

# THE BULLETIN

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*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.*

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*The decisions are presented in the following way:*

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

**G. Buquicchio**

Secretary of the European Commission for Democracy through Law

# THE VENICE COMMISSION

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**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 2004 – 31 December 2004 for the following countries:

Cyprus, Ireland, Japan, Sweden (Supreme Court).

Précis of important decisions of the reference period 1 September 2004 – 31 December 2004 will be published in the next edition, *Bulletin* 2005/1 for the following countries:

Italy, Netherlands.

# Albania

## Constitutional Court

### Important decisions

*Identification:* ALB-2004-3-004

**a)** Albania / **b)** Constitutional Court / **c)** / **d)** 11.11.2004 / **e)** 16 / **f)** Constitutionality of a law / **g)** *Fletore Zyrta* (Official Gazette), 84/04, 6248 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

- 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.
- 4.5.2 **Institutions** – Legislative bodies – Powers.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
- 5.3.24 **Fundamental Rights** – Civil and political rights – Right to information.
- 5.3.32 **Fundamental Rights** – Civil and political rights – Right to private life.

*Keywords of the alphabetical index:*

Official, high, property, declaration / Conflict of interest / Civil servant, rights and obligations / Corruption, prevention / Data, personal, protection / Data, processing, right of control / Transparency, administrative.

*Headnotes:*

The law regarding declaration of property held by public officials and providing for the publication of personal data upon request is not unconstitutional and does not infringe the right to privacy. The legislator has given priority to the right to information (general interest) as compared to private interests. Such a restriction does not exceed the limits provided for by the European Convention on Human Rights and does not infringe the essence of the right to privacy. The purpose to be achieved by the legislator thoroughly justifies adoption of the law. In addition, the means used to achieve this lawful purpose are

effective and proportional. The legislator has been very careful in striking a fair balance between the right to information and the right to respect the private life.

*Summary:*

The Constitutional Court rejected an application by the Albanian Helsinki Committee (a non-profit organisation) for a declaration of unconstitutionality of a legal provision relating to the declaration of property held by public officials and for the publication of their personal data. It was argued that the provision infringing the right to privacy because data relating to property had to be considered personal data. The publication of such personal information should be permitted only with the consent of the persons making the declarations. It was further argued that the right to privacy should not be restricted without due consideration of Article 8 ECHR. In addition, the appellant challenged the provision of the law that also imposed an obligation to declare property of the family members of public officials who were under an obligation to declare property.

Having considered the relevant provision of law and the arguments presented by the parties' representatives, the Court considered that the right to information (as a fundamental right for giving and receiving information) should be exercised without the interference of public authorities.

This right and the right of expression are closely related to the principle of the rule of law. However, the right of respect of private life is one of the challenges placed before democratic states, and it represents a positive obligation of the state to protect it. After having defined the concept of private life, the Court reached the conclusion that the respect of privacy requires non-interference in decisions reached by individuals as to how they organise their lives, which could also include the free development of an individual's personality.

The challenged provision permits publication of personal data upon the consent of the individual or when required by law to do so. The restriction has been made by law and in the interest of the general public. The right to privacy and the right to information are both considered as fundamental constitutional rights. The legislator chose to restrict the right to private life instead of the right to information, since the latter serves a higher and more general interest. The margin of appreciation of the legislator depends on certain circumstances, but it should strike a fair balance between the right to be restricted and the right to be guaranteed.

Declaration of property avoids conflict of interests and corruption. The intended purpose thoroughly justifies the adoption of that kind of law. The legislator had been very careful in striking a fair balance between both of those fundamental constitutional rights. The obligation to declare income and make it public did not intend to damage or denigrate the public officials, but led to a better transparency and a more rigorous control against illegal enrichment and financial relations to third parties. The public has a lawful interest to be informed about the activities or property of elected persons or public officials.

As to the obligation to declare property belonging to family members of public officials who are under an obligation to make property declarations, the Court recognises that the concept of the family should be understood in the narrow sense, i.e. spouses and children. Since the persons in question are closely related to the person obliged to make a declaration, they should not be exempt from making a declaration of property. Otherwise, there would be an increased danger of concealment or manipulation of data on property belonging to persons obliged to make a declaration, thereby circumventing the law. The Court held that the provision requiring a declaration of property to be made by public officials for a period of 4 years after having left their duties is founded. This serves to promote transparency and the fight against corruption.

For all the above-mentioned reasons, the Court rejected the application as unfounded.

#### *Languages:*

Albanian.



## Argentina

### Supreme Court of Justice of the Nation

#### Important decisions

*Identification:* ARG-2004-3-003

**a)** Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 22.10.2004 / **e)** M. 3724. XXXVIII / **f)** Milone, Juan Antonio v/ Asociat S. A. Aseguradora de Riesgos de Trabajo s/ accidente. Ley 9688 / **g)** to be published in *Fallos de la Corte Suprema de Justicia de la Nation* (Official Digest), 327 / **h)** CODICES (Spanish).

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

3.5 **General Principles** – Social State.  
 3.23 **General Principles** – Equity.  
 5.2 **Fundamental Rights** – Equality.  
 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.  
 5.4.17 **Fundamental Rights** – Economic, social and cultural rights – Right to just and decent working conditions.

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

Accident, work-related, compensation / Law, objective pursued / Law, rigidity, unconstitutional / ILO, Convention no. 17.

#### *Headnotes:*

The law on employment risks is unconstitutional in stipulating without exception that the cash compensation awarded to workers for certain occupational disabilities shall be paid in the form of a monthly allowance and not as a lump sum in a single instalment.

#### *Summary:*

The law on employment risks (hereinafter referred to as “the law”), enacted in 1995, provided that the cash compensation awarded to workers for damage consequential to a work accident or an occupational disease would consist, in the case of occupational

disabilities, of a periodical allowance paid in monthly instalments for levels of disability above 20% and below 66% (Article 14.2.b). In the case in point, the worker had lodged a claim for compensation alleging the unconstitutionality of the law which prevented receipt of the compensation in the form of a single payment of the full amount. The decisions at first and second instance admitted the complaint on the ground that, considering the complainant's age (55 years) and occupational activity (taxi driver), the damage incurred (loss of sight in one eye) and the degree of disability (65%), it was in the victim's interest to receive the full amount of the compensation. These were the circumstances in which the insurance company lodged an extraordinary appeal with the Supreme Court, contending that the law in question was constitutional.

The Supreme Court upheld the judgment. Its reasoning was founded on three premises:

- a. the law admitted of no exception to the system of monthly payment;
- b. one of the objectives of the law was to redress "damage consequential to work accidents and occupational diseases" (Article 2.b); and
- c. in the memorandum laying the law before Congress, the Executive pointed out that the system under challenge tended to reinstate the criterion established earlier by the first law on employment risks, enacted in 1915, signifying a change towards alignment of benefits to victims' actual needs.

The Court held that no deliberative effort was needed to conclude that, because of its absoluteness, the system of periodical payments as the sole cash benefit prescribed could have opposite results to the law's intended statutory "objectives" and could reverse the tendency towards adaptation to victims' actual needs.

It took into account the fact that in the parliamentary debate on the 1915 law mentioned above the Congress, while approving compensation in the form of a periodical payment, had warned against the adverse consequences that might arise from a system admitting of no exception. It further recalled that the subsequent amendments to the law of 1915 had progressively mitigated the rule of monthly payment and eventually sanctioned compensation in the form a lump sum. It added that while Article 5 of Convention no. 17 of the International Labour Organisation – having a higher status than the laws, according to Article 75.22 of the national Constitution – provided for payment in the form of a periodical allowance, it also permitted the possibility of payment as a lump sum. The Court stressed that these two antecedents, one pertaining to the history of national

legislation and the other to an international source, highlighted the typical inconsistency of rigid regulations such as the impugned law. On the contrary, what should be sought was equitable redress, ie redress that would retain the sense of compensation *in concreto*.

The Court went on to point out that the law must be assessed in the light of the principle of protection set out in Article 14bis of the national Constitution: "labour in its several forms shall be protected by law, which shall secure to workers dignified and equitable working conditions". According to the Court's practice, this entailed "ineluctable duties" for the Congress, intended to secure the worker's "inviolable rights". The law in question, however, did not succeed in "securing" a "fair", i.e. just, condition because it was so stringent that it finally took no account of the concrete reality to which it was meant to be applied.

The Court added that Article 14bis of the national Constitution integrated the International Covenant on Economic, Social and Cultural Rights (ICESCR) which, alongside other international treaties, had the same status as the Constitution. Article 6 ICESCR recognises the "right to work", which includes the right of everyone to have the opportunity to earn their living. This provision is supplemented by Article 7b ICESCR in which the States Parties recognise everyone's right to enjoy just and favourable conditions of work which ensure decent living conditions for oneself and one's family, in particular safe and healthy working conditions – and by Article 12 ICESCR which establishes everyone's right to "the enjoyment of the highest attainable standard of physical and mental health", paragraph 2 of which provides that "the steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for [...] b. the improvement of all aspects of environmental and industrial hygiene; c. the prevention, treatment and control of [...] occupational [...] diseases". According to the Court, it followed from Article 7b ICESCR that, once appropriate legislation had been framed by the States concerning safe and healthy working conditions, one of the principal aspects was the compensation to be awarded to victims (see Craven, Matthew, *The International Covenant on Civil, Political and Cultural Rights*, Oxford, Clarendon, 1998, p. 242). The Court observed that analogous conclusions attached to the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, known as the Protocol of San Salvador, adopted by law 24.658, having regard to its Preamble and to Articles 6 and 7 dealing respectively with the right to work and just, equitable and satisfactory conditions of work.



The Court further observed that where Article 75.23 of the national Constitution mandated Congress to legislate and promote positive measures guaranteeing true equal opportunities and treatment and the full benefit and exercise of the rights recognised by the Constitution and by the international treaties on human rights in force, it referred in particular to traditionally neglected groups among whom “disabled persons” were explicitly mentioned. For that reason, an interpretation according to the letter of the Constitution made it clear that the protection of labour laid down by Article 14bis of the Constitution was reiterated and amplified, for the purposes of the instant case, by the mandate in Article 75.23 of the Constitution. This article also set forth the principle of non-regression of fundamental rights. Article 2.1 ICESCR likewise adopted the principle of progressiveness, in accordance with Article 11.1, to the effect that the States Parties recognised the right of everyone to “the continuous improvement of living conditions”.

The Court held that, from another standpoint, a disability – especially the disabilities contemplated by Article 14.2.b of the law – would not only have ineluctable repercussions on the victim’s economic life but would also affect various aspects of his private life linked with the domestic, cultural and social spheres, thereby hampering his self-fulfilment and leading to personal frustration. Owing to the gravity of this personal crisis the worker – and equally so his family, if any – would doubtless be prompted to reformulate his life plan in depth, in which case the compensation awarded would prove crucially important. Thus, if the means of redress became inappropriate it could aggravate this state of frustration. That was precisely the case with the system originally prescribed by the law, which drastically reduced the range of choices open to the worker for reformulating his life plan. Article 14.2.b hampered any option attainable through lump sum compensation even in the event that such options would be more advantageous for the victim. Hence the victim must be content to make his choice within the extremely narrow limits which the monthly allowance imposed. Thus, while rejecting the idea that such was the legislator’s intention, there could be no doubt that the constitutionally protected area of freedom within which the life plan took shape was subjected to unreasonable regulatory intrusion devoid of any protective purpose.

The law moreover introduced a factor of discrimination by prescribing, for disabilities less severe than those contemplated by Article 14.2.b, the payment of lump sum compensation. This treatment was at variance with the provision made for the imperative

needs of the worst affected victims, and thus detracted from the goal of protection envisaged.

The Court concluded that the law, in having laid down the obligation to pay cash compensation in the form of a periodical allowance for certain disabilities, could not be challenged as unconstitutional, but could be for having failed to make an exception for certain cases like the one under consideration, where the statutory criterion was not consistent with the objective of redress pursued. The provision furthermore sanctioned a solution incompatible with Article 14bis of the national Constitution, which laid down the principle of protection and stipulated fair working conditions. It also encroached on the area of freedom founded on the individual’s autonomy in formulating his life plan. Lastly, it gave rise to discrimination between disabilities.

*Languages:*

Spanish.





# Armenia

## Constitutional Court

### Statistical data

1 September 2004 – 31 December 2004

- 44 references made, 44 cases heard and 44 decisions delivered.
- 44 decisions concerning the compliance of international treaties with the Constitution. All treaties examined were declared compatible with the Constitution.

Information on the activities of the Court

IXth Yerevan International Conference on the topic: “Ensuring the principle of rule of law in the practice of constitutional justice” took place on 14-16 October 2004.

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

The following issues were discussed during the conference: “The principle of the rule of law as a guarantee of constitutional democracy”; “Rights and the Judiciary: European dimensions”; and “The principle of the rule of law in the case-law of the European Court of Human Rights”. The participants from the Russian Federation, France, Ukraine, Greece, Slovakia, Romania, the Czech Republic, Bulgaria, the “former Yugoslav Republic of Macedonia”, Lithuania, Belarus and Hungary presented the principle of the rule of law in the practice of the Constitutional Courts of their countries.

### Important decisions

*Identification:* ARM-2004-3-005

a) Armenia / b) Constitutional Court / c) / d) 17.09.2004 / e) DCC-508 / f) On the conformity with the Constitution of obligations set out in the Protocol

no.12 to the Convention for the Protection of Human Rights and Fundamental Freedoms / g) to be published in *Tegekagir* (Official Gazette) / h).

*Keywords of the systematic thesaurus:*

5.2 **Fundamental Rights** – Equality.

*Keywords of the alphabetical index:*

European Convention on Human Rights, Protocol no. 12, conformity with the Constitution / Discrimination, definition.

*Headnotes:*

The obligations assumed by Armenia upon ratification of Protocol 12 ECHR are compatible with the Constitution, as the Protocol established an international legal mechanism for the realisation of the principle of equality and non-discrimination as enshrined in Articles 15 and 16 of the Constitution, as well as for the realisation of the implementation of the guarantee set out in Article 4 of the Constitution.

*Summary:*

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

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

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

The Constitutional Court considered it necessary to mention in its decision, that the content of the concept

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

#### Cross-references:

European Court of Human Rights:

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

#### Languages:

Armenian.



#### Identification: ARM-2004-3-006

**a)** Armenia / **b)** Constitutional Court / **c)** / **d)** 17.09.2004 / **e)** DCC-509 / **f)** On the conformity with the Constitution of obligations set out in Protocol no. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention / **g)** to be published in *Teghekgagir* (Official Gazette) / **h)**.

#### Keywords of the systematic thesaurus:

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

#### Keywords of the alphabetical index:

European Convention on Human Rights, Protocol no. 14, conformity with the Constitution.

#### Headnotes:

The obligations set forth in Protocol no. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention provide for additional guarantees to secure the protection of human rights and freedoms in accordance with the norms and principles of International Law and for the implementation of the right of judicial protection of rights and freedoms by an international court. Those obligations are in conformity with the Constitution.

#### Summary:

The President of the Republic lodged an application with the Constitutional Court for a review of the conformity with the Constitution of the obligations stated in Protocol no. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention.

The Constitutional Court stated that according to the Protocol, Armenia assumed the following obligations:

- to recognise the institutional structures of the Court as set forth in the above-mentioned Protocol; and
- to provide all conditions necessary for the execution of the effective consideration of cases by the European Court of Human Rights.

Armenia also reconfirmed its obligation to execute the final judgments of the European Court concerning cases to which it is a Party.

The Constitutional Court found that the obligations set forth in the Protocol were in conformity with the Constitution.

#### Languages:

Armenian.



# Austria

## Constitutional Court

### Statistical data

Session of the Constitutional Court during September/October 2004

- Financial claims (Article 137 B-VG): 5
- Conflicts of jurisdiction (Article 138.1 B-VG): 0
- Review of regulations (Article 139 B-VG): 14
- Review of laws (Article 140 B-VG): 45
- Challenge of elections (Article 141 B-VG): 3  
Article 142/143 B-VG: 0
- Complaints against administrative decrees (Article 144 B-VG): 640  
(324 refused to be examined)

and during November/December 2004

- Article 126a B-VG: 2
- Financial claims (Article 137 B-VG): 8
- Conflicts of jurisdiction (Article 138.1 B-VG): 1
- Review of agreements (Article 138a B-VG): 1
- Review of regulations (Article 139 B-VG): 20
- Review of laws (Article 140 B-VG): 65
- Challenge of elections (Article 141 B-VG): 1
- Complaints against administrative decrees (Article 144 B-VG): 369  
(227 refused to be examined)

### Important decisions

*Identification:* AUT-2004-3-003

**a)** Austria / **b)** Constitutional Court / **c)** / **d)** 14.10.2004 / **e)** B 1512/03 / **f)** / **g)** / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

- 3.19 **General Principles** – Margin of appreciation.  
 5.1.1.2 **Fundamental Rights** – General questions – Entitlement to rights – Citizens of the European Union and non-citizens with similar status.  
 5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.  
 5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship or nationality.

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

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

5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.

*Keywords of the alphabetical index:*

Couple, same sex, residence, right / Homosexual, partnership, legal regime, right to residence / European Union, citizen, homosexual, partner, non-EU citizen, residence.

*Headnotes:*

Neither the equal protection clause nor the European Convention on Human Rights (i.e. 'men and women' in Article 12 ECHR) require the extension of marriage, which is a relationship aiming at the general possibility of parenthood, to other kinds of relationships. The fact that elsewhere other partnerships are treated as being equivalent to marriage does not affect the legislator's freedom to apply the legal consequences provided exclusively for spouses only to relations between persons of the opposite sex.

However, there must be an objective context between marriage and its legal consequences. According to § 47.2 of the Alien Act of 1997, third country nationals who are spouses (children or parents) of citizens of the Union are entitled to a settlement permit. The intention of the legislator to facilitate, support and secure matrimonial or family life constitutes such an objective context.

The general provisions on residence of the Alien Act are open to all other partnerships – between persons of the same or opposite sex. Consideration of the particularity of marriage between a man and a woman cannot be said to lead to discrimination against other partnerships.

*Summary:*

A citizen of the United States married a German national of the same sex at a registry office in the Netherlands. He was denied a settlement permit on the ground that being a partner of the same sex was not a 'spouse' within the meaning of § 47.3 of the Alien Act.

He brought the case to the Constitutional Court alleging a violation of his fundamental rights to equal treatment among foreigners, to a fair trial, to private and family life and to freedom of movement and

residence; he further requested that the matter be referred to the Court of Justice of the European Communities.

