivalence did not prevent the legislation of a member state from laying down, as in the case under consideration, alongside the limitation period applicable under the ordinary law to actions between private individuals for the recovery of sums paid but not due, special detailed rules, which were less favourable, governing claims and legal proceedings to challenge the imposition of taxes and other levies, provided those less favourable rules did not apply solely to actions based on Community law.

Lastly, the Court reiterated that the fact that it had given a preliminary ruling interpreting a provision of Community law, without limiting the temporal affects of its judgment, did not affect the right of a member state to impose a time-limit under national law within which, on penalty of being barred, proceedings for repayment of sums levied in breach of that provision must be commenced.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



European Court of Human Rights

Important decisions

Identification: ECH-2003-3-008

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 09.10.2003 / **e)** 48321/99 / **f)** Slivenko v. Latvia / **g)** *Reports of Judgments and Decisions of the Court* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.

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

5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.

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

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

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

Keywords of the alphabetical index:

Deportation / International agreement, withdrawal of military troops / Family life, definition / Family member, interpretation.

Headnotes:

Deportation from the country where an individual has developed since birth a network of personal, social and economic relations constitutes an interference with the right to respect for private life and home.

There is no right under the Convention to choose in which country to continue or re-establish family life. Deportation of members of a family which does not involve breaking up the family group does not constitute an interference with the right to respect for family life.

A treaty providing for the withdrawal of foreign troops and their families is not in itself objectionable and the public interest in removing them would normally outweigh the individual's interest in remaining. However, specific circumstances might render removal unjustified.

Summary:

The applicants are a mother and daughter of Russian origin. The first applicant, whose father was an officer in the army of the Soviet Union, moved to Latvia with her parents when she was one month old. She married another Soviet officer in 1980 and the second applicant was born in 1981. After Latvia gained its independence, the applicants were entered on the register of Latvian residents as “ex-USSR citizens”.

In 1994 the first applicant's husband, who had been discharged from the army during that year, applied for a temporary residence permit on the basis of his marriage to a permanent resident. His application was refused on the ground that he was required to leave Latvia in accordance with the treaty of April 1994 on the withdrawal of Russian troops. As a result, the registration of the applicants was annulled. The deportation of all three family members was ordered in August 1996 and the first applicant's husband subsequently moved to Russia.

The applicants challenged their removal from Latvia. They were successful at first and second instance but the Supreme Court quashed these decisions and remitted the case to the Regional Court, which then found that the first applicant's husband was required to leave and that the decision to annul the applicants' registration was lawful. This decision was upheld by the Supreme Court. Both applicants subsequently moved to Russia and adopted Russian citizenship.

In the application lodged with the Court, the applicants stated that their deportation violated their right to respect for private and family life and home. They relied on Article 8 ECHR.

The Court observed that the applicants had been removed from the country where they had developed, uninterruptedly since birth, the network of personal, social and economic relations that make up the private life of a human being. Furthermore, they had lost the flat in which they had lived. In these circumstances, their removal constituted an interference with respect for their private life and home. In contrast, the impugned measures did not have the effect of breaking up the family, since the deportation concerned all three members and there is no right under the Convention to choose in which country to continue or re-establish family life. Moreover, there was no “family life” with the first applicant's parents, who were adults not belonging to the core family and who had not been shown to be dependent on the applicants' family. Nonetheless, the impact of the impugned measures on family life was a relevant factor in the assessment under Article 8

ECHR and the link with the first applicant's parents was to be taken into account.

As to the legal basis for the applicants' deportation, the principal ground relied on by the Government was that their removal was required by the treaty on the withdrawal of Russian troops. While that treaty was not yet in force when the applicants were registered as "ex-USSR citizens", the relevant provisions of domestic law could later be legitimately interpreted and applied in the light of the treaty, a legal instrument accessible to the applicants. In addition, the applicants must have been able to foresee to a reasonable degree, at least with legal advice, that they would be regarded as covered by the treaty. In any event, the decisions of the courts did not appear arbitrary. The applicants' removal could accordingly be considered to have been "in accordance with the law". Moreover, the Court accepted that the treaty and implementing measures had sought to protect the interests of national security and thus pursued a legitimate aim.