It was not for the Constitutional Court to judge whether the legal opinion of the administrative authorities was as such correct. The Court could only oppose their legal opinion if another interpretation of the Alien Act was required by the Constitution. However, the Court could not find such a constitutional requirement; rather it found that the statute applied was objective and not discriminating in nature. It was even more so as the legislator had fulfilled its duty to take Community Law (Article 10 Regulation (EEC) no. 1612/68) into consideration when enacting the relevant statute.

Moreover, the Court stated that it did not fall under its jurisdiction to examine whether the authorities' interpretation of the Alien Act was in conformity with Community law. The Court could therefore not deal with the complainant's request to make a reference for a preliminary ruling. Not even the complainant himself maintained that Community law in the context of freedom of movement for workers and their right to be joined by their family or the case-law of the Court of Justice of the European Communities or the case-law of the European Court of Human Rights demanded treatment of a couple of the same sex equivalent to that of marriage. A Directive (2004/58/EC) enacted by the European Parliament and the Council which did not need to be implemented by the national legislator for the time being as well as the expectation of a change in the Luxembourg Court's case-law (Case 59/85 Reed [1986] ECR 1283; Case C-122/99 and C 125/99 [2001] ECR-I 4312) were, contrary to the complainant's view, of no relevance whatsoever to the case in question.

The Court dismissed the complaint.

#### *Languages:*

German.



#### *Identification:* AUT-2004-3-004

a) Austria / b) Constitutional Court / c) / d) 16.12.2004 / e) B 484/03 / f) / g) / h) CODICES (German).

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

4.3.4 **Institutions** – Languages – Minority language(s).  
5.3.40 **Fundamental Rights** – Civil and political rights – Linguistic freedom.  
5.3.45 **Fundamental Rights** – Civil and political rights – Protection of minorities and persons belonging to minorities.

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

District, judicial, meaning / District, mixed population / Language, minority, use in official communications.

#### *Headnotes:*

§ 3.1.1 of the Federal Government's regulation on the use by courts, administrative authorities and other offices of the Slovene language as an official language in addition to German (*Amtssprachen-Verordnung 1977*, hereinafter "the Regulation") lists three district courts (*Bleiburg*, *Eisenkappel* and *Ferlach*) in Carinthia. Given that there has not been a high enough percentage of the Slovene minority living in the court circuit of the district court of Klagenfurt, it is constitutional for this district court not to be listed in the relevant regulation as one in which the Slovene language could be used as an official language in addition to German.

The term 'judicial district' has, like the term 'administrative district' (Article 7.3 of the Vienna State Treaty 1955; hereinafter: the Treaty), a territorial meaning according to which a district court constitutes the smallest territorial unit within the ordinary court system.

The different treatment of members of the Slovene minority having the right to use their language before one of the three above-mentioned district courts and those members of the minority having the right to use their language only before administrative authorities results from the different meaning of the relevant terms used by the constitutional law itself (Article 7.3 of the Treaty).

#### *Summary:*

An Austrian national of the Slovene minority refused to pay the court fees for an entry in the land register

because he was not permitted to use the Slovene language before the district court of Klagenfurt. After unsuccessful appeals to the President of the Court of Appeal and to the Minister of Justice, he filed a complaint with the Constitutional Court. He complained that his constitutionally-guaranteed right to use Slovenian in the legal matter had been infringed by the application of § 3.1.1 of the Regulation: insofar as that provision restricted the public use of his mother-tongue to three explicitly listed district courts and excluded the district court of Klagenfurt, to whose jurisdiction some communities with a high proportion of the Slovene minority were subject, it contradicted Article 7.3 of the Vienna State Treaty of 1955.

The Court did not share the legal doubts of the complainant.

Article 7.3 lays down that (only) in ‘the administrative and judicial districts of Carinthia, Burgenland and Styria, where there are Slovene, Croat or mixed populations, the Slovene or Croat language shall be accepted as an official language in addition to German’. When examining the question of which were the territorial units that were thought of at the time of the Treaty’s conclusion, the Court quoted the relevant parts of its precedent (VfSlg. 15.970/2000; [AUT-2000-3-006]) on the interpretation of the term “administrative district”. In its precedent, the Court had ruled that that term also had to be related to ‘communities’ as the smallest territorial units and that the public use of the minority language had to therefore be granted both before the administrative authorities of the communities and of the political districts where a certain percentage of the population belonged to the Slovene minority.

Transferring its previous considerations to the territorial aspects of the term ‘judicial district’, the Court, pointed out that – aside from the fact that the terms used in the Treaty are general and undetermined – a ‘judicial district’ clearly means a circuit beneath the level of regional courts and, consequently, means the circuits of district courts.

That led, as the Court expressly stressed, to another important fact: the ordinary court system establishes the district courts as the smallest territorial units, and unlike the term ‘administrative district’, it is not possible to interpret the term ‘judicial district’ as an area of a community. Any different treatment concerning the public use of the minority language before an administrative or a judicial authority is an inevitable consequence of the fact that the Vienna State Treaty of 1955 itself applies the different terms ‘administrative and judicial district’ with regard to their territorial meaning.

On the basis of that interpretation, the Court assumed that the impugned provision could only contradict the Treaty if a high enough percentage of the Slovene minority (‘mixed population’) resided in the circuit of Klagenfurt’s district court. A look at the results of the decennial census held from 1951 to 2001 showed that that was not so.

#### *Languages:*

German.





# Azerbaijan Constitutional Court

## Important decisions

*Identification:* AZE-2004-3-003

**a)** Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 19.11.2004 / **e)** A-300 / **f)** / **g)** *Azerbaijan, Respublika, Khalg gazetii, Bakinski rabochiy* (Official Newspapers), *Azerbaijan Respublikasi Konstitusiyası Mehkemesinin Melumatı* (Official Digest) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Claim, filing, right / Claim, establishment, calculation / Contract, fulfilment.

*Headnotes:*

A person cannot apply to the state authorities for the protection of a right that has been violated without being informed about the violation of that right. The legislation links the right to bring a claim with the fact that a person knows or should have known that his/her right has been violated.

According to Article 78 of the Civil Code which was in force until 1 September 2000, the time limit in which a person must bring a claim starts to run from the day that the person has a right to bring a claim, and the right to bring a claim arises on the day on which the person was informed of the violation of his/her right or on the day on which the person should have known about the violation.

*Summary:*

Local Commercial Court no. 1 adopted a resolution on 19 May 2003 allowing a claim by Syama10 Firm

against Etilen-Polietilen Factory concerning the payment of a debt of 320,130,000 AZM. The resolution required the payment by Etilen-Polietilen Factory to Syama10 Firm of 20,500,000 AZM, as well as a 298,375,000 AZM penalty and 1,355,000 AZM payment to the tax authority.

By resolution of the Commercial Court on 12 August 2003, the resolution of the court of first instance was upheld. No modifications were made.

However, the decision of Judicial Chamber on Commercial Disputes of the Supreme Court of 9 October 2003 varied the abovementioned resolution of the Commercial Court. The part of the resolution concerning the payment of a penalty of 298,375,000 AZM was deleted. The remaining part of the resolution was unchanged.

According to the letter of Chairman of the Supreme Court of 20 April 2004, Article 424 of the Civil Procedure Code did not contain any grounds for the examination by the Plenum of Supreme Court of the complaint by Syama10 Firm by way of additional cassation proceedings.

Syama10 Firm alleged that the decision of the court of cassation instance was illegal and unfounded, and it brought a complaint before the Constitutional Court seeking a review of the conformity of the decision to the laws and Constitution. The complaint was based on the fact that the court of cassation instance applied Article 74 of the Civil Code of 1964, which should not have been applied, and moreover, without giving any reasons, it struck out the part concerning the penalty.

The court of cassation instance did not agree with the resolutions of the courts of first and appellate instances in the part concerning the claim by Syama10 Firm against Etilen-Polietilen Factory as to the 298,375,000 AZM penalty. Having taken into account the facts that the contract had been concluded in April 2000 and the claim arose in April 2003, the Court of Cassation considered that the time limit for bringing a claim had expired. Based on that fact, the Judicial Chamber on Commercial Disputes of the Supreme Court struck out the part concerning the penalty.

The Plenum of the Constitutional Court considered the decision of the court of cassation instance as incompatible with the civil legislation.

The Plenum of the Constitutional Court considered that the principal issue was the determination of the point at which the time limit for bringing a claim starts to run. An individual could not apply to state



authorities for the protection of a right that had been violated without being informed about that violation. Therefore, the legislation connects the right to bring a claim with the fact that an individual knows or should have known that his/her right has been violated. Thus, according to the Article 78 of the Civil Code which was in force until 1 September 2000, the time limit to bring a claim starts to run from the day on which the right to bring a claim arises, and the right to bring a claim arises on the day on which the person was informed about the violation of his/her right or on the day on which the person should have known about the violation of his/her right.

From the resolutions of the courts of first and appellate instances, it became evident that Etilen-Polietilen Factory had acknowledged the debt of 20,500,000 AZM to Syama10 Firm, and on 25 February 2002 and 19 March 2003 declarations confirming this had been signed and sealed.

Etilen-Polietilen Factory acknowledged that it owed a debt to Syama10 Firm until April 2003, that is, until Syama10 Firm lodged a claim with the court.

The Plenum of Constitutional Court came to the conclusion that the decision of the court of cassation instance, which was challenged by Syama10 Firm, contradicted Article 78 of the Civil Code which was in force until 1 September 2000, as well as Articles 416, 417.0.3 and 418.1 of the Code of Civil Procedure, which in turn caused a violation of the right to the legal protection of rights and liberties of every citizen as enshrined by the Article 60 of the Constitution.

In this connection, the Plenum of Constitutional Court decided that the decision of the Judicial Chamber on Commercial Disputes of the Supreme Court of 9 October 2003 contradicted Article 60 of the Constitution, Article 78 of the Civil Code, as well as Articles 416, 417.0.3 and 418.1 of the Code of Civil Procedure and should be considered null and void. In accordance with the decision of the Plenum, the case had to be reheard via the procedure specified in the legislation on civil procedure.

#### Languages:

Azeri.



## Belgium

### Court of Arbitration

#### Important decisions

*Identification:* BEL-2004-3-009

**a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 03.10.2004 / **e)** 157/2004 / **f)** / **g)** *Moniteur belge*, (Official Gazette), 18.10.2004 / **h)** CODICES (French, Dutch, German).

#### Keywords of the systematic thesaurus:

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

1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.

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

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

5.1.2.2 **Fundamental Rights** – General questions – Effects – Horizontal effects.

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

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

5.2.3 **Fundamental Rights** – Equality – Affirmative action.

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

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

5.3.45 **Fundamental Rights** – Civil and political rights – Protection of minorities and persons belonging to minorities.

#### Keywords of the alphabetical index:

*Actio popularis* / Discrimination, definition / Discrimination, prohibition of publication of intention / Freedom of expression, censorship, preventive, prohibition / Book, publication, ban, condition.

#### Headnotes:

In cases where legislation has expressly opted for an (open) system of protection against discrimination

among individuals (horizontal effect), it is inadmissible to exclude certain grounds of discrimination (political opinions or language, in the instant case) from the scope of the law.

The principle that offences and punishments must be strictly defined by law (*nullum crimen, nulla poena sine lege*) is not infringed by the use of the word “discrimination” in the definition of an offence if a judge can verify that the conditions listed by the Court have been fulfilled.

Freedom of expression is one of the main foundations of a democratic society. Open incitement to discrimination may be punished, but not the fact of publicising one's intention to resort to discrimination, hatred or violence, because such a prohibition would stifle debate. The general ban on publishing discriminatory statements infringes freedom of expression.

So-called “positive” discrimination and corrective inequality of treatment are acceptable under certain conditions, compliance with which must be verified by the courts.

#### Summary:

A number of individuals lodged applications to set aside the so-called Anti-Discrimination Law of 25 February 2003 prohibiting discrimination among individuals.

The Court accepts that the applicants have legitimate interests in this matter: in view of the nature of the obligations and sanctions laid down, including criminal ones, the fact that the Law is applicable to an unspecified number of individuals is not such as to classify the applications as an *actio popularis*.

By the same token, the interests of a number of applicants submitting applications as the representatives of a political party are accepted.

The first complaint was that the Law prohibited certain types of discrimination while disregarding others. The legislation only targets differential treatment that lacks any objective, reasonable justification and is based on sex, alleged race, colour, descent, national or ethnic origin, sexual orientation, civil status, birth, wealth, age, religious or philosophical conviction, present or future state of health, disability or a specific physical feature. Discrimination based on political convictions was excluded because the legislator had feared that extremist parties and fundamentalist organisations would misuse the legislative provisions. An amendment aimed at

adding “language” as a ground of discrimination had also been rejected.

The Court notes that the legislator expressly opted for an “open” system of protection in which inequality of treatment only constitutes discrimination if such differential treatment was objectively and reasonably unjustified. Under this system it is inadmissible to preclude specified grounds of discrimination from the scope of the law.

The Court struck out the possible grounds of discrimination set out in Article 2. In the Court's view, this setting aside should be taken as meaning that the Law is now applicable to all types of discrimination, whatever their basis.

The second complaint was directed against the criminal provisions of the Anti-Discrimination Law. Article 6.2 punishes any discrimination effected by public authority agents on grounds other than political opinions or language. Here again the Court considers the distinction drawn among various grounds of discrimination unjustifiable. However, this does not warrant the inference that criminal provisions must be taken as covering all grounds of discrimination, which would be incompatible with the principle that offences and punishments must be strictly defined by law. Article 6.2 must therefore be struck down in its entirety.

The other criminal provisions punish the expression of an intention to effect or incite to discrimination, rather than any discriminatory conduct as such. These definitions of offences affect freedom of expression and concern all individuals, and not only the staff of public authorities. The Court of Arbitration agrees that legislation is entitled to confine itself to punishing (or more severely punishing) the most reprehensible expressions of opinion.

The Court is invited to consider whether these definitions of offences comply with the principle that offences and punishments must be strictly defined by law (Articles 12 and 14 of the Constitution, Article 7.1 ECHR and Article 15.1 of the International Covenant on Civil and Political Rights).

It accepts that the word “discrimination” as used in the definition complies with the aforementioned principle provided that:

- the concept of discrimination is ascribed the same scope as in the case-law of both the European Court of Human Rights and the higher-level courts in Belgium;
- the prosecution can prove that discrimination has taken place, duly according the accused the benefit of the doubt;

- the discrimination in question has caused the victim direct, personal damage; and
- demonstrations taking place in the context of freedom of expression are not punishable offences unless there is a specific punishable intention.



The Court also holds that the definition given in the first indent of Article 6.1 of “incitement to discrimination, hatred or violence” as an offence complies with the principle that offences and punishments must be strictly defined by law and with freedom of expression (Article 19 of the Constitution and Article 10 ECHR) provided that there is a specific will (a special moral element), under specified circumstances (as listed in Article 444 of the Criminal Code), to “incite”, which must entail more than mere information, ideas or criticism.

In the Court's view, the ban stipulated in the second indent of Article 6.1 on “publicising an intention to resort to discrimination, hatred or violence” goes beyond what is necessary: this prohibition stifles the debate by preventing the individual expressing this intention from being contradicted and dissuaded from carrying out this intention (repeal of Article 6.1, second indent).

The Court strikes down the provision banning the publication of discriminatory comments (Article 2.4, fifth indent). It has not been demonstrated, in the instant case, that restrictions on freedom of expression are necessary in a democratic society, that they correspond to a vital need and that they are proportionate to the legitimate aim pursued.

The provision allowing for a court application for the discontinuation of “discriminatory” publications (Article 19.1) can be interpreted in conformity with freedom of expression and freedom of the press (Articles 19 and 25 of the Constitution), given that the courts can only intervene when the publication in question has already been disseminated (the Constitution prohibits any form of preventive censorship), and provided that the judge ascertains that the restriction of freedom of expression is necessary in the instant case, corresponds to an urgent social need and is proportionate to the legitimate aim pursued.

Still according to the Court of Arbitration, it is not unconstitutional to prevent or offset inequalities (so-called “positive action”) under the conditions listed in its judgment.

#### *Languages:*

French, Dutch, German.

#### *Identification:* BEL-2004-3-010

**a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 20.10.2004 / **e)** 158/2004 / **f)** / **g)** *Moniteur belge*, (Official Gazette), 28.10.2004 / **h)** CODICES (French, Dutch, German).

#### *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.  
 3.12 **General Principles** – Clarity and precision of legal provisions.  
 3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.

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

Cannabis, possession, use, sanction / Public nuisance, definition / Prosecution, mandatory, principle.

#### *Headnotes:*

The Law stipulating that no police reports should be drawn up in cases of possession by a person of full age of a given quantity of cannabis for personal use, where such possession does not involve a public nuisance or problem use of the drug, comprises a number of concepts which are so vague and imprecise that it is impossible to ascertain their exact scope, so that this text does not comply with the requirements of the principle of mandatory prosecution in criminal cases.

#### *Summary:*

The Law on trafficking in poisonous, soporific, narcotic, psychotropic, disinfectant or antiseptic substances and substances potentially useable in the unlawful manufacturing of narcotic and psychotropic substances provides that the possession by a person of full age of cannabis for personal use is a punishable offence. However, it was amended under a Law of 3 May 2003, and it now lays down that the police should not draw up reports on, but rather merely record, cases of possession by a person of full age of a given quantity of cannabis for personal use, where such possession does not involve a public nuisance or problem use of the drug.

The Court of Arbitration has before it an application to strike this Law down. The applicants invoke, *inter alia*, an infringement of the principle of mandatory prosecution in criminal cases as enshrined in Articles 12.2 and 14 of the Constitution, Article 7 ECHR and Article 15 of the International Covenant on Civil and Political Rights. The Court notes that while the said principle does not go so far as to require legislation to govern every individual aspect of the prosecution procedure, it does nevertheless require the law not to infringe the particular requirements of precision, clarity and predictability with which all criminal legislation must comply. It stresses that in the instant case this requirement is all the more necessary as the challenged provision departs in several respects from the general rules of criminal law, particularly in connection with the jurisdiction of the public prosecutor's office and the obligation on police services to report on offences coming to their attention.

The applicants' main complaint is that the decision not to prosecute a person of full age in possession of cannabis implies that such possession is confined to a given "quantity for personal use" only.

According to the Court of Arbitration, when the Law stipulates that although the possession of cannabis for personal use is punishable, such possession should, under certain conditions, not be reported to the public prosecutor's office, the quantity of the drug in question must be clearly established. This is the only way of ensuring that police officers have an objective criterion for deciding whether or not to draw up a report.

Although it is admissible *per se* to assign the executive the responsibility for determining such quantity, the legislative mandate to do so must unequivocally require the executive to determine a clearly defined quantity. Insofar as the provision complained of does not comply with these requirements and, as explained in a Ministerial Directive, allows the definition of a quantity of cannabis for personal use to be determined on the basis of subjective elements, the prescriptive content of the provision is not sufficiently detailed to comply with the principle of mandatory prosecution in criminal cases.

The applicants further object to the vague wording of the provision in question, which states that where the possession of cannabis by a person of full age does not involve any "problem use" of the drug, no report should be drawn up, but rather an anonymous police record entered.

The Court observes that the wording of the provision complained of would seem to indicate that the

"problem use" in question is gauged not in terms of with the effect which the person in question has on his/her immediate family and friends but rather solely on the basis of his/her personal condition. The police officers drawing up the report are quite free to assess the cannabis user's psychological, medical and social condition, a situation which leads to uncertainty of the law and is at variance with the principle of mandatory prosecution in criminal cases.

Lastly, the applicants complain of the fact that possession by a person of full age of a quantity of cannabis for personal use is tolerated as long as it does not involve a "public nuisance".

The legal definition of "public nuisance" refers primarily to the possession of cannabis in specified buildings or in their immediate environs. The Court notes that it is difficult to understand what is meant by the "premises of a social service" or its "immediate environs". Furthermore, possession cannabis is deemed to cause a public nuisance in "places frequented by under-age persons for educational, sporting or social purposes". This definition of "public nuisance" is broad enough to be interpreted as meaning that a report should be drawn up on any case of cannabis use by a person of full age in a place accessible to under-age persons. The foregoing comments, in the Court's opinion, show that the ambiguity of the "public nuisance" concept also fails to comply with the requirements of the principle of mandatory prosecution in criminal cases.

The Court therefore strikes down the provision complained of, but simultaneously makes use of the faculty (see Article 8 of the Special Law on the Court of Arbitration of 6 January 1989 – CODICES) of retaining the effects of the provision until the date of publication of the present judgment in the *Moniteur belge*, in order to avoid depriving of a ground of defence any persons on whom a police report has been transmitted to the public prosecutor's office in breach of this provision.

#### *Cross-references:*

- See also *Bulletin* 1998/3 [BEL-1998-3-011], *Bulletin* 2004/2 [BEL-2004-2-007].

#### *Languages:*

French, Dutch, German.





*Identification:* BEL-2004-3-011

**a)** Belgium / **b)** Court of Arbitration / **c)** / **d)** 20.10.2004 / **e)** 159/2004 / **f)** / **g)** *Moniteur belge*, (Official Gazette), 29.10.2004 / **h)** CODICES (French, Dutch, German).

*Keywords of the systematic thesaurus:*

1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.

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

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

5.2.2.6 **Fundamental Rights** – Equality – Criteria of distinction – Religion.

5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of conscience.

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

5.3.34 **Fundamental Rights** – Civil and political rights – Right to marriage.

*Keywords of the alphabetical index:*

Marriage, civil, persons of the same gender / Marriage, religious, prior to civil marriage / Homosexual, marriage.

*Headnotes:*

The Court may only criticise a case of identical treatment where both categories of individuals finding themselves in situations which are fundamentally different in the light of the measure under consideration have been treated identically for no apparent justifiable reason.

It is for legislation to determine the nature and conditions of marriage. However, such legislation must comply with the constitutional principle of equality and non-discrimination.

Given that the legislator now regards marriage as an institution having the main aim of creating a lasting conjugal life between two individuals, the effects of which are governed by law, the difference between persons wishing to form a conjugal life with a person of the opposite sex and those wishing to form such a life with a person of the same sex is not such as to preclude the possibility of marriage for the latter.

*Summary:*

The Law of 13 February 2003 permitting persons of the same sex to marry amended *de facto* several provisions of the Civil Code.

A number of individuals submitted an application to the Court of Arbitration to set this Law aside. Some of the applicants rely on their capacity as married persons to argue that they have been affected by the modification of the nature of marriage, given that marriage is no longer in keeping with their intentions at the time of their marriage. Others adduce their status as single persons to contend that their interests have been affected because, before celebrating a religious wedding they would be required, under Article 21 of the Constitution, to conclude a civil marriage and therefore to support an institution which is incompatible with their religious convictions.

The Court of Arbitration refrains at this stage from pronouncing on the *locus standi* of these applicants, because that would involve considering the scope and effects of the Law and would therefore confuse the consideration of the admissibility of the applications with the examination of the merits.

The applicants begin by pleading that the Law complained of applies the same treatment to fundamentally different situations without any reasonable justification.

The Court replies that it can only criticise cases of identical treatment where both categories of individuals finding themselves in situations which are fundamentally different in the light of the measure under consideration have been treated identically for no apparent reason.

Secondly, the applicants complain that the Law flouts Articles 11, 11bis and 21.2 of the Constitution, and also, taken in conjunction with Article 10 of the Constitution, Article 12 ECHR, Article 23 of the International Covenant on Civil and Political Rights and “the general principles of law in civilised nations”.

The Court first of all holds that the parties are ascribing to Article 21.2 of the Constitution, which provides that “a civil wedding must always precede the nuptial benediction except in cases established by law, should this be necessary”, a scope which it does not have.

This constitutional provision, incorporated in 1831, was intended to put an end to the then common practice whereby some individuals, being convinced that a religious wedding was sufficient to have effect in the civil domain, would only conclude a religious marriage. This means that Article 21.2 of the Constitution neither establishes the conditions for marriage nor has the aim or effect of subordinating civil marriage to any given religious conception of marriage.

The Court subsequently observes that the fact of Articles 10.3 and 11bis of the Constitution ascribing special importance to equality between women and men does not have the effect of enabling the “fundamental sexual duality of humankind” to be considered as a principle of the Belgian constitutional system. Nor can Article 12 ECHR and Article 23 of the International Covenant on Civil and Political Rights be interpreted as requiring Contracting States to consider the “fundamental sexual duality of humankind” as a cornerstone of their respective constitutional systems. The applicants are therefore ascribing to those provisions a scope which they do not have.

The applicants further contend that the Law complained of violates Article 12 ECHR and Article 23 of the International Covenant on Civil and Political Rights and “the general principles of law in civilised nations”, in conjunction with Articles 10 and 11 of the Constitution, by extending the concept of marriage to cover an institution which cannot be defined as marriage within the meaning of the said provisions.

In answering this argument, the Court relies on Article 53 ECHR and Article 5.2 of the International Covenant on Civil and Political Rights. It deduces that Article 12 ECHR and Article 23.2 of the International Covenant on Civil and Political Rights cannot be interpreted as prohibiting States Parties to these conventions from granting the right secured under these provisions to persons wishing to exercise this right with persons of the same sex.

In connection with alleged discrimination by society and the State against the “protection of the family” (Article 23.1 of the International Covenant on Civil and Political Rights), the Court points out that the applicants have not demonstrated, nor can it see, how “the family's relative position of protection” could be undermined by a Law which makes no tangible change to the legal provisions governing the effects of civil marriage between individuals of different sex.

The Court further replies, with regard to an alleged violation of religious freedom, that the damage claimed by the applicants results from Article 21.2 of the Constitution rather than from the Law complained

of. The fact is that the Court has no jurisdiction to adjudicate on a restriction of freedom of religion and worship deriving from a choice effected by the very author of the Constitution.

*Languages:*

French, Dutch, German.





# Bosnia and Herzegovina Constitutional Court

## Important decisions

*Identification:* BIH-2004-3-006

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

*Keywords of the systematic thesaurus:*

- 3.9 **General Principles** – Rule of law.
- 3.10 **General Principles** – Certainty of the law.
- 4.7.2 **Institutions** – Judicial bodies – Procedure.
- 5.2 **Fundamental Rights** – Equality.
- 5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.
- 5.3.13.28 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to examine witnesses.

*Keywords of the alphabetical index:*

Witness, testimony outside trial.

*Headnotes:*

If the contested judgment meets the criteria of legality and constitutionality, in accordance with the principle of the rule of law under Article 1.2 of the Constitution, there is no legal basis for claiming discrimination in relation to a fair hearing merely because the court decided an earlier case differently in a similar situation.

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

accordance with the principle of the rule of law provided for in Article 1.2 of the Constitution.

*Summary:*

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

The appellant alleged that the challenged judgments violated his rights to a fair trial provided for in Article 11.3.e of the Constitution and Article 6.3.d ECHR and his right to prohibition of discrimination provided for in Article 11.4 of the Constitution and Article 14 ECHR.

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

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

The Constitutional Court took note that, in the case at hand, the previous testimonies of witnesses had been read out at the main hearing, without their presence at the hearing in person in the capacity of witnesses. However, the ordinary courts had had valid reasons for such procedure: the testimonies had been read

out on the basis of powers given under Article 333.1.1 of the Law on Criminal Procedure, because it had not been possible to summon witnesses to the main hearing since their place of residence was not on the territory of the Republika Srpska any more; the judgment was not exclusively based on the stated testimonies, but on the statement of another witness and material evidence; and the appellant had had an opportunity to give his statement in relation to the previously given testimonies of the disputed witnesses. The stated circumstances came within the quoted case law of the Constitutional Court and the European Court of Human Rights, in relation to cases where witnesses have not given their testimonies before, nor were present at, the main hearing.

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

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

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

#### *Languages:*

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



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

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

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

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.  
 3.9 **General Principles** – Rule of law.  
 3.16 **General Principles** – Proportionality.  
 3.17 **General Principles** – Weighing of interests.  
 3.18 **General Principles** – General interest.  
 4.5.8 **Institutions** – Legislative bodies – Relations with judicial bodies.  
 5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.  
 5.3.17 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

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

Court, decision, execution.

#### *Headnotes:*

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

#### *Summary:*

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

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

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

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

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

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

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

#### *Languages:*

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



## Bulgaria Constitutional Court

### Statistical data

1 September 2004 – 31 December 2004

Number of decisions: 4

There was no relevant constitutional case-law during the reference period 1 September 2004 – 31 December 2004.



## Canada Supreme Court

### Important decisions

*Identification:* CAN-2004-3-005

**a)** Canada / **b)** Supreme Court / **c)** / **d)** 18.11.2004 / **e)** 29419 / **f)** Haida Nation v. British Columbia (Minister of Forest) / **g)** *Canada Supreme Court Reports* (Official Digest), [2004] 3 S.C.R. 511 / **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.  
3.17 **General Principles** – Weighing of interests.  
5.5.5 **Fundamental Rights** – Collective rights – Rights of aboriginal peoples, ancestral rights.

*Keywords of the alphabetical index:*

Government, duty to consult and accommodate / Aboriginal people, land rights / Crown, honour, obligation.

*Headnotes:*

The Crown has a duty to consult and accommodate the Aboriginal peoples prior to making decisions that might adversely affect their as yet unproven Aboriginal rights and title claims. This duty does not extend third parties.

*Summary:*

For more than 100 years, the Haida people have claimed title to all the lands of Haida Gwaii and the waters surrounding it, but that title has not yet been legally recognized. The Province of British Columbia issued a Tree Farm License (T.F.L. 39) to a forestry company in 1961, permitting it to harvest trees in an area of Haida Gwaii designated as Block 6. In 1981, 1995, and 2000 the Minister replaced T.F.L. 39, and in 1999, the Minister approved a transfer of T.F.L. 39 to a new forestry company. The Haida challenged in court these replacements and the transfer, which were made without their consent and, since at least 1994, over their objections. They asked that the



replacements and transfer be set aside. The chambers judge dismissed the petition, but found that the government had a moral, not a legal, duty to negotiate with the Haida. The Court of Appeal reversed the decision, declaring that both the government and the company have a duty to consult with and accommodate the Haida with respect to harvesting timber from Block 6. In a unanimous decision, the Supreme Court of Canada dismissed the Crown's appeal and allowed the company's appeal.

The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the principle of the honour of the Crown. While the asserted but unproven Aboriginal rights and title are insufficiently specific for the honour of the Crown to mandate that the Crown act as a fiduciary, the Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.

The scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. The Crown is not under a duty to reach an agreement; rather, the commitment is to a meaningful process of consultation in good faith. The content of the duty varies with the circumstances and each case must be approached individually and flexibly. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal people with respect to the interests at stake. The effect of good faith consultation may be to reveal a duty to accommodate. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.

Third parties cannot be held liable for failing to discharge the Crown's duty to consult and accommodate. The honour of the Crown cannot be delegated,

and the legal responsibility for consultation and accommodation rests with the Crown.

The Crown's obligation to consult the Haida on the replacement of T.F.L. 39 was engaged in this case. The Haida's claims to title and Aboriginal right to harvest red cedar were supported by a good *prima facie* case, and the Province knew that the potential Aboriginal rights and title applied to Block 6, and could be affected by the decision to replace T.F.L. 39. T.F.L. decisions reflect strategic planning for utilisation of the resource and may have potentially serious impacts on Aboriginal rights and titles. If consultation is to be meaningful, it must take place at the stage of granting or renewing T.F.L.'s. Furthermore, the strength of the case for both the Haida's title and their right to harvest red cedar, coupled with the serious impact of incremental strategic decisions on those interests, suggest that the honour of the Crown may also require significant accommodation to preserve the Haida's interest pending resolution of their claims.

#### *Cross-references:*

The companion case *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, deals with a mining company that has been seeking permission from the British Columbia government to re-open an old mine since 1994. The Taku River Tlingit First Nation (TRTFN), which participated in the environmental assessment process engaged in by the Province under the *Environmental Assessment Act*, objected to the company's plan to build a road through a portion of the TRTFN's traditional territory. The Province granted the project approval certificate in 1998. The TRTFN brought a petition to quash the decision on grounds based on administrative law and on its Aboriginal rights and title. The chambers judge concluded that the decision makers had not been sufficiently careful during the final months of the assessment process to ensure that they had effectively addressed the substance of the TRTFN's concerns. She set aside the decision and directed a reconsideration. The majority of the Court of Appeal upheld the decision, finding that the Province had failed to meet its duty to consult with and accommodate the TRTFN. In a unanimous decision, the Supreme Court of Canada allowed the Province's appeal.

The Crown's obligation to consult the TRTFN was triggered in this case and the process engaged in by the Province under the *Environmental Assessment Act* fulfilled the requirements of its duty to consult and accommodate. The TRTFN was part of the Project Committee, participating fully in the environmental review process. Its views were put before the

decision makers, and the final project approval contained measures designed to address both its immediate and its long-term concerns. The Province was not under a duty to reach agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN.

#### *Languages:*

English, French (translation by the Court).



#### *Identification:* CAN-2004-3-006

**a)** Canada / **b)** Supreme Court / **c)** / **d)** 09.12.2004 / **e)** 29866 / **f)** Reference re Same-Sex Marriage / **g)** *Canada Supreme Court Reports* (Official Digest), [2004] 3 S.C.R. 698 / **h)** Internet: <http://www.lexum.umontreal.ca/csc-scc/en/index.html>; CODICES (English, French).

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

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

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

3.11 **General Principles** – Vested and/or acquired rights.

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

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

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

5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of conscience.

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

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

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

Marriage, civil / Homosexuality, same-sex couples, right to marriage / Judicial restraint.

#### *Headnotes:*

Proposed federal legislation extending rights to civil marriage to same-sex couples is consistent with the constitutional guarantees of equality rights and freedom of religion.

#### *Summary:*

Pursuant to Section 53 of the Supreme Court Act, the Governor in Council referred the following questions to the Supreme Court of Canada:

1. Is the ... Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes within the exclusive legislative authority of the Parliament of Canada? If not, in what particular or particulars, and to what extent?
2. If the answer to question 1 is yes, is Section 1 of the proposal, which extends capacity to marry to persons of the same sex, consistent with the Canadian Charter of Rights and Freedoms? If not, in what particular or particulars, and to what extent?
3. Does the freedom of religion guaranteed by Article 2.a of the Canadian Charter of Rights and Freedoms protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?
4. Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in Section 5 of the Federal Law-Civil Law Harmonisation Act, no. 1, consistent with the Canadian Charter of Rights and Freedoms? If not, in what particular or particulars and to what extent?

The operative sections of the proposed legislation read as follows:

1. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.
2. Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.

In a unanimous opinion, the Court answered the reference questions as follows: Question 1 is answered in the affirmative with respect to Section 1 of the proposed legislation and in the negative with respect to Section 2. Questions 2 and 3 are both



answered in the affirmative. The Court declined to answer Question 4.

#### Question 1

Section 1 of the proposed legislation is *intra vires* Parliament. In pith and substance, Section 1 pertains to the legal capacity for civil marriage and falls within the subject matter of Section 91.26 of the Constitution Act, 1867. Section 91.26 did not entrench the common law definition of “marriage” as it stood in 1867. The “frozen concepts” reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life. Read expansively, the word “marriage” in Section 91.26 does not exclude same-sex marriage. The scope accorded to Section 91.26 does not trench on provincial competence. While federal recognition of same-sex marriage would have an impact in the provincial sphere, the effects are incidental and do not relate to the core of the power in respect of “solemnisation of marriage” under Section 92.12 of the Constitution Act, 1867 or that in respect of “property and civil rights” under Section 92.13.

Section 2 of the proposed legislation is *ultra vires* Parliament. In pith and substance, Section 2 relates to those who may (or must) perform marriages and falls within the subject matter allocated to the provinces under Section 92.12.

#### Question 2

Section 1 of the proposed legislation is consistent with Sections 15.1 and 2.a of the Canadian Charter of Rights and Freedoms (equality rights and freedom of religion). The purpose of Section 1 is to extend the right to civil marriage to same-sex couples and, in substance, the provision embodies the government’s policy stance in relation to the Section 15.1 equality concerns of same-sex couples. With respect to the effect of Section 1 of the proposed legislation, the mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the Section 15.1 rights of another. The promotion of Charter rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the Charter was meant to foster. Although the right to same-sex marriage conferred by the proposed legislation may potentially conflict with the right to freedom of religion if the legislation becomes law, conflicts of rights do not imply conflict with the Charter; rather, the resolution of such conflicts generally occurs within the ambit of the Charter itself by way of internal balancing and delineation. It has not been demon-

strated in this reference that impermissible conflicts – conflicts incapable of resolution under Section 2.a – will arise.

#### Question 3

Absent unique circumstances, the guarantee of religious freedom in Section 2.a of the Charter is broad enough to protect religious officials from being compelled by the state to perform civil or religious same-sex marriages that are contrary to their religious beliefs.