As to the necessity of the interference, the fact that the treaty provided for the withdrawal of all Russian military officers, including those who had been discharged prior to its entry into force, and obliged their families to leave the country, was not in itself objectionable under the Convention. Indeed, it could be said that the arrangement respected family life in that it did not interfere with the family unit. In so far as the withdrawal interfered with private life and home, the interference would not normally appear disproportionate, having regard to the conditions of service of military officers. Moreover, the continued presence of active servicemen of a foreign army might be seen as incompatible with the sovereignty of an independent State and a threat to national security.

However, it could not be excluded that specific circumstances might render removal measures unjustified under the Convention. In particular, the justification did not apply to the same extent to retired officers and their families and, while their inclusion in the treaty did not as such appear objectionable, the interests of national security carried less weight in respect of them. In the present case, the fact that the first applicant's husband had already retired by the time of the proceedings concerning the legality of the applicants' stay in Latvia had made no difference to the determination of their status, yet it appeared from information provided by the Government about treatment of certain hardship cases that the authorities considered that they had some latitude which allowed them to ensure respect for private and family life and home. A scheme for withdrawal of foreign troops and their families based on a general finding that their removal is necessary for national security cannot as such be deemed contrary to

Article 8 ECHR, but implementation of such a scheme without any possibility of taking into account individual circumstances is not compatible with that provision.

In the present case, the applicants had developed ties in Latvia unrelated to their status and it had not been shown that their level of fluency in Latvian was insufficient for them to pursue normal life there. They were therefore sufficiently integrated into Latvian society at the relevant time. Finally, they could not be regarded as endangering national security by reason of belonging to the family of the first applicant's father, a former Soviet officer who had retired in 1986, had remained in the country and was not himself deemed to present any such danger. In all the circumstances, the applicants' removal could not be regarded as having been necessary in a democratic society. Consequently, there had been a breach of Article 8 ECHR.

Cross-references:

- *X. v. Germany*, no. 3110/67, Commission decision of 19.07.1968, *Collection of decisions* 27, p. 77;
- *Marckx v. Belgium*, Judgment of 13.06.1979, Series A, no. 31; *Special Bulletin Leading Cases ECHR* [ECH-1979-S-002];
- *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Judgment of 28.05.1985, Series A, no. 94; *Special Bulletin Leading Cases ECHR* [ECH-1985-S-002];
- *Fox, Campbell and Hartley v. United Kingdom*, Judgment of 30.08.1990, Series A, no. 182;
- *Gül v. Switzerland*, Judgment of 19.02.1996, *Reports of Judgments and Decisions* 1996-I;
- *Benham v. United Kingdom*, Judgment of 10.06.1996, *Reports* 1996-III;
- *Chahal v. United Kingdom*, Judgment of 15.11.1996, *Reports* 1996-V;
- *Dalia v. France*, Judgment of 19.02.1998, *Reports* 1998-I;
- *Amann v. Switzerland* [GC], no. 27798/95, *Reports of Judgments and Decisions* 2000-II;
- *Cyprus v. Turkey* [GC], no. 25781/94, *Reports of Judgments and Decisions* 2001-IV;
- *Boultif v. Switzerland*, no. 54273/00, *Reports of Judgments and Decisions* 2001-IX.

Languages:

English, French.



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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.

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¹¹ Referrals of preliminary questions in particular.

¹² Enactment required by law to be reviewed by the Court.

¹³ Review *ultra petita*.

¹⁴ Horizontal distribution of powers.

¹⁵ Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

¹⁶ Decentralised authorities (municipalities, provinces, etc.).

¹⁷ This keyword concerns decisions on the procedure and results of referenda and other consultations.

¹⁸ This keyword concerns decisions preceding the referendum including its admissibility.

¹⁹ Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (questions relating to the distribution of powers as between the State and federal or regional entities are the subject of another keyword 1.3.4.3.

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²⁰ As understood in private international law.