#### Question 4

In the unique circumstances of this reference, the Court should exercise its discretion not to answer Question 4. First, the federal government has stated its intention to address the issue of same-sex marriage legislatively regardless of the Court’s opinion on this question. As a result of decisions by lower courts, the common law definition of marriage in five provinces and one territory no longer imports an opposite-sex requirement and the same is true of Section 5 of the Federal Law-Civil Law Harmonisation Act, no. 1. The government has clearly accepted these decisions and adopted this position as its own. Second, the parties in the previous litigation, and other same-sex couples, have relied upon the finality of the decisions and have acquired rights which are entitled to protection. Finally, an answer to Question 4 has the potential to undermine the government’s stated goal of achieving uniformity in respect of civil marriage across Canada. While uniformity would be achieved if the answer were “no”, a “yes” answer would, by contrast, throw the law into confusion. The lower courts’ decisions in the matters giving rise to this reference are binding in their respective provinces. They would be cast into doubt by an advisory opinion which expressed a contrary view, even though it could not overturn them. These circumstances, weighed against the hypothetical benefit Parliament might derive from an answer, indicate that the Court should decline to answer Question 4.

#### Languages:

English, French (translation by the Court).



# Croatia

## Constitutional Court

### Important decisions

*Identification:* CRO-2004-3-011

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 15.09.2004 / **e)** U-III-2998/2002 / **f)** / **g)** *Narodne novine* (Official Gazette), 136/04 / **h)** CODICES (Croatian, English).

*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.

5.2.2.3 **Fundamental Rights** – Equality – Criteria of distinction – National or ethnic origin.

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

*Keywords of the alphabetical index:*

Contract, null / Contract, condition, performance.

*Headnotes:*

Despite the provision of Article 71.2 of the Constitutional Act, whereby the Court is authorised not to consider a constitutional complaint in cases where the complaint does not deal with the violation of a constitutional right, the Court's practice is that all applications that meet formal requirements, and are therefore considered constitutional complaints, are decided on the merits.

*Summary:*

The applicant in the constitutional complaint had filed a civil suit to have declared null and void a contract for the exchange of real property signed by himself and the respondent. The civil courts ruled against him. In his constitutional complaint, he claimed the violation of the constitutional rights guaranteed by Articles 14.2 and 26 of the Constitution, which he substantiated by the facts that the impugned contract

had been concluded during wartime, when he had, as a person of Serb nationality, felt endangered; the alleged disproportionate difference in the values of the real properties exchanged; and the lack of certification of the signatures on the contract.

From the case-file, the Constitutional Court found that the impugned contract had been concluded in written and valid form in a law office in Knin in 1992. It contained a clause identifying and describing the property in detail, and had been discharged. Consequently, it was not a quasi-contract. It was the will of the parties to conclude the contract in the way in which it was concluded. The circumstances connected to the certification of the signatures on that contract could not lead to a ruling different from those made in the impugned court judgments.

The applicant did not allege unequal treatment at trial or biased court procedures, which could have led to a finding of a violation of the right to equality of all before the law (Article 14.2 of the Constitution). Furthermore, the Court did not find any reasons for finding a violation of Article 26 of the Constitution, under which all citizens of the Republic of Croatia and aliens are equal before the courts, other government bodies and bodies vested with public authority.

Consequently, the constitutional complaint was rejected as ill-founded.

*Languages:*

Croatian, English.



*Identification:* CRO-2004-3-012

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 28.09.2004 / **e)** U-I-1948/2000 / **f)** / **g)** *Narodne novine* (Official Gazette), 145/04 / **h)** CODICES (Croatian, English).

*Keywords of the systematic thesaurus:*

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

3.18 **General Principles** – General interest.

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

*Keywords of the alphabetical index:*

Property, disposal, limitation / Resource, natural, exploitation.

*Headnotes:*

Mineral wealth, as a good of interest to the State, enjoys special protection and is owned by the State. It can be exploited under the conditions and in the manner prescribed by law. The rules on the exploitation of such land also apply to the owner of the land, who is, regarding the grant of a mining concession, in the same position as all other legal subjects interested in the exploitation of raw materials.

*Summary:*

In proceedings of review of the conformity of the law with the Constitution, the issue was a proposal made by a profit-making company submitted in connection with Articles 1.2 and 3 of the Mining Act (*Narodne novine*, nos. 27/91, 26/93, 92/94, 35/95 – consolidated text, 114/01 and 190/03 – consolidated text, hereinafter: the Act).

Article 1 of the Act stipulates:

“Mineral wealth is a good of interest to the Republic of Croatia, enjoys special protection and shall be exploited under the conditions and in the manner provided for by this Act.

Mineral wealth is the property of the Republic of Croatia.”

Article 2 of the same Act defines mineral wealth and/or mineral raw materials, while items 1 to 7 of Article 3 list what are considered to be mineral raw materials. Item 7 of Article 3 of the Act lists the following raw materials: technical and construction stone, construction sand and gravel, and brick clay.

Other provisions of the impugned Act provide as follows. Article 9 sets out the legal and natural persons (commercial companies and tradesmen) to which and the conditions under which permission for the research of or concessions for the exploitation of mineral raw materials may be granted. Article 10.1 provides that the right to research or exploit mineral raw materials in certain areas by commercial companies and tradesmen must be exercised according to the authorisations or mining concessions issued by the governmental bodies competent for mining. Article 30.3 states that a mining concession provides the right to carry out mining activity with the

aim of commercially exploiting the mineral raw materials. Article 44.1 prescribes what a mining concession must contain.

As to the landowner, the impugned Act states that a concession may not be granted unless the concessionaire has concluded a contract with the landowner for the lease of the land (Article 42.2); the owner must receive a copy of a mining concession granted to a third party (Article 44.2); and the owner has a right to the rehabilitation of the land together with a right to have measures undertaken for the protection of his property and the environment during and after exploitation (Articles 53 and 54).

The applicant argued that the impugned provisions and the impugned Act as a whole did not set out provisions which would, in accordance with the provisions of Articles 3, 48.1, 49.2, 50 and 52.2 of the Constitution, regulate the relations between the owner of the land with the mineral wealth and/or mineral raw materials and the State, which is, according to the impugned Act, the owner of the mineral wealth.

The applicant argued that the owner of the land with construction gravel was prevented by the impugned Act from realising his property rights to the use of that land, for he could not obtain a concession for its exploitation or build an ECO-PARK on the land. He put forward that that was contrary to the provisions of Articles 3.2 and 33 of the Ownership and Other Proprietary Rights Act (*Narodne novine*, nos. 91/96, 68/98, 137/99, 22/00, 73/00 and 114/01), and deemed that both the impugned provisions and the impugned Act as a whole should be brought into accordance with his constitutional right to his own property and with his right to freely use that property.

In examining the applicant's proposal, the Constitutional Court took into account the following provisions of the Constitution, which are relevant to these kinds of constitutional court proceedings:

Article 52 of the Constitution:

“The sea, sea coast and islands, waters, air space, mineral wealth and other natural resources, as well as land, forests, flora and fauna, other parts of nature, real estate and goods of special cultural, historic, economic and ecological importance, which are specified by law to be of interest to the Republic of Croatia, shall enjoy its special protection.

The way in which goods of interest to the Republic of Croatia may be used and exploited by holders of rights to them and by their owner, and

compensation for the restrictions imposed on them, shall be regulated by law.”



Article 3 of the Constitution establishes the highest constitutional values, including the inviolability of ownership.

Article 48.1 of the Constitution guarantees the right of ownership.

Article 49.2 of the Constitution states:

“The State shall ensure all entrepreneurs an equal legal status on the market.”

Article 50 of the Constitution states:

“Property may, in the interest of the Republic of Croatia, be restricted or expropriated by law upon payment of compensation equal to its market value, and the exercise of entrepreneurial freedom and property rights may exceptionally be restricted by law for the purposes of protecting the interest and security of the Republic of Croatia, nature, the environment and public health”.

The Court held that the impugned part of the Act was in accordance with the above-mentioned Constitutional provisions.

That view is based on the reasoning that mining wealth, as a good of interest to the State, enjoys the State’s special protection and therefore the State is its legitimate owner and its exploitation is allowed only under conditions and in the manner stipulated by law. This means that the rules on exploitation of such land also refer to the owner of the land, and that he is, regarding the issue of a mining concession, in the same position as all other legal subjects interested in the exploitation of raw materials.

The Court found that the part of the applicant’s claims relating to the proceedings in which he had tried to obtain a concession for the exploitation of raw materials amounted to a specific legal case that had been resolved in proceedings which did not fall within the jurisdiction of the Court to review the constitutionality of the law. It therefore advised the applicant to institute the corresponding constitutional court proceedings for the protection of his rights against individual enactments of governmental bodies.

#### *Languages:*

Croatian, English.

#### *Identification: CRO-2004-3-013*

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 28.09.2004 / **e)** U-III-3698/2003 / **f)** / **g)** *Narodne novine* (Official Gazette), 141/04 / **h)** CODICES (Croatian, English).

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

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

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

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

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

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

3.16 **General Principles** – Proportionality.

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

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

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

Detention, on remand, extension.

#### *Headnotes:*

A decision on the extension of detention on remand, which is a legal measure depriving a person of his or her freedom before a final criminal conviction, has to be thoroughly reasoned. It has to state all relevant and complementary reasons justifying the need for the further extension of detention on remand. A court is obliged to consider reasons for extension of detention on remand, taking into account the specific circumstances of a particular case. It has to establish a legal basis for detention on remand and state the detailed reasons on which it bases its decision, including its opinion on the existence of the legal and legitimate aims of detention on remand.



### Summary:

The Constitutional Court accepted (thereby departing from its practice in the past) a constitutional complaint submitted in connection with the applicant's detention on remand during the time that criminal proceedings were still taking place against him on several counts of abuse of office and authority with the acquisition of considerable material gain. The applicant's detention on remand was repeatedly extended in the 15-month period preceding the complaint, and the end of proceedings was not in sight – as was evident from the court file and from the statements of what evidence was still to be adduced. Nevertheless, the maximum period of detention on remand was not exceeded.

The Constitutional Court based its decision on the violation of the applicant's constitutional rights on the provisions of Article 22 of the Constitution (the right to freedom is a fundamental human right which may be restricted only under conditions laid down by the Constitution), Article 16.2 of the Constitution (principle of proportionality and legality in restriction of freedoms guaranteed by the Constitution) and Article 25.2 of the Constitution (anyone who is detained and accused of a criminal offence shall have the right to be brought before the court within "the shortest term"....).

In addition to the Constitution and the Criminal Procedure Act, the Court also relied on the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, and the case-law of the European Court of Human Rights in Strasbourg. The Court noted that the ordinary courts had omitted to apply, in addition to domestic legislation, the case-law of the international sources of law, which had already become a part of the Croatian legal system, and ranked above domestic law in terms of legal effects.

Based on the international case-law, the Court pointed out the need for ordinary courts to follow, study, become acquainted with and apply the provisions of ratified international treaties and corresponding (and obligatory) case-law of international courts. The reason for that was because the Court held that in the case at instance, the legally prescribed instruments and measures for the protection of human rights were inadequate for the protection of the fundamental human rights of individuals from the application of unnecessary and exaggerated measures of restriction, i.e. the case-law of international sources of law had not been followed, and instead administrative measures had been taken based on previous domestic judicial opinions.

In the case at instance, the Constitutional Court took into account the amount of time that the applicant spent in detention on remand, all the circumstances of the case, the procedural steps taken in the context of the criminal proceedings against the applicant, as well as the requirements imposed by the Constitution, the European Convention on Human Rights and the Criminal Procedure Act. The Constitutional Court found that the courts deciding on the extension of the applicant's detention on remand had failed to proceed with due diligence. The impugned decisions of the Supreme Court and the Osijek County Court lacked adequate reasoning concerning the applicant's constitutional rights protected under Article 22, in conjunction with Articles 16.2 and 25.2 of the Constitution.

The following are excerpts of separate opinions delivered by two judges.

Judge Vuković stated that the assessment of the facts concerning detention on remand was up to the trial court alone and not to the Constitutional Court. That statement could not and was not contrary to the provisions of Articles 5 and 9 ECHR. That was all the more so because Croatian legislation did not contain any explicit constitutional or legal provisions empowering the Constitutional Court to hear and determine cases on detention on remand during the main trial in criminal cases. Lastly, in his separate opinion, Judge Vuković relied on a previous decision of the Constitutional Court, Decision no. U-III-1182/1997, in connection with which the Legislative Committee of the Croatian Parliament adopted a conclusion stating, *inter alia*: "...starting from the principle of the separation of powers into the legislative, executive and judicial branches and the fact that the Constitution defines the Supreme Court as the highest court securing the uniform application of law and equality of citizens, the Government shall be obliged to examine the constitutional position of the Constitutional Court and its influence on procedure until the completion of trial".

Judge Željko Potočnjak, LL.D., disagreed with the decision because he found no violation of the applicant's constitutional right and no relevant reason to quash the courts' decisions. It should have been decided, as a preliminary question, whether the provision of Article 102.1 of the Criminal Procedure Act (on the basis of which the quashed decisions on extension of detention on remand had been rendered) complied with the provision of Article 5.1 ECHR, to which the applicant had also referred. Only after having decided that question, should the Court have considered the complaint of a violation of the applicant's constitutional rights. The reason was that the case-law of the European Court of Human Rights



indicates that the reasons for detention on remand in Article 5.1 ECHR are cited only *exempli gratia* and that further provisions do not define *numerus clausus* reasons for detention on remand, which is even more evident since the risk of collusion (risk that a person against whom the criminal proceedings are pending will destroy evidence, influence the witnesses or obstruct and prevent in some other way the determination of relevant facts in the proceedings) is not mentioned in those provisions and that ground for detention is recognised by the legal systems of all parties to the European Convention.

Judge Potočnjak deemed that the decision, without appropriate prior review and consideration of all the effects, essentially changed the Constitutional Court practice regarding cases of the same kind where, until the adoption of the decision in the case at instance, the Court had a restrictive approach in determining whether the rulings on detention on remand violated fundamental human rights. In the past, the Court had quashed such rulings only on the ground of exceptionally grave infringements of laws resulting in violations of the fundamental human right to freedom. In the case at instance, according to Judge Potočnjak, the Court found that the detention on remand, which was lawful, was not at the same time constitutional, and the Court had, against the Constitution and law, set up new additional criteria for the review of the constitutionality of a ruling on detention on remand. In addition, the detention on remand in the case at instance was within the limits of the maximum lawful length of detention on remand set by law, and nothing indicated that the courts ordering detention on remand had omitted to act in compliance with the relevant provisions of the Criminal Procedure Act, or that the constitutional right to a trial within the reasonable time had been at all violated.

Judge Potočnjak found that the Court's statement that the application of the measure of detention on remand was to be determined with regard to the "steps undertaken so far in the proceedings" constituted a particularly disputable issue, and he argued that the Court thus substantially influenced the right of the trial court to determine when and what evidence it would take, and its freedom to assess and weigh that evidence. Such an approach substantially diminished the role of the Constitutional Court as a "guard" of constitutionality, legality and fundamental human rights, since by introducing new standards for the determination of detention on remand, the Court reduced legal certainty and security. He added that the case-law of the European Court of Human Rights provided no support for the decision taken by the Constitutional Court.

### *Languages:*

Croatian, English.



### *Identification:* CRO-2004-3-014

**a)** Croatia / **b)** Constitutional Court / **c)** / **d)** 27.10.2004 / **e)** U-III-669/2003 / **f)** / **g)** *Narodne novine* (Official Gazette), 157/04 / **h)** CODICES (Croatian, English).

### *Keywords of the systematic thesaurus:*

1.3.4.8 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of jurisdictional conflict.

1.3.5.12 **Constitutional Justice** – Jurisdiction – The subject of review – Court decisions.

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

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

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

### *Keywords of the alphabetical index:*

Arbitration, court, decision, constitutional review / Contract, arbitration clause, interpretation.

### *Headnotes:*

The reasons for a decision adopted by a court of arbitration whereby it found that it was incompetent to deal with a dispute are highly relevant to the protection of the constitutional rights of the parties to the dispute. Indeed, the lack of reasons in a decision by a court of arbitration may result in a violation of the applicant's right to a fair trial within a reasonable time, including the right to have his civil rights determined by an independent and impartial tribunal as guaranteed by Article 29 of the Constitution, as the impugned decision deprives the applicant of his right of access to a court on the territory of Croatia without adequate reasons for doing so.

### Summary:

The Constitutional Court allowed a constitutional complaint brought against a decision of the Court of Arbitration of the Permanent Arbitral Tribunal attached to the Croatian Chamber of Commerce in Zagreb, whereby the Court of Arbitration had declared that it had no jurisdiction in respect to a Croatian company's claim against the respondent, an Italian company. The impugned decision was quashed, and the case returned to the Court of Arbitration for renewed proceedings.

Before bringing the constitutional complaint, the applicant had tried to settle the dispute before the Commercial Court in Zagreb, and only after the Commercial Court had accepted the objection to its jurisdiction by the respondent and dismissed the claim, did the applicant apply to the Permanent Arbitral Tribunal attached to the Croatian Chamber of Commerce on the basis of the provision of Article 13 of the contract, which states:

“Any dispute that may arise between the parties and which cannot be resolved in a friendly manner shall be resolved by a court of arbitration seated in Zagreb, Croatia, consisting of three arbitration judges appointed according to the regulations of the International Chamber of Commerce, and with application of Croatian substantive law.”

However, the Court of Arbitration had come to the conclusion that it lacked jurisdiction in light of the respondent's repeated objection to jurisdiction, and the Court of Arbitration's statement of reasons in the impugned decision reads as follows:

“...the respondent may raise an objection as to the jurisdiction of the Court of Arbitration only to the Court of Arbitration itself, before he ends his presentation of the substance of the case. The statements of the parties before the ordinary courts are therefore irrelevant in the proceedings conducted before this Court of Arbitration, especially as in this case the claimant has not proved the respondent's intention to vary, by his statements before ordinary courts, the terms of the arbitration clause in clause 13 of the contract.