²¹ Including constitutional laws.

²² For example organic laws.

²³ Local authorities, municipalities, provinces, departments, etc.

²⁴ Or: functional decentralisation (public bodies exercising delegated powers).

²⁵ Political questions.

²⁶ Unconstitutionality by omission.

²⁷ For the withdrawal of proceedings, see also 1.4.10.4.

²⁸ Pleadings, final submissions, notes, etc.

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²⁹ May be used in combination with Chapter 1.2 Types of claim.

³⁰ For the withdrawal of the originating document, see also 1.4.5.

³¹ Comprises court fees, postage costs, advance of expenses and lawyers' fees.

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³² For questions of constitutionality dependent on a specified interpretation, use 2.3.2.

³³ This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters, etc.).

³⁴ Including its Protocols.

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³⁶ Including the principle of a multi-party system.

³⁷ Includes the principle of social justice.

³⁸ See also 4.8.

³⁹ Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

⁴⁰ Including maintaining confidence and legitimate expectations.

⁴¹ Principle according to which sub-statutory acts must be based on and in conformity with the law.

⁴² Prohibition of punishment without proper legal base.

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⁴³ Including compelling public interest.

⁴⁴ Only where not applied as a fundamental right. Also refers to the principle of non-discrimination on the basis of nationality as it is applied in Community law.

⁴⁵ Including questions of treason/high crimes.

⁴⁶ Including prohibition on monopolies.

⁴⁷ For the principle of primacy of Community law, see 2.2.1.6.

⁴⁸ Including the body responsible for revising or amending the Constitution.

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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.

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.

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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.

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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.

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⁷⁴ See also 3.6.

⁷⁵ And other units of local self-government.

⁷⁶ See also keywords 5.3.40 and 5.2.1.4.

⁷⁷ Organs of control and supervision.

⁷⁸ Proportional, majority, preferential, single-member constituencies, etc.

⁷⁹ For aspects related to fundamental rights, see 5.3.40.2.

⁸⁰ For the creation of political parties, see 4.5.10.1.

⁸¹ E.g. Names of parties, order of presentation, logo, emblem or question in a referendum.

⁸² Tracts, letters, press, radio and television, posters, nominations, etc.

⁸³ Impartiality of electoral authorities, incidents, disturbances.

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⁸⁴ E.g. signatures on electoral rolls, stamps, crossing out of names on list.

⁸⁵ E.g. in person, proxy vote, postal vote, electronic vote.

⁸⁶ E.g. Panachage, voting for whole list or part of list, blank votes.

⁸⁷ E.g. Auditor-General.

⁸⁸ Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

⁸⁹ E.g. Court of Auditors.

⁹⁰ The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

⁹¹ *Staatszielbestimmungen*.

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⁹² Institutional aspects only: questions of procedure, jurisdiction, composition, etc; are dealt with under the keywords of Chapter 1.

⁹³ Including state of war, martial law, declared natural disasters, etc; for human rights aspects, see also keyword 5.1.4.

⁹⁴ Positive and negative aspects.

⁹⁵ For rights of the child, see 5.3.43.

⁹⁶ The question of "Drittwirkung".

⁹⁷ See also 4.18.

⁹⁸ Taxes and other duties towards the state.

⁹⁹ Here, the term "national" is used to designate ethnic origin.

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¹⁰⁰ For example, discrimination between married and single persons.

¹⁰¹ This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.

¹⁰² Detention by police.

¹⁰³ Including questions related to the granting of passports or other travel documents.

¹⁰⁴ May include questions of expulsion and extradition.

¹⁰⁵ 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.

¹⁰⁶ This keyword covers the right of appeal to a court.

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¹⁰⁸ Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

¹⁰⁹ This keyword also includes the right to freely communicate information.

¹¹⁰ Militia, conscientious objection, etc.

¹¹¹ Aspects of the use of names are included either here or under "Right to private life".

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¹¹² Including compensation issues.

¹¹³ For institutional aspects, see 4.9.5.

¹¹⁴ This keyword also covers "Freedom of work".

¹¹⁵ 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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