The Court of Arbitration finds that the arbitration clause in clause 13 of the contract does not mention the Tribunal either explicitly or implicitly. It does not mention either the Court of Arbitration attached to the Croatian Chamber of Commerce, or the Croatian Chamber of Commerce, or the Croatian Chamber or anything similar. Nor is there any mention of the Rules of the Croatian Chamber

of Commerce on settling disputes with an international element, or of the Zagreb rules or of any kind of link that would indicate the Tribunal. In such a situation, the Court of Arbitration finds no reason in favour of the jurisdiction of the Tribunal. The only thing that was determined in the contract was the place of arbitration and the number of members of the panel of arbitration, and the reference to the rules of the International Chamber of Commerce indicated that the parties were probably thinking of the International Chamber of Commerce (ICC) in Paris, whose arbitrators should be appointed in accordance with the ICC rules, and a court or panel composed in such way would conduct the proceedings in Zagreb. It is not for this Tribunal to decide on that issue, but for the ICC Tribunal.”

In its preparations for the constitutional court proceedings, the Constitutional Court had to resolve the preliminary question of whether the impugned decision of the Court of Arbitration was a decision against which a constitutional complaint was allowed under the provision of Article 62.1 of the Constitutional Act on the Constitutional Court of the Republic of Croatia. This question was to be resolved in light of the body that had made the impugned decision and its content, that is, the matter that the decision concerned. The above-mentioned article of the Constitutional Act stipulates that anyone may bring a constitutional complaint to the Constitutional Court where he or she finds that a decision of a governmental body, a body of local and regional self-government or a legal person vested with public authority, on his rights and obligations, or on a suspicion or an accusation of a criminal act, has violated his or her human rights and fundamental freedoms guaranteed by the Constitution (hereinafter: constitutional right).

Constitutional complaints regarding arbitral decisions and proceedings had appeared very rarely before the Constitutional Court before the date the case at instance was considered.

The Constitutional Court found that the following amendments to Croatian legislation were relevant to the exercise of its jurisdiction and to the need for the Constitutional Court to decide on the arbitration issue:

- the amendments to the Constitution of the Republic of Croatia (*Narodne novine*, no. 113/00) in connection with the amendment of the provision of Article 29 of the Constitution (the right to a fair trial was, in addition to criminal proceedings, established as a constitutional guarantee in all other legal proceedings that decide on the rights and obligations of parties);

- the enactment of the Constitutional Act on Revisions and Amendments of the Constitutional Act on the Constitutional Court of the Republic of Croatia (*Narodne novine*, no. 49/02 – consolidated text) (the present Article 62.1);
- the enactment of the new, separate Arbitration Act (*Narodne novine*, no. 88/01), which regulates the legal material (that is to say, legal and other relevant documents) to be put before the arbitration panel or court, which before this Act entered into force had been regulated by some provisions of the Civil Procedure Act (*Narodne novine*, no. 53/91), the Conflict of Laws Act (*Narodne novine*, no. 53/1) and the Obligations Act (*Narodne novine*, nos. 53/91, 73/91, 111/93, 3/94, 7/96, 91/96 and 112/99); and
- Article 4 of the Judicial Act (*Narodne novine*, nos. 3/94, 100/96, 115/97, 131/97, 129/00 and 67/01), which states: “everyone shall have the right to be tried by the court into whose jurisdiction the matter falls, in proceedings established by law, without unfounded delay. Particular legal matters that fall within the jurisdiction of courts may by contract be entrusted to courts of arbitration for adjudication, in compliance with law.”

Consequently, the Constitutional Court found that it had the jurisdiction to hear and determine constitutional court proceedings regarding arbitration decisions. After examining the relevant provisions of the Arbitration Act, it concluded that the applicant had been put into a situation where no body in the territory of the Republic of Croatia had jurisdiction to decide on his duties and obligations, and at the same time he had no right of appeal or any other legal remedy against the impugned decision before any governmental body.

The Constitutional Court held that the impugned decision did not take into account the provisions of Article 99.2 of the Obligations Act, which stipulate that when a court interprets contractual provisions in dispute, it should not adhere to the literal meaning of the terms used, but should examine the mutual intention of the contracting parties. The Court of Arbitration had omitted to do so. Instead, the statement of reasons of the impugned decision contained only reasons suggesting that the parties did not have the intention of agreeing by contract on the Court of Arbitration in Zagreb as their choice of jurisdiction, and that statement did not examine or explain the rules by which the arbitrators of the Permanent Arbitral Tribunal attached to the Croatian Chamber of Commerce were appointed, and whether those rules differed from the rules for the appointment of arbitrators of the International Chamber of Commerce in Paris – and if so, whether that

difference could result in a declaration that the Court of Arbitration in Zagreb lacked jurisdiction. Finally, the impugned decision did not state any legal grounds or reasons as to why arbitration judges could not be appointed in the instant case by direct application of the rules of the International Chamber of Commerce in Paris, as the agreed on by the parties.

Consequently, because of essential defects in the reasons for the impugned decision, the Constitutional Court found that the applicant’s constitutional right, as guaranteed by the provision of Article 29.1 of the Constitution, whereby everyone has the right to an independent and fair trial provided by law which shall within a reasonable time decide upon his rights and obligations, had been violated, as the impugned decision prevented the applicant’s access to a court on the territory of the Republic of Croatia.

#### *Languages:*

Croatian, English.



#### *Identification:* CRO-2004-3-015

a) Croatia / b) Constitutional Court / c) / d) 11.11.2004 / e) U-III-2656/2004 / f) / g) *Narodne novine* (Official Gazette), 160/04 / h) CODICES (Croatian, English).

#### *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.

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

Judgment, enforcement, law / Execution, proceedings, legal basis / Debt, enforcement.

#### *Headnotes:*

In a situation where a part of a final judgment has been declared null and void by a subsequent judgment rendered in proceedings between the same parties, a court shall allow execution only of the part of the judgment that has not been declared null and void.

**Summary:**

The applicants in the constitutional complaint acted as joint and several guarantors in respect of a loan for an amount equal to double the average (statistic) salary made to the debtors. The debtors were obliged to pay an annual interest rate of 84%, and in case of default, an annual default interest rate of 84%. Those conditions soon made it impossible for the debtors to fulfil their contractual obligations. The creditor obtained a legally valid and enforceable judgment in civil proceedings, on the basis of which he instituted enforcement proceedings against the property of the joint and several guarantors.

Finding themselves in a situation where their entire property was endangered due to the usurious interest rates, the applicants (the joint and several guarantors) instituted another set of civil proceedings, in which they were successful with their claim to have declared void the part of the contract providing for an annual default interest rate exceeding 24%, which corresponded to the interest rate applied by banks in similar contracts.

The results of those two sets of proceedings needed to be merged and execution carried out only up to the amount of the lower interest rate (24%), in accordance with the subsequent declaratory judgment. Because of the appeal against the enforcement proceedings, the applicants were advised to bring a suit. However, both their suit and the appeal to the higher court were rejected.

Firstly, the Constitutional Court temporarily stayed execution of the enforcement proceedings until the delivery of the final decision on the constitutional complaint.

While resolving the matter on its merits, the Constitutional Court found the proceedings for a bar against execution had not been conducted fairly because the lower court had erred in its interpretation of the application of Article 46.2.9 of the Enforcement Act, which stipulates:

“(2) The execution debtor may lodge an appeal, in particular in the following cases:

[...]

9. if the claim is extinguished because of a fact that has occurred at a time when the execution debtor could no longer effectively present it in the proceedings that led to the decision, or if the claim is extinguished because of a fact that has occurred after the conclusion of the court or

administrative settlement or after a notarised document has been drawn up [...]”,

and the provisions of Articles 109.1 and 110 of the Obligations Act, which read:

“The court shall consider nullity *ex officio*, and any person with an interest in the matter may plead it.

The right to raise a plea of nullity shall not expire.”

The legal opinion of the Constitutional Court regarding the case at instance followed from the above-mentioned provisions of the law. Where a subsequent judgment ordering the payment of a debt is rendered between the same parties and that judgment declares part of a debt whose has been payment ordered in a previous judgment to be null and void and there are no circumstances for reopening the proceedings in which the previous judgment was delivered, the courts shall not allow the execution of the entire debt but only the part of the debt that has not been declared null and void. That being so, in the case at instance the claim had to be considered to be partly extinguished because of a fact that had occurred at a time when the execution debtor could no longer effectively present it in the proceedings that led to the previous judgment ordering payment of the debt and the judgment for its enforcement. Moreover, taking into account the provision of Article 109.1 of the Obligations Act according to which the courts shall consider nullity *ex officio*, it is the duty of the courts upon being informed by an execution debtor of the partial nullity of the writ of execution established by a final court decision between the same parties to the execution proceedings, not to allow execution of the part that has been declared null, and to allow execution only of the remaining valid part.

For those reasons, the Court found that the applicants' constitutional right to a fair trial, a right guaranteed by the provision of Article 29.1 of the Constitution, had been violated.

**Languages:**

Croatian, English.





# Czech Republic

## Constitutional Court

### Statistical data

1 September 2004 – 31 December 2004

- Judgments by the plenary Court: 5
- Judgments by chambers: 55
- Other decisions of the plenary Court: 12
- Other decisions by chambers: 781
- Other procedural decisions: 61
- Total: 914

### Important decisions

*Identification:* CZE-2004-3-013

**a)** Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 15.04.2003 / **e)** I.US 752/02 / **f)** Extradition for criminal prosecution / **g)** *Sbírka nálezů a usnesení*, no. 30, Judgment no. 54 (Collection of decisions and judgments of the Constitutional Court) / **h)** CODICES (Czech).

*Keywords of the systematic thesaurus:*

- 2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
- 2.2.1.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and constitutions.
- 5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
- 5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
- 5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.

*Keywords of the alphabetical index:*

Extradition, torture / Extradition, information about receiving state / Obligation, international, conflict / Treaty, human rights, primacy.

*Headnotes:*

The precedence of obligations resulting from conventions on the protection of human rights in the case of a conflict of obligations arising from international treaties results first and foremost from the content of these conventions in relation to the Constitution, according to which the Czech Republic is a law-based State. Respect for and protection of fundamental rights is a defining attribute of a law-based state, so that, in the case that there exist side by side a treaty obligation protecting a fundamental right and a treaty obligation which tends to threaten the same right, the former obligation must prevail. No amendment to the Constitution can be interpreted in the sense that, in consequence thereof, the already attained procedural level of the protection of fundamental rights and freedoms would be restricted. Although following the amendment to the Constitution, conventions on the protection of human rights no longer constitute a separate category of legal norms which take precedence, over other treaty obligations, they are nonetheless a special group of norms and, at the same time, provide a reference for both abstract norm control and proceedings on constitutional complaints.

*Summary:*

The complainant is a Moldovan citizen. The Moldovan authorities requested the Czech Republic to extradite him so that he could be prosecuted for theft. Both the Regional Court and the Superior Court ruled that the complainant's extradition was permissible and the Minister of Justice decided to allow the complainant's extradition. In his constitutional complaint the complainant contested the mentioned decision as in conflict with Article 3 ECHR, Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention against Torture"), Article 7 of the International Covenant on Civil and Political Rights ("ICCPR"), and Article 7.2 of the Charter of Fundamental Rights and Basic Freedoms ("Charter"), as in his view, should the deportation be carried out, he would allegedly be subjected to torture or other inhuman treatment.

The Constitutional Court consulted the Office of the UN High Commissioner for Refugees in Prague (UNHCR) and the Czech Helsinki Committee. According to their reports, human rights are violated in Moldovan prisons, in particular, the right to life and the prohibition of torture and other cruel, inhuman and degrading treatment.

The Constitutional Court considered the contested decisions from the perspective of the violation of



fundamental rights and basic freedoms guaranteed by the constitutional order of the Czech Republic. In this connection, it examined first of all the alleged violation of Article 3 ECHR, since the complainant maintained that, should he be extradited, he would be subjected to treatment forbidden by Article 3, in other words, torture, inhuman or degrading treatment or punishment.

Apart from the obligations arising from the European Convention on Human Rights, the Constitutional Court further concerned itself with obligations resulting from the Convention against Torture. Article 3.1 thereof provides that no State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. For the purposes of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or massive violations of human rights (Article 3.2).

In the case of *Soering v. the United Kingdom*, the European Court of Human Rights decided that, according to the Convention, an extraditing State bears certain responsibility for any subsequent bad treatment of the extradited individual: “were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances [...] would plainly be contrary to the spirit and intentment of [Article 3]”. In the case of *D. v. the United Kingdom*, the European Court of Human Rights emphasised that, in principle, aliens subject to deportation have no claim to remain on the territory of the States parties to the Convention; nevertheless, in light of the very exceptional circumstances of the case and from a basic humanitarian perspective, it declared that to carry out the decision to deport the complainant would constitute a violation of Article 3 ECHR.

It appears from the decisions of the Regional Court and the Superior Court that those courts did not concern themselves with the issue of substantial grounds and merely observed that the complainant should not be deported to a region beset by military conflict and that there are no humanitarian, health, or other serious grounds that would hinder the deportation.

In the light of the case law of the European Court of Human Rights, the Constitutional Court examined whether substantial grounds exist for believing that, if the complainant were extradited, he would face the

danger of torture (the “substantial grounds test”). It came to a view entirely different from that of the ordinary courts and found the constitutional complaint to be well-founded. The UNHCR statement and attached monitoring report each independently confirmed that the substantial grounds in question do exist. The conditions in Moldovan prisons into which he would be placed (for the duration of his criminal prosecution and, should he be found guilty by a court, for the period of serving the sentence imposed) represent a genuine threat to the complainant’s rights to be free of torture, inhuman or degrading treatment or punishment. In this respect, the ordinary courts encroached upon complainant’s fundamental rights protected by Article 3 ECHR, Article 3 of the Convention against Torture, Article 7 ICCPR, and Article 7.2 of the Charter. The Constitutional Court emphasised at this juncture that it is not competent to find an actual violation in Moldovan prisons of the prohibition on torture, inhuman or degrading treatment or punishment. On the basis of the submitted evidence, however, the Constitutional Court found that there are substantial grounds for supposing that, if the complainant were extradited, the threat exists that this prohibition will be violated.

In the complainant’s case, therefore, two of the Czech Republic’s international obligations are in conflict, those under the European Convention on Extradition and those under the mentioned international human rights conventions. The Constitutional Court then declared that it is appropriate in such cases to accord precedence to the obligations arising from the conventions on the protection of human rights; therefore, it quashed the contested decisions.

#### *Languages:*

Czech.



#### *Identification: CZE-2004-3-014*

**a)** Czech Republic / **b)** Constitutional Court / **c)** Third Chamber / **d)** 16.09.2004 / **e)** III. US 288/04 / **f)** Service contribution to emeritus military personnel / **g)** / **h)** CODICES (Czech).

*Keywords of the systematic thesaurus:*

- 3.11 **General Principles** – Vested and/or acquired rights.  
 3.16 **General Principles** – Proportionality.  
 3.19 **General Principles** – Margin of appreciation.  
 3.22 **General Principles** – Prohibition of arbitrariness.  
 4.5.2 **Institutions** – Legislative bodies – Powers.  
 4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.  
 5.2.2.9 **Fundamental Rights** – Equality – Criteria of distinction – Political opinions or affiliation.  
 5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.

*Keywords of the alphabetical index:*

Competence, certificate, requirement / Communism, supporter / Soldier, professional / Remuneration, fair, principle.

*Headnotes:*

The legislature must define subjects of law on reasonable and objective grounds that are free from any arbitrariness. Equality requires the elimination only of unjustified differences. The principle of equality in law must be understood as requiring that the legal differentiation in the approach to certain rights may not manifest arbitrariness. It does not imply, however, that any right whatsoever must be accorded to everybody. Statutory rules which accord advantages to one group or category of persons as against another cannot, in and of themselves and without more, be designated as violating the principle of equality. The legislature has a certain amount of discretion to enshrine such preferential treatment. It must at the same time strive to ensure that advantages are granted on objective and reasonable grounds and that a relationship of proportionality exists between this aim and the means employed to attain it.

*Summary:*

The complainant contested a decision of the Supreme Administrative Court by asserting that it constituted a violation of the Charter of Fundamental Rights and Basic Freedoms, the Constitution, Article 6. 1 and Article 14 ECHR, Article 1 Protocol 1 ECHR, and Article 2.1 and Article 26 of the International Covenant on Civil and Political Rights. In the contested decision, the Supreme Administrative Court rejected on the merits the complainant's case against a decision of the Minister of Defence, which had upheld a decision of the Military Office of Social Security rejecting his claim for retroactive acknowledgement of his service contribution.

The complainant had been granted a service contribution for the period 1995 – 2013. By decision of the Military Office for Social Security, however, the payment of this contribution was confirmed only until 1996. For this reason, the complainant brought an action before that office. Public authorities had decided that the complainant had not voluntarily submitted to an evaluation of whether he was capable of continuing to perform his service ("recertification"), thus he did not fulfill an essential condition for renewal of the payment of the service contribution. The complainant asserts that he was not able to take part in the recertification because he was not a member of the Military Defence Intelligence Service, to which it related. He considers a restrictive interpretation of the term "recertified" to be unconstitutional, for it leads to discriminatory consequences. He proposed that the Constitutional Court quash this decision and annul the provision according to which the payment of his service contribution was discontinued.

The constitutional complaint was held not to be well-founded. The Court took into account the Supreme Administrative Court's argument to the effect that, in relation to recertification, the legislature granted more advantages to a group of persons who were assigned to a special sector of the army, namely to members of the former Counterintelligence and the Military Defence Intelligence Service. This approach was justified by their role in ensuring the State's safety during the military conflict in the Persian Gulf. In interpreting the term "recertification", which was carried out for two groups of persons, it must be pointed out that in the first category were soldiers who had been, on the basis of their voluntary decision, recertified and found capable of further performing service, and in the second category were soldiers whose service relation continued until the Act entered into force. In connection with the analysis of the term at issue "was voluntarily recertified and found capable of further performing service", it came to the conclusion that the intent of the given statutory scheme was to grant to a relatively narrow group of persons who had undergone repeated assessments of their capability the advantage of crediting previously excluded periods. It was not therefore appropriate to give a broad interpretation to this exception.

The Constitutional Court did not consider that the interpretation which the Supreme Administrative Court gave to the provision in question exceeded constitutional limits. The service contribution was taken away from the category of persons who had been given preferential treatment in relation to other persons, paradoxically for actions which were frequently directed against these persons. It would therefore be immoral for persons who previously provided support to the communist regime to be

remunerated from public funds. It is in the light of these considerations that one must also understand the indirect amendment of this Act, which represents the relaxation of strict provisions in relation to those former professional soldiers whose service contributions have been withdrawn on the basis of these provisions, even though immediately after the overthrow of the totalitarian regime they voluntarily underwent recertification, with negative results in that their conduct in the service was tied to the violation of human rights by the communist regime.

If the complainant's petition aims at the annulment of this inequality on the basis of the asserted violation of the principle of equality, that is, on the basis that not all persons were enabled to obtain the reapproval, then *de facto* he is seeking a positive intervention of the legislature, or an act which does not fall within the competence of the Constitutional Court.

In spite of this partial conclusion, it must nonetheless be observed that the contested provisions do not exhibit features of unconstitutionality. The legislature must define subjects of law on reasonable and objective grounds that justify its approach and that are free from any arbitrariness. The Constitutional Court adheres to the position that equality requires the elimination only of unjustified differences. The principle of equality in law must be understood such that the legal differentiation in the approach to certain rights may not manifest arbitrariness. It does not follow therefrom, however, that any sort of right whatsoever must be accorded to everybody. Statutory rules which accord advantages to one group or category of persons as against another cannot, in and of themselves and without more, be designated as violating the principle of equality. The legislature has a certain amount of discretion to enshrine such preferential treatment. It must at the same time strive to ensure that advantages are granted on objective and reasonable grounds and that a relationship of proportionality exists between this aim and the means employed to attain it.

For the given reasons the Constitutional Court rejected the constitutional complaint as manifestly unfounded.

#### *Languages:*

Czech.



#### *Identification:* CZE-2004-3-015

**a)** Czech Republic / **b)** Constitutional Court / **c)** Fourth Chamber / **d)** 23.09.2004 / **e)** IV. US 524/03 / **f)** Rent regulation / **g)** / **h)** CODICES (Czech).

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

3.25 **General Principles** – Market economy.

5.2 **Fundamental Rights** – Equality.

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

5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to a sufficient standard of living.

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

Housing, lease, termination / Housing, lease, amount, determination / Housing, rent, pricing, regulation / Housing, tenant, capacity, rights / Housing, tenant, obligation to vacate apartment.

#### *Headnotes:*

Czech law on the rental of flats is based on an enhanced protection of the tenant. This increased protection is justified primarily on social grounds. Nonetheless, it is not permissible to transfer to the landlord the social burdens of the tenant. Although the amount of rent is of significance for assessing the suitability of the replacement flat, it is so, however, only in the sense that it must correspond to the ordinary amount of rent in the given place and time. Therefore, the level of rent that was set in the period when an unconstitutional regulation of rent applied cannot be considered as comparable. The circumstance that there has not as yet been adopted a statute on rents, which would lead to its deregulation, cannot work to the landlord's detriment. The distortion of the market in flats caused by the long-term unresolved problem of leased flats with the so-called "regulated rents" cannot further be conserved by judicial case law. It conflicts with the constitutional principle of equality of the subjects of private law relations. Tenants and landlords of flats may not be placed in positions of inequality by "regulated rents" and "unregulated rents". Therefore, if the landlord obtains the right to evict a tenant from a flat with a regulated rent, he has the right to the enforcement of the eviction under the same conditions as those which apply for a landlord who has obtained the same in relation to a flat with an unregulated rent.

### Summary:

The complainant is the landlord of a flat who gave notice of the termination of his lease, so that, according to currently applicable law, he was obliged to procure for the tenant a replacement flat. In his constitutional complaint he sought to have quashed the Regional Court ruling which had affirmed the District Court ruling. By this ruling his action seeking the enforcement of the eviction notice was rejected on the merits. The first instance court came to the conclusion that the replacement flat which the complainant offered the tenant did not meet the requirements of a replacement flat, because it was not essentially a flat of equal value to the vacated flat. Although in terms of location, square footage, and even quality it would be possible to consider the replacement flat as one that was essentially of equal value, the prescribed non-regulated rent was several times higher than that of the original regulated rent for the vacated flat. The first instance court came to the conclusion that, in the circumstance where the tenant's rent would be set at a level higher than regulated rent, such replacement flat could not be considered as a replacement flat of equal value. The appellate court affirmed the decision of the first instance court. The Supreme Court rejected the complainant's extraordinary appeal on preliminary grounds. The complainant emphasised that he had acquired for the tenant the most inexpensive flat in the given location and that, by its decision, the court shifted the State's social obligations upon the complainant because it took into consideration solely the tenant's financial situation but in no sense the complainant's financial situation.

The Constitutional Court came to the conclusion that the constitutional complaint was well-founded. The complainant objected that the Charter of Fundamental Rights and Basic Freedoms had been violated, in that ordinary courts in judicial proceedings failed to respect his right to judicial protection and the principle of equality in the sense that they did not recognise the residence offered by the complainant as a flat that was comparable (essentially of equal value) to the flat which the tenant was meant to vacate, the main reason being the fact that the amount of rent was several times higher than that for the original flat.

Czech law on the rental of flats is based on an enhanced protection of the tenant. This fact is particularly evident where a rental relationship is terminated, both in the sense that that possibility is limited to precisely defined grounds for which a court can assent to the termination of the lease of a flat, and in the sense that protection is granted to the tenant by providing that he is not obliged to move out of the flat until an equivalent replacement flat is procured for him.

The legal provisions regulating the matter distinguish various types of replacement flats on the basis of both quantitative and qualitative criteria. Such flats are defined by law as a replacement flat which, according to local conditions, is essentially of equal value to the vacated flat. In interpreting the terms, "essentially of equal value" and "local conditions", the Constitutional Court came to the conclusion that they must be interpreted in the sense that they place upon the landlord the obligation to make all efforts which can reasonably be expected of him to procure a replacement flat which, according to the local conditions and to all parameters laid down in the law, most closely approximates the vacated flat. In a situation where it is, under local conditions, difficult or impossible to procure such a commensurate replacement flat, a restrictive interpretation of the term, "essentially of equal value", would result *de facto* in depriving the landlord of his right to give the tenant notice of termination. A restrictive interpretation would lead to the elimination of the landlord's right of disposition as an owner, by which his constitutionally guaranteed right would be affected.

In the course of the proceeding to enforce the eviction from the flat, the complainant offered the tenant a replacement flat which clearly, in area, quality and furnishings, was essentially of equal value to the vacated flat. The amount of rent was the sole reason the ordinary courts did not acknowledge this replacement flat as being essentially of the same value. Although the required flat the complainant offered was one of smaller area where a lower rent could be set, nonetheless the tenant rejected it, as it was not a flat of equal value. The complainant also offered the required replacement flat with the lowest possible rent, although it did not have regulated rent, as was the case with the vacated flat. In view of the prevailing situation on the market in flats, it was not possible for the landlord to obtain by legal means a replacement flat with regulated rent. The Constitutional Court has repeatedly emphasised that the social burdens of economically disadvantaged persons, which should otherwise be borne by the State, cannot be placed upon landlords. Accordingly, the constitutional complaint was granted and the contested decision was quashed.

### Languages:

Czech.





*Identification: CZE-2004-3-016*

a) Czech Republic / b) Constitutional Court / c) Fourth Chamber / d) 11.10.2004 / e) IV. US 538/03 / f) Testimony of a sexual abused minor / g) / h) CODICES (Czech).

*Keywords of the systematic thesaurus:*

1.6.1 **Constitutional Justice** – Effects – Scope.  
 3.16 **General Principles** – Proportionality.  
 3.22 **General Principles** – Prohibition of arbitrariness.  
 4.7.2 **Institutions** – Judicial bodies – Procedure.  
 5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.  
 5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Rules of evidence.  
 5.3.13.20 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Adversarial principle.  
 5.3.13.28 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to examine witnesses.  
 5.3.44 **Fundamental Rights** – Civil and political rights – Rights of the child.

*Keywords of the alphabetical index:*

Witness, testimony outside trial / Witness, protection / Child, best interest.

*Headnotes:*

In order for the accused to be accorded a fair trial, any restriction of the right of defence must receive sufficient procedural compensation from the State bodies participating in the criminal proceedings. A decision not to examine a child before court, taken in the interest of protecting the child's mental and moral development, could constitute a measure which is strictly necessary, while the cross-examination of other witnesses could be considered a procedural compensation for the restriction of the right of the defence. In line with constant jurisprudence, the facts of the case must also be proved by other evidence (in this case, indirect evidence which was mutually supporting) so that only a single conclusion can be inferred from them and any other possible conclusions can be excluded.

The judgment of the Constitutional Court may not constitute, even indirectly, a decision on the complainant's guilt or innocence.

An indictment issued in a criminal proceeding cannot be considered a final decision, nor may its issuance be considered as some other encroachment by public authorities into constitutionally guaranteed fundamental rights and basic freedoms.

*Summary:*

In his constitutional complaint, the complainant contested ordinary court decisions finding him guilty of the criminal offence of the sexual abuse of a minor. He asserted that his rights guaranteed by the Charter of Fundamental Rights and Basic Freedoms (hereinafter "the Charter") and by the ECHR had been infringed. He stated that, since the child's testimony had been obtained as an exigent and unrepeatable act before the criminal prosecution had even been initiated, he had not had the opportunity, in the course of his criminal trial, to assert his right of defence by asking the child questions. The state bodies participating in the criminal proceedings had decided on the basis of this testimony without further summoning the child to give evidence in the presence either of the complainant or his defence attorney. The complainant was of the view that testimony obtained in this manner could not serve as evidence supporting his conviction and therefore requested that the Constitutional Court quash these decisions.

The Constitutional Court decided that the constitutional complaint was well-founded. It assessed whether and to what extent the restriction on the right of defence in relation to a child witness, whose testimony was the sole direct evidence against the complainant, could be tolerated. The Constitutional Court had previously held that initiating the pre-trial phase of the proceeding by carrying out an exigent act must fall within an objective and precisely defined situation and that in the case that such a situation is not present, due to the inapplicability of permissible exceptions to the principle of immediacy and orality, that would constitute an encroachment upon the constitutionally guaranteed right to defence. In the interests of a just decision, therefore, it is necessary to ensure such conditions as allow the accused to assert his rights by means of the relevant procedural guarantees. If the Criminal Procedure Code allows evidence taken outside of the main hearing to be used for a decision on the merits, that taking of evidence must be done in such a manner as to guarantee the right of defence and the principle that the proceeding must be accusatorial to a degree making it comparable to the safeguards applicable to the admission of evidence in the main hearing.

The Constitutional Court also took into consideration the conclusions resulting from the case law of the European Court of Human Rights (hereinafter "the



European Court”) relating to Article 6.3.d ECHR (see *Van Mechelen and others v. The Netherlands*, 1997, *Lüdi v. Switzerland*, 1992). Under certain circumstances, it is possible to consider witness testimony admissible in conformity with the cited article of the Convention even where the examination was made during the pre-trial phase of the proceeding, if the defence has the right to give its views on the testimony, impugn it and ask the witness questions. In the European Court’s view, the testimony of a witness who has never faced cross examination cannot be the exclusive or decisive evidence of guilt (see *P.S. v. Germany*, 2001); on the other hand, the reading out of the testimony of such a witness need not constitute a violation of Article 6 of the Convention, if the conviction does not rest exclusively, or to a decisive degree, on that testimony (see *Verdam v. The Netherlands*, 1999). There are exceptions to the principle that proceedings should be accusatorial; measures restricting the right of defence must, however, be strictly necessary and difficulties caused to the defence must be sufficiently compensated by the manner in which the judicial bodies proceed.

In the case under consideration, at no stage of the criminal prosecution was the child witness examined so as to allow the complainant at least a minimal opportunity to monitor her responses. The manner in which State bodies participating in the criminal process proceeded relied on the provisions of the Criminal Procedure Code which allow a witness to be examined before the criminal prosecution is brought, if it concerns an exigent or unrepeatable act, and in place of examining the witness, especially where the testimony of a child is concerned, it is possible during the main proceeding merely to read out the record of the testimony. Nevertheless, such a manner of proceeding represents an abridgement of the rights of defence in relation to such a witness (the right to attend the examination of the witness and pose questions), which could, as a general matter, be allowed to the extent that it concerns a strictly necessary measure. In order that the accused be accorded a fair trial, however, the detriment caused to the right of defence by the restriction placed thereupon must receive sufficient procedural compensation by the approach adopted by State bodies participating in the criminal process. In the case under consideration, the decision, taken in the interest of protecting the child’s mental and moral development, not to examine the child before the court could constitute a measure which is strictly necessary, and the cross-examination of other witnesses could represent a procedural compensation for the restriction of the right of the defence. Of course, in line with constant jurisprudence, the facts of the case must also be proved by other evidence (in the given case indirect evidence which was mutually

supporting) so that only a single conclusion can be inferred from them and any other possible conclusions can be excluded. In consideration of the above-stated grounds, the Constitutional Court granted the constitutional complaint and quashed the contested decision.

#### Languages:

Czech.



#### Identification: CZE-2004-3-017

a) Czech Republic / b) Constitutional Court / c) Plenary / d) 20.10.2004 / e) Pl. US 52/03 / f) Authorisation to ministerial regulation / g) *Sbírka zákonů* (Official Gazette), 568/2004 Sb. / h) CODICES (Czech).

#### Keywords of the systematic thesaurus:

- 1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
- 1.4.9.4 **Constitutional Justice** – Procedure – Parties – Persons or entities authorised to intervene in proceedings.
- 3.4 **General Principles** – Separation of powers.
- 3.13 **General Principles** – Legality.
- 4.6.2 **Institutions** – Executive bodies – Powers.
- 4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.

#### Keywords of the alphabetical index:

Powers, separation and interdependence, principle / Regulation, executive, minister / Regulation, implementing statute, issuing.

#### Headnotes:

In terms of the designation of parties to Constitutional Court proceedings, the Act on the Constitutional Court is based on the principle of legality (i.e. relevant subjects gain their status *ex lege*). The group of subjects who by law enjoy the status of parties to proceedings was selected by the legislature so as to reflect the principles upon which the Constitutional Order is founded and to correspond to the object of the proceeding itself.

State power in the Czech Republic is based on the separation of powers. One of the key areas in which the principle of the separation of powers is reflected is division of law-making power between the legislative and the executive. It is necessary to maintain the distinction between power and competence. The power of ministries and other administrative bodies to issue secondary legal enactments is based on the Constitution, which on a general level provides that executive bodies have the power to create secondary legal norms as long as this power is specifically regulated in a statute defining certain competences. The statutory empowerment of the executive is thus merely a fulfilment of this power with regard to its extent and content (competence).

### *Summary:*

In their petition a group of Deputies sought the annulment of a regulation of the Ministry of Labour and Social Affairs which repealed the regulation concerning the performance of labour and the material security of miners with long-term invalidity.

The petitioners stated that the contested regulation repealed the previous regulation of the Federal Ministry of Labour and Social Affairs of the CSFR which had been issued on the basis of an empowering clause contained in the Labour Code. The Ministry issued the contested repealing regulation after this empowerment had been withdrawn as a result of an amendment to the Labour Code, i.e. without being empowered by law to issue it.

The Constitutional Court declared the petition admissible. Since, however, in proceedings concerning the annulment of a statute or some other legal enactment, the issuing body is the party to the proceeding, and only the Public Protector of Rights may be a secondary party, the Court did not grant the Trade Union of Labourers in Mining, Geology and the Petroleum Industry status as a secondary party.

The petitioners questioned whether the ministries and other administrative authorities enjoy a derived law-making power to repeal an already existing sub-statutory legal enactment where the clause originally empowering it to adopt that enactment has been removed from the statute.

State power in the Czech Republic is founded on the separation of powers. Mutual relations among individual state bodies are constructed in the Constitution in such a way as to form a complex system of checks and balances. In assessing as a matter of constitutional law the extent and content of the powers of individual state bodies, it is always necessary to bear in mind the system of checks and

balances. One of the key areas in which that system is reflected is the division of law-making power between the legislative and the executive. Whereas the legislative is endowed with a general power to enact legal norms, the Constitution has restricted the executive solely to the issuance of derived secondary legislation, where the legislative authority has expressly empowered it to do so and has prescribed the framework and substantive boundaries thereof.

This power is enshrined directly in the Constitution because it concerns the crucial issue of the separation of powers between the legislative and the executive in the area of legislation. The Constitution establishes the power of the executive to form derived norms and prescribes the limits thereof in relation to the legislature. This provision must also be perceived in such a manner that it accords the executive protection from unconstitutional encroachments by the legislature. The conception contained in the Constitution thus presupposes that the legislature does not create this power by means of an ordinary statute; on the contrary, the Constitution merely entrusts it with the possibility, in particular cases, to empower the executive, in the form of specific competences, to implement a statute.

Should the legislature in a specific case empower the executive to implement a statute, from the perspective of the separation of powers it is impermissible for it itself to modify the resulting legal enactment, except that it may modify, or simply withdraw, the competence directive or itself adopt a new rule in the form of primary legislation. The legislature is only authorised to lay down for the executive the boundaries of secondary legislation. It is thus in keeping with the principle of the separation of powers that such power defines the limits both for executive and legislative bodies.

The Constitutional Court has already held that the removal from a statute of an empowering provision cannot automatically result in the repeal of a regulation issued on the basis of that empowerment, unless it is expressly so stated in the statute, with the result that the contested regulation remains a valid part of the Czech legal order. The repeal of the empowering provisions in question did not result in the automatic derogation of the regulation, which thus continued to form a valid part of the legal order. However, it is a part that, without more, is scarcely applicable, in other words, in effect.

The power to issue a legal enactment is thus not based upon the annulled empowering provision, rather on the Constitution itself, which reflects the constitutional principle of the separation of powers. In other words, the whole time the implementing legal

enactment was in effect, the competent executive body possessed the power to modify it or to repeal it. And even after the repeal of the statutory empowering clause, the competent executive body still possessed the power of norm formation, nonetheless solely the power to derogate the resulting legal enactment. And since this case concerns an act of repeal, that is, an act without any substantive content, it did not require any statutory definition, which regulates solely the extent and content of such act. It would be a violation of the principle of the separation of powers for the legislature directly to modify the relevant legal rules contained in an implementing enactment.

Therefore, the Constitutional Court rejected the petition on the merits.

#### *Languages:*

Czech.



#### *Identification:* CZE-2004-3-018

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 20.10.2004 / **e)** Pl. US 33/03 / **f)** Withdrawal of the additional salary / **g)** *Sbírka zákonů* (Official Gazette), 584/2004 / **h)** CODICES (Czech).

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

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

3.11 **General Principles** – Vested and/or acquired rights.

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

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

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

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

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

Official, salary, additional, right / Salary, claim, conditions.

#### *Headnotes:*

Pursuant to the Act on Salary and other Perquisites connected with the Holding of Office as Representatives of State Power and certain State Bodies (hereinafter “the Act on Salary”) a claim for an additional salary payment will arise if a State official actually performs the function for a period of at least 90 calendar days in the half year, and provided he or she has not discontinued the function prior to the 31 May or the 30 November of the year. Thus, the Act does not require a representative to work until the very end of the half year, rather only the greater part of it. The calendar half year merely defines the period in which the statutory conditions must be met in order for the claim to come into being. The conclusion of that time period is of significance as a legal fact to which is tied the opportunity to fulfil these conditions, but it is not itself a condition for such a claim to come into being.

The conditions under which a claim to an additional salary payment would arise are also the starting point from which any possible retroactive effect of the contested act should be judged.

#### *Summary:*

The Supreme Court requested the annulment of the words “representatives of state power and of certain state bodies” from the Act on the Withdrawal of the Additional Salary Payment for the Second Half of 1999 and 2000 from Representatives of State Power and of certain State Bodies (hereinafter “1999 Act on Withdrawal of Additional Salary”) which came into force on 3 December 1999. The petition was submitted in connection with an extraordinary appeal filed by a group of members of the Supreme Auditing Office, who were claiming an additional salary payment which should have arisen to them on the basis of the Act on Salary. With reference to the 1999 Act on Withdrawal of Additional Salary, the amount claimed was not paid out. For this reason the plaintiffs brought an action that eventually came before the Supreme Court, which came to the conclusion that the provisions of this Act were in conflict with the Constitution. Accordingly it suspended the proceeding in this matter and referred it to the Constitutional Court. The Supreme Court was of the view that the withdrawal of the additional salary payment for the second half of 1999 by means of a statute that came into effect only on 3 December 1999 constituted an instance of retroactivity.

The Constitutional Court came to the conclusion that the reviewed portion of the law was constitutional, but only under certain conditions. As regards the position of other subjects, in an *obiter dictum* the Constitutional Court observed, with reference to its previous decision on the analogous Act for the year 1998, that

“the provisions of the Act on Salary lay down two statutory conditions for the right to an additional salary payment for the second half of 1998 to come into being, namely, first the actual performance of the function for a period of at least 90 calendar days in that half year, and further the continuance in office until the 30 November 1998. The right to an additional salary payment arose for entitled persons only on 30 November 1998; which means, in consequence, that the contested statute does not operate retroactively. And since on the day it came into effect, that is 19 November 1998, no person had acquired the individual right to an additional salary payment, it could not have intruded upon acquired rights either.”

The conditions under which a claim to an additional salary payment would arise is the starting point from which any possible retroactive effect of the contested act should be judged. An additional salary payment cannot be considered as a payment for a calendar half-year, which ends either on 30 June or 31 December. The calendar half-year – in the case under consideration, the period from 1 July 1999 until 31 December 1999 – merely defines the time span in which the statutory conditions must be met for the claim to come into being. In terms of this statute entering into force, therefore, the day 31 December 1999 is irrelevant. On the other hand, the day 30 November 1999 lays down the earliest moment in which the claim can be acquired.

In deciding on the proposed annulment of the provisions of this statute, the Constitutional Court reviewed whether retroactivity or an intrusion into acquired rights had occurred as a result of the fact that the Act on withdrawal of Additional Salary did not come into effect until 3 December 1999. The annulment of the affected provisions of this Act would entail a change in the legal situation even in cases which did not in fact give rise to an unconstitutional situation. That concerns representatives who did not fulfil the conditions for the claim to an additional salary payment for the second half of 1999 until 3 December 1999 and further for the entire year 2000. Therefore, for the second half of 1999, the Act could prevent a claim from coming into being only for persons who, while they were carrying out duties as representatives on 30 November 1999, however, as of 2 December 1999 had still not met the basic condition of actually having worked for a period of 90 days. In the opposite case, this Act would have to be annulled as unconstitutional, in the part which concerns the second half of 1999.

Therefore, the Constitutional Court reached the conclusion that the petition proposing the annulment of the words “representatives of state power and of certain state bodies” is not well-founded and that the protection of acquired rights can be achieved by

adopting a different approach. It considered it sufficient to carry out a constitutionally conforming interpretation, first of the general rule for the claim to an additional salary payment to come into being and second of the special rule concerning its withdrawal. The Constitutional Court came to the conclusion that this enactment cannot be interpreted as being retroactive. While it was originally intended for this Act to withdraw the additional salary payment for everyone, since it was not issued in time, it could no longer affect those representatives who had, as of 2 December 1999, already fulfilled the conditions for the additional salary payment.

From the perspective of the case under consideration, it was necessary to consider whether the phrases “representatives of state power” and “representatives of certain state bodies” form two separate groups of persons or not. The Constitutional Court inclined toward the conclusion that the phrase “representatives” comprehends one group of persons which cannot be further subdivided. Thus, this proceeding was initiated solely by some “representatives”. However, the results of the judgment might, even if only indirectly, project into the legal situation even of other “representatives”. Therefore the Constitutional Court rejected the complaint on its merit.

#### *Languages:*

Czech.



#### *Identification:* CZE-2004-3-019

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 20.10.2004 / **e)** Pl. US 17/02 / **f)** Municipal regulation exceeding statutory criteria / **g)** / **h)** CODICES (Czech).

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

3.13 **General Principles** – Legality.  
 4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.  
 4.8.8 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers.  
 4.8.8.2 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Implementation.



*Keywords of the alphabetical index:*

Regulation, municipal, validity / Regulation, implementing statute, illegal / Regulation, municipal, exceeding statutory criteria.

*Headnotes:*

The articles of the Constitution and the Charter of Fundamental Rights and Basic Freedoms which provide that State authority may be asserted only in cases, within the limits and in the manner provided for by law, also relate to the conduct of a municipality in its capacity of a public law corporation when it unilaterally lays down orders and prohibitions. This rule necessarily applies also to the authoritative designation of the relations of individuals within the territorial boundaries of a municipality by means of a generally binding municipal regulation. In order to issue a generally binding regulation within its autonomous competence, a municipality must be empowered by statute, it must respect the limits of its competence as defined by a statute and may not regulate matters which are reserved solely for statutory regulation or are already governed by legal enactments of public or private law.

*Summary:*

The District Office requested the annulment of the generally binding municipal regulation of Municipality X on the Breeding and Keeping of Animals within the Municipality's Boundaries. At first the District Office merely adopted a decision suspending the enforcement of this regulation, but since Municipality X did not rectify the situation, the District Office submitted to the Constitutional Court a petition proposing the regulation be annulled. This regulation regulates in more detail the breeding of farm animals and house pets, which is regulated by statute. The District Office asserted that the regulation intervenes in private law relations governed by the Civil Code and infringes the Constitution and the Charter of Fundamental Rights and Basic Freedoms. It criticised the municipality for using a regulation to transpose the content of statutes relating to the exercise of state administration and even laying down norms in the area of state administration, thus exceeding the limits of the authority entrusted to municipalities' autonomous competence. The District Office therefore proposed that the Constitutional Court annul this regulation.

The Constitutional Court ascertained that the contested regulation had been adopted in the prescribed manner, at a public session of Municipality X's representative body, the organ empowered to do so. After reviewing the regulation's individual provisions and after

evaluating them as a whole, the Constitutional Court, in agreement with the complainant, came to the conclusion that, in the predominant part of the regulation, its provisions did not meet the constitutional and statutory requirements for the issue, within its autonomous competence, of a generally binding municipal regulation.

Although regulating a field that is already covered in a number of statutes, the regulation only made some imprecise references to the general legal rules in the relevant statutes on the breeding of animals and to the related issues. These statutes relate to the performance, on a nation-wide level, of state administration in this field. There is thus no reason for the adoption, in this unsuitable manner, of a regulation to apply within the territory of a single municipality.

A municipality may, by means of generally binding regulations, regulate only those affairs which are entrusted to its autonomous competence, and such regulations must be in conformity with the statutes. It is not permitted to regulate, by means of regulations, issues which fall within the area reserved to state administration or, as the case may be, to private law relations. This is in no way affected by the fact that the exercise of state administration may also be transferred to municipalities. If the municipality wished to regulate undesirable influences in construction proceedings, which it cited in its pleadings as the reasons for the adoption of the regulation, then that is an inadmissible manner of regulation, for the Building Office acts in the capacity of a body of state administration, not of an autonomous authority.

For the given reasons, the Constitutional Court annulled in full the generally binding regulation of Municipality X on the Breeding and Keeping of Animals within the Municipality's Boundaries due to its conflict with the Constitution, the Charter of Fundamental Rights and Basic Freedoms and the Act on Municipalities.

*Languages:*

Czech.





# Denmark

## Supreme Court

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### Important decisions

*Identification:* DEN-2004-3-003

a) Denmark / b) Supreme Court / c) / d) 15.04.2004 / e) / f) / g) / h) *Ugeskrift for Retsvæsen* 2004, 1773.

*Keywords of the systematic thesaurus:*

- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Rules of evidence.
- 5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
- 5.3.23 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

*Keywords of the alphabetical index:*

Defamation, through press / Witness, testimony outside trial / Child, protection / Child, sexual abuse.

*Headnotes:*

A chief editor was not responsible for defamation for the reports made by his newspaper concerning an acquittal in a case concerning sexual abuse of children.

The coverage both of the judgment of the High Court and of one of the parents' reaction to the acquittal were justifiable as a part of an ongoing debate regarding the subject on how to secure and use evidence in cases concerning sexual abuse against children.

*Summary:*

On 18 June 1999, the City Court of Gladsaxe sentenced B. to one year's imprisonment for violation of the Danish Criminal Code because he, on nine separate occasions, had engaged in sexual intercourse and other sexual conduct with minors. The City Court placed great emphasis on the

testimony from the nine alleged victims, which had been video-taped in order to spare the minors the psychological stress associated with appearing in person in court. In addition to the prison sentence, B. was held liable for damages to the minors and was furthermore declared unfit to work or associate with minors.

B. appealed the judgment of the City Court to the High Court of Eastern Denmark arguing, *inter alia*, that the video-taped testimonies from the alleged victims should be excluded as evidence, since he had not had a chance to contradict the evidence in that testimony.

The Supreme Court had – in the time between the judgment against B. in the City Court and the proceedings before the High Court in another case – ruled that video-taped testimony should be excluded in instances where the defendant has not had a chance to submit his own line of questioning to the police officers interviewing the alleged victims. The Supreme Court had based its decisions on the argument that children's testimonies can sometimes be unreliable and influenced by other testimonies, such as their parents or investigating police officers. It was the view of the Supreme Court that the defendant's right to a fair trial would be prejudiced if the witnesses could not be cross-examined and/or defence counsel was unable to submit questions to the alleged victims.

The High Court based its ruling in B.'s case on the above-mentioned Supreme Court precedent and excluded the evidence by a ruling of 11 August 2000. Consequently, the only evidence available in the proceedings against B. was the testimony given by the parents of the alleged victims.

In the final judgment on appeal, the High Court acquitted B. of all charges, holding that the parents' testimony could not be corroborated with other evidence; thus, the evidence presented by the prosecution was not beyond all reasonable doubt and could not be used as a basis for a conviction.

The acquittal in the High Court of B. was followed by a substantial public outcry, especially from the parents of the children. On 1 September 2000, a tabloid newspaper, C., published an article relating to the case. In bold print covering almost the entire front page, C. had printed, "Distressed mother after sex-acquittal: I WILL EXPOSE HIM AS A PAEDOPHILE." The front page referred to a more detailed coverage within the newspaper. There it was, *inter alia*, mentioned that the parents were considering exposing B. as a paedophile on the Internet, as had happened previously in certain instances in the UK.

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The article and the front page cover were mostly based, *verbatim*, on quotations from one of the concerned mothers, D.

The following day, counsel representing B. sent letters to C., D., and A., the chief editor of C. and appellant in the present case, stating that he intended to hold them liable for defamation of B.

On 5 September 2000, the newspaper C. printed a reply to B.'s claims, elaborating further on the statements made in particular by D. The article quoted D., saying, *inter alia*, "In the High Court [B.] was acquitted because the judges were prevented from seeing the video tapes where the children themselves told about the sexual assaults [...] Now it is only adults that can testify [...] and the court ruled the other day that their opinions are prejudiced... The kindergarten teacher who should have gone to prison left the court exonerated and as a free man."

On 1 October 2001, Copenhagen City Court acquitted A. for defamation. The City Court emphasised that the series of newspaper articles run by the newspaper C. were an important contribution to an ongoing debate. Pursuant to Article 10 ECHR, the court had to balance the opposing considerations: The protection of B.'s name and the right not to be falsely accused of a crime for which he had been acquitted, and the role of the media as a "public watchdog" reporting on events of acute public interest on the other. The City Court then noted that this evaluation required the Court to look at the expression as a whole and that the form of the articles were important in that respect. In the view of the City Court the articles appeared as *verbatim* quotations from D. and other parents. The articles merely stated what the parents had to say after the acquittal and did not express C.'s own opinion on the matter. Therefore the articles were not defamatory.

B. appealed the decision of the City Court to the High Court of Eastern Denmark, which on 24 June 2002 reversed the judgment of the City Court and held A. responsible for defamation of B.'s character.

The High Court focused on a part of C.'s first article printed on 1 September 2000, which stated, *inter alia*, "When [B.] was acquitted it was especially because the video-taped testimonies given by the children to the police were inadmissible." The High Court agreed that this was a quotation of a statement made by D., one of the parents involved in the original criminal case. However, when examining the choice of words and the broader context in which this quote appeared in C.'s article, the Court concluded that C. expressed its own opinion that B. was indeed guilty, despite his acquittal of all charges. In that respect, the quotation

and the context it had been placed in had the same exact meaning as if C. in its own words had written that B. was guilty.

The High Court recognised the argument that C.'s articles were part of the ongoing debate and that C.'s role as a "public watchdog" was an important consideration when applying Article 10 ECHR. The Court, however, emphasised in particular that C. could have contributed to the debate regarding the use of children's video-taped testimony in sexual abuse cases without defaming B. Consequently, A. as chief editor could not invoke Article 10 ECHR as defence for defamation.

A. appealed the judgment of the High Court to the Supreme Court, and on 15 April 2004, the Supreme Court reversed the judgment of the High Court. The Supreme Court noted that the criticism of the outcome of a court case does not necessarily, and in itself, amount to a defamatory accusation. Whether a statement amounts to an accusation of defamatory character is subject to a concrete evaluation.

C.'s series of articles, in particular the article of 1 September 2000, gave rise to serious doubt as to C.'s own point of view with regard to B.'s guilt. This doubt could be criticised, but it was not in itself enough to consider the articles as an expression of C.'s belief that B. was indeed guilty.

The Supreme Court emphasised that the coverage both of the judgment of the High Court and D.'s reaction to the acquittal were justifiable as a part of an ongoing debate regarding the subject as to how to secure and use evidence in cases concerning sexual abuse against children.

After due consideration, the Supreme Court found it questionable to hold that A. was guilty of defamation, as the national rules are interpreted in the light of Article 10 ECHR. Accordingly, the Supreme Court quashed the judgment of the High Court and affirmed the judgment of the City Court of Copenhagen.

#### Languages:

Danish.



# Finland

## Supreme Administrative Court

### Statistical data

1 September 2004 – 31 December 2004

Total number of decisions was 1382 during the reference period. The number of precedents to be published in the Court's Yearbook was 44.

### Important decisions

*Identification:* FIN-2004-3-001

**a)** Finland / **b)** Supreme Administrative Court / **c) / d)** 21.09.2004 / **e)** 2004/88 / **f) / g)** *Korkeimman hallinto-oikeuden vuosikirja* (Official Digest) / **h)** CODICES (English, Finnish).

*Keywords of the systematic thesaurus:*

5.1.1.2 **Fundamental Rights** – General questions – Entitlement to rights – Citizens of the European Union and non-citizens with similar status.

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

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

5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.

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

*Keywords of the alphabetical index:*

Expulsion, foreigner, under criminal procedure / Public security, protection measures, admissibility.

*Headnotes:*

Upon accession of Estonia to the European Union on 1 May 2004, all persons having the nationality of Estonia also became citizens of the Union. A citizen of the Union may only be expelled on grounds of public policy, public security or public health.

In the assessment concerning the expulsion of an EU citizen, the Community legislation and the relevant case-law have to be taken into consideration.

*Summary:*

The Directorate of Immigration, by its decision of 23 July 2003, ordered person A. to be expelled to his country of origin under Section 40.1.1 and 40.1.3 of the Aliens Act because he had committed an offence for which the minimum sentence provided by law was one year of imprisonment and because he resided in Finland without a residence permit. At the same time, the Directorate of Immigration imposed a prohibition of entry upon A. for five years. The prohibition of entry without separate authorisation also applied to entry into other Schengen states.

The Helsinki Administrative Court, by its decision of 10 February 2004, dismissed the appeal lodged by A. from the decision of the Directorate of Immigration.

The Helsinki Administrative Court found that there were more grounds supporting expulsion than against it, referring to the nature of the criminal offences committed by A., to his continued criminal activity, and to the fact that he had no family members within the meaning of the Aliens Act in Finland. The Administrative Court further referred to Article 8.2 ECHR, according to which interference with the exercise of the right to respect for private and family life is possible if it is in accordance with the law and is necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime or for the protection of the rights and freedoms of others.

The Supreme Administrative Court, without examining as the court of first-instance the weight to be given to the offences committed by A. or the assessment of the existence of grounds for expulsion, quashed the decisions of Helsinki Administrative Court and the Directorate of Immigration and referred the case back to the Directorate of Immigration for re-examination.

Because A. had been a citizen of the Union as of 1 May 2004, Community legislation and relevant case-law had to be taken into account in the assessment concerning his expulsion. Furthermore, under Section 40.3 (763/2001), of the Aliens Act of 1991 (378/1991), a citizen of the Union may only be expelled on grounds of public policy, public security or public health.

The provisions of Community law applied included Articles 18.1, 39.3, 46.1 and 55 EC, as well as Articles 1.a, 2.1, 3.1 and 3.2 of Council Directive 64/221/EEC of 25 February 1964 on the co-ordination

of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health. The Supreme Administrative Court also applied the case-law of the Court of Justice of the European Communities (e.g. cases 30/77, *Bouchereau*, 27 October 1977, paragraph 35; C-482/01 and C-493/01, *Orfanopoulos*, 29 April 2004, paragraphs 66 and 67; and C-348/96, *Calfa*, 19 January 1999, paragraph 24).

#### *Cross-references:*

- Decision of the Supreme Administrative Court of 21.09.2004, *Bulletin* 2004/3 [FIN-2004-3-002].

#### *Languages:*

Finnish.



#### *Identification:* FIN-2004-3-002

a) Finland / b) Supreme Administrative Court / c) / d) 21.09.2004 / e) 2004/89 / f) / g) *Korkeimman hallinto-oikeuden vuosikirja* (Official Digest) / h) CODICES (English, Finnish).

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

- 2.1.1.3 **Sources of Constitutional Law** – Categories – Written rules – Community law.
- 5.1.1.2 **Fundamental Rights** – General questions – Entitlement to rights – Citizens of the European Union and non-citizens with similar status.
- 5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
- 5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.
- 5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.

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

Expulsion, foreigner, under criminal procedure / Public security, protection measures, admissibility / Entry, prohibition, duration.

#### *Headnotes:*

Upon the accession of Estonia to the European Union on 1 May 2004, persons having the nationality of Estonia also became citizens of the Union. A citizen of the Union may only be refused entry on grounds of public policy, public security or public health. The facts which had led to a sentence of six years' imprisonment of A. for a narcotics offence showed that his own conduct constituted a threat to public policy and public security. The appellant, who had no family ties in Finland, could be returned to Estonia. However, a citizen of the Union may only receive a prohibition of entry for a maximum of 15 years in the decision on refusal of entry. Therefore, the prohibition of entry could not be valid for an indefinite time.

#### *Summary:*

The Directorate of Immigration, by its decision of 11 September 2003, ordered person A. to be returned to his country of origin, Estonia, upon his release from prison, and at the same time imposed upon him a prohibition of entry to be valid as of the date of issue of the decision for an indefinite time. The prohibition of entry without separate authorisation also applied to entry into other Schengen States.

The Helsinki Administrative Court, by its decision of 27 February 2004, dismissed the appeal lodged by A. from the decision of the Directorate of Immigration. A. had been convicted by Pori District Court on 8 May 2003 of an aggravated narcotics offence committed between 1 February and 11 August 2002 and forgery committed on 29 July 2002, and received a joint sentence of imprisonment for eight years and four months. Considering the offences of which A. had been found guilty, the Administrative Court found that there was reason to return him to his country of origin, Estonia. In a decision refusing the entry of an alien, a prohibition of entry may be imposed upon him or her for a maximum period of fifteen years or for indefinite time. The Administrative Court applied Sections 8.1.5, 37.1.1, 37.1.5, 38 and 43.1 of the Aliens Act, as well as Articles 5, 25 and 96 of the Convention implementing the Schengen Agreement.

The Supreme Administrative Court dismissed the appeal to the extent it concerned refusal of entry. This part of the decision of the Administrative Court was upheld. However, the decisions of the Administrative Court and the Directorate of Immigration were quashed to the extent they concerned the prohibition of entry. That part of the decision was referred back to the Directorate of Immigration for re-examination.



As A. had been a citizen of the Union as of 1 May 2004, the Community legislation and relevant case-law had to be taken into account in the assessment of the existence of grounds for refusal of entry in his case. The provisions of Community law applied included Articles 17, 18.1, 39.3, 46.1 and 55 EC, as well as Articles 1.a, 2.1, 3.1 and 3.2 of Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health. The Supreme Administrative Court also applied the case law of the Court of Justice of the European Communities (e.g. cases C-30/77, *Bouchereau*, 27 October 1977, paragraph 35; C-482/01 and C-493/01, *Orfanopoulos*, 29 April 2004, paragraphs 66, 67 and 99; and C-348/96, *Calfa*, 19 January 1999, paragraphs 22 and 24).

According to Section 37.3 (763/2001) of the Aliens Act of 1991 (378/1991), an alien whose right to reside in Finland is based on the Treaty on the European Economic Area may be refused entry only for a reason relating to public order, security or public health. Pursuant to Section 38.1 (537/1999) of the Act, all relevant facts and circumstances have to be taken into account in their entirety when considering refusal of entry. These include at least the duration of stay in Finland, the relationship between a child and a parent, family ties and other ties to Finland.

A. had been convicted of an aggravated narcotics offence and sentenced to a term of imprisonment of six years. The facts that had led to his conviction showed that his own conduct constituted a threat to public order and public security. Bearing in mind the forgery and other acts of which he had been found guilty, and that he had not resided lawfully in Finland and had no family ties to the country, the Supreme Administrative Court found that there was reason to return A. to his country of origin, Estonia, on grounds of public order and public security.

Although the prohibition of entry imposed upon A. for an indefinite time was a consequence of the narcotics offence committed by him, the facts leading to it had been caused by his own conduct, as was the threat caused by it to public order and public security, the Supreme Administrative Court, taking also into account the provisions of Section 170 of the new Aliens Act (301/2004) which came into force on 1 May 2004, according to which a citizen of the Union may only receive a prohibition of entry for a maximum of 15 years in the decision on refusal of entry, found that the prohibition of entry could not be ordered for an indefinite time.

#### Cross-references:

- Decision of the Supreme Administrative Court of 21.09.2004, *Bulletin* 2004/3 [FIN-2004-3-001].

#### Languages:

Finnish.



#### Identification: FIN-2004-3-003

a) Finland / b) Supreme Administrative Court / c) / d) 25.11.2004 / e) 2004/99 / f) / g) *Korkeimman hallinto-oikeuden vuosikirja* (Official Digest) / h) CODICES (English, Finnish).

#### Keywords of the systematic thesaurus:

- 5.1.1.4.1 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Minors.
- 5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
- 5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of opinion.

#### Keywords of the alphabetical index:

Child, parental rights / Education, religious, authorisation.

#### Headnotes:

In accordance with the Freedom of Religion Act the right to religious education is an integral part of the freedom of religion. It is inherent in the principle of freedom of religion that no one is compelled to participate in religious education which does not correspond to one's own religious beliefs. No pupil has to participate in religious education in accordance with the majority of the pupils if he or she does not belong to a religious community in question. On the other hand, a pupil who does not belong to any religious community has, according to Section 13.1, of the Basic Education Act, the right to participate in religious education.



One of the custodians of a child cannot make a binding notification referred to in Section 13.1 of the Basic Education Act, concerning the participation of a child not belonging to any religious community in religious education, if the other custodian objects to such participation.

*Summary:*

On 28 August 2003 the children's mother made a request for the teaching of ethics for her children born in 1992 and 1994. The children did not belong to any religious community. The children were in the joint custody of both parents and had participated in religious education as of the date on which they started school. The children's father had by letters of 20 and 29 August 2003 informed the school that he wanted his children to continue to participate in religious education. The local school authority, whose decision was upheld by the regional administrative court, had on 28 October 2003 decided not to accept the mother's request for the provision of education in ethics.

In the reasons for its decision, the regional administrative court referred to the fact that the children had participated in religious education in previous school years as well as to the disagreement between the two custodians.

The Supreme Administrative Court quashed the decisions of the regional administrative court and the local school authority, applying Section 11 of the Constitution and certain other legislative provisions relevant to the exercise of the freedom of religion. According to Section 11 of the Constitution, everyone has the freedom of religion and conscience. The freedom of religion and conscience entails, *inter alia*, the right to express one's convictions and the right to be a member of or decline to be a member of a religious community. The freedom of religion and conscience provided for in the Constitution has also served as a basis for the enactment of the Freedom of Religion Act (453/2003) which came into force on 1 August 2003. According to Section 6 of the Freedom of Religion Act, however, the provisions on participation in religious education at school are included in the Basic Education Act.

A pupil who does not belong to any religious community has, according to Section 13.1 of the Basic Education Act the right to participate in religious education. For this purpose, it is required that the child's custodian informs the provider of basic education of the matter. Considering the provisions of Section 3.2 of the Freedom of Religion Act and Section 5 of the Child Custody and Right of Access Act, one of the custodians cannot make a binding

notification referred to in Section 13.1 of the Basic Education Act, concerning the participation of a child not belonging to any religious community in religious education if the other custodian objects to such participation. Therefore, the decision made by the local school authority on 28 October 2003 that children not belonging to any religious community were required to continue to participate in religious education was not in conformity with the law.

*Languages:*

Finnish.



# France

## Constitutional Council

### Important decisions

*Identification:* FRA-2004-3-010

**a)** France / **b)** Constitutional Council / **c)** / **d)** 19.11.2004 / **e)** 2004-505 DC / **f)** Treaty Establishing a Constitution for Europe / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 24.11.2004, 19885 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

3.1 **General Principles** – Sovereignty.

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

4.5.2.1 **Institutions** – Legislative bodies – Powers – Competences with respect to international agreements.

4.17.2 **Institutions** – European Union – Distribution of powers between Community and member states.

5.1 **Fundamental Rights** – General questions.

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

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

*Keywords of the alphabetical index:*

European Union, Constitution, international treaty, nature / State, powers, transfer / European Union, fundamental rights, Charter / European Union, law, primacy.

*Headnotes:*

Under texts of constitutional force (Preamble and Articles 53 and 88-1 of the Constitution of 1958), France may participate in the creation and development of a permanent European organisation endowed with legal personality and vested with decision-taking powers through the effect of transfers of powers agreed by the member States. However, when commitments entered into for this purpose contain a clause contrary to the Constitution, cast

doubt on constitutionally guaranteed rights and freedoms, or adversely affect the essential conditions of the exercise of national sovereignty, authorisation to ratify these requires revision of the Constitution.

As a result of the stipulations of the treaty submitted to the Constitutional Council, entitled “Treaty Establishing a Constitution for Europe”, and particularly those relating to its entry into force, revision and the possibility of denouncing it, it retains the nature of an international treaty accepted by the signatory states to the Treaty Establishing the European Community and the Treaty on European Union.

It is clear from Article 88-1 of the Constitution that the constituent assembly endorsed the existence of a Community legal order integrated into the domestic legal order and distinct from the international legal order.

The Treaty, by substituting a single organisation for the organisations established by the previous treaties, alters neither the nature of the European Union nor the scope of the principle that Union law shall have primacy, as this results from Article 88-1 of the Constitution (cf. decisions of the Constitutional Council of 10 June and 1 and 29 July 2004 [FRA-2004-2-004] and [FRA-2004-2-006]). Thus Article 1-6 of the Treaty submitted for examination by the Council, according to which “The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States”, does not entail a revision of the Constitution.

Neither by the content of its articles nor by its effects on the essential conditions of the exercise of national sovereignty does the Charter entail a revision of the Constitution.

The Charter is addressed to member States when they implement Union law, and only in this case.

In so far as the Charter recognises fundamental rights as these derive from the constitutional traditions common to member States, these rights have to be interpreted in harmony with the said traditions.

In particular, Article II-70, on the right to manifest religion or belief in public, is not contrary to the Constitution.

Thus, in accordance with the “explanations” appended to the Charter, the right mentioned in Article II-70 has the same scope as Article 9 ECHR. The European Court of Human Rights interprets this article in harmony with the constitutional tradition of each member State. Noting the merits of the principle

of secularism which is part of several national constitutional traditions, it leaves States broad discretion to define the most appropriate measures, taking account of their national traditions, to reconcile religious freedom and the secular principle.

Article II-107 of the Treaty on the right to an effective remedy and a fair trial, Article II-110 on the *non bis in idem* principle, which relates solely to criminal law, and the restrictive clause set out in the first paragraph of Article II-112 are not contrary to the Constitution.

Revision of the Constitution is necessitated, in contrast, by those provisions which, notwithstanding the principle of subsidiarity, transfer to the European Union powers affecting the essential conditions of the exercise of sovereignty other than those mentioned in Article 88-2 of the Constitution.

This is the case of:

- the provisions of the Treaty which transfer to the European Union, and make subject to “ordinary legislative procedure” (that of the European Union), new powers inherent in national sovereignty, especially with regard to border controls, judicial co-operation in civil matters and judicial co-operation in criminal matters.

It is also the case of:

- the article relating to the setting up of a European prosecution service, in view of its influence on the exercise of national sovereignty;
- any provision which, in matters inherent in national sovereignty, amends the rules on decision making applicable by substituting the qualified majority rule for the unanimity rule within the Council. This includes certain provisions relating to judicial co-operation in criminal matters, Eurojust, Europol, and the Union actions or positions decided on the basis of a proposal by the Union's Minister for Foreign Affairs;
- measures amending the rules on decision making by conferring a decision-taking function on the European Parliament. This is the case of the measures necessary for use of the Euro, and of the introduction of any enhanced co-operation within the Union;
- provisions substituting for each member State's own power of initiative under the preceding treaties a joint right of initiative by a quarter of the member States with a view to presenting a draft European act in matters relating to the area of freedom, security and justice (Eurojust, judicial co-operation);

- provisions of the Treaty designated by the negotiators “bridge provisions”, which enable, through a unanimous decision of the European Council or Council of Ministers, decision-making by a majority to be substituted for the rule of unanimity within the Council of Ministers. Such amendments will, in due course, require no act of ratification or national approval enabling constitutionality to be verified. This includes bridge provisions laid down in respect of measures relating to family law with transborder effects, minimum rules relating to criminal procedure and the definition and punishment of particularly serious crimes with a transborder dimension. It also includes the general bridge provision enabling decisions relating to foreign policy or common security policy to be taken by the Council by a qualified majority.

National parliaments', and therefore the French parliament's, right under the Treaty to oppose amendment of the Treaty by simplified means necessitates revision of the Constitution, as does the right conferred on each chamber to issue a reasoned opinion or submit an appeal to the Court of Justice in the context of the monitoring of compliance with the subsidiarity principle.

### Summary:

In pursuance of Article 54 of the Constitution, the President of the Republic referred the “Treaty Establishing a Constitution for Europe” to the Constitutional Council as soon as it had been signed, in Rome on 29 October 2004, by the Heads of State or Government of the 25 member States.

In its decision, the Council affirms that the “Constitution for Europe” remains a Treaty and does not create a federal State. The Constitution may not be established and revised other than by a unanimous agreement between the member States, which are continuing to take, through acts subject to ratification, the founding decisions of the Union (laying down its powers and operating rules). The French Constitution remains at the top, within the domestic system, of the hierarchy of rules and regulations.

Recalling the case-law of the Court of Justice of the European Communities and the recent case-law of the Constitutional Council on the relations between constitutional law and subordinate Community law, the Constitutional Council considers Article I-6 concerning the primacy of Union law not to be contrary to the Constitution. Revision of the Constitution is not necessary in order to integrate the principle of such primacy which, thus understood, has already been enshrined in Article 88-1 of the Constitution.

Analysis of the Charter of Fundamental Rights, which required quite particular attention, in the light, *inter alia*, of the importance and specific nature of the principle of secularism in France, led to the conclusion that neither in its content nor in its effects on national sovereignty was it contrary to the French Constitution.

On the other hand, it is the provisions relating to regalian rights and either transferring powers to the Union or making new arrangements for the exercise of powers already transferred that necessitate revision of the Constitution, in that they affect “the essential conditions of the exercise of national sovereignty”.

The same applies to the new powers that parliament is recognised to have to oppose a simplified revision of the Treaty or to secure compliance with the subsidiarity principle, which require an amendment of the Constitution in order to make its exercise by deputies and senators effective.

#### Cross-references:

- See Decision 2004-496 DC of 10.06.2004, Law on confidence in the digital economy [FRA-2004-2-004], Decision 2004-497 DC of 01.07.2004, Law on electronic communications and on audio-visual communication services [FRA-2004-2-005] and Decision 2004-498 DC of 29.07.2004, Law on bioethics [FRA-2004-2-006].

#### Languages:

French.



#### Identification: FRA-2004-3-011

**a)** France / **b)** Constitutional Council / **c)** / **d)** 02.12.2004 / **e)** 2004-506 DC / **f)** Simplification of the Law Act / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 10.12.2004, 20876 / **h)** CODICES (French).

#### Keywords of the systematic thesaurus:

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

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

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

3.13 **General Principles** – Legality.

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

#### Keywords of the alphabetical index:

Law, scope, ordinance / Government, authorisation / Ordinance, ratification / Law, intelligibility, accessibility / Law, simplification, constitutional value, objective / Constitutionality, dependent on a specified interpretation, effects.

#### Headnotes:

Article 38 of the Constitution, which enables the government to request parliamentary authorisation to take measures by ordinance which are ordinarily in the field of the legislation, obliges the government to tell parliament the purpose of the measures that it intends to take, but not to state their content.

Urgency is one of the grounds which may be relied on to justify the use of Article 38 of the Constitution.

Simplification of the law and the pursuit of its codification meet the objective of constitutional value of accessibility and intelligibility of the law.

The conformity with the Constitution of the terms of a promulgated law cannot effectively be challenged other than when legislative provisions amend its substance, supplement it or affect its field of application.

The Constitutional Council's specified interpretation on which the constitutionality of a provision is dependent bears the authority conferred on its decisions by Article 62 of the Constitution. Consequently, this authority is not restricted to *res iudicata*, but also extends to interpretation.

#### Summary:

The Simplification of the Law Act adopted on 18 November 2004 contained numerous articles on authorisation (relating to simplification and codification) and a large number of ratifications of ordinances. It was the subject of two referrals, one by over sixty deputies, the other by over sixty senators.

The measures advocated, authorised to be taken through ordinances on the grounds that parliament

was overburdened, had the objective of “intelligibility and accessibility of the law”.

The applications submitted challenged the authorising articles as a whole, objecting to the pernicious nature of the use of ordinances in such a large number of matters. The Constitutional Council, while it declared these complaints ill-founded, did specify the possible scope of authorisation, its purpose and its effects.

Again challenging “public-private partnerships” as provided for by the ordinance of 17 June 2004 on “partnership contracts”, the applications caused the Constitutional Council to specify its position on the ratification of such ordinances, which in this case coincided with that expressed by the State Council (Supreme Administrative Court): ratification may be the result of a law, which, without having such ratification as its direct purpose, necessarily entails it. The applicants also gave the Council occasion to affirm the authority of its specified interpretations on which the constitutionality of a provision is dependent.

#### *Languages:*

French.



#### *Identification:* FRA-2004-3-012

**a)** France / **b)** Constitutional Council / **c)** / **d)** 09.12.2004 / **e)** 2004-507 DC / **f)** Act containing several provisions relating to professional sport / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 16.12.2004, 21290 / **h)** CODICES (French).

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

4.5.2 **Institutions** – Legislative bodies – Powers.  
4.10.7 **Institutions** – Public finances – Taxation.  
5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.

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

Sport, competitive working conditions, pay, determination / Sport, management company, means, European competitor / Collective bargaining, representative organisation, working conditions /

Athlete, professional, non-commercial profits, collective image, financing / Training leave, financing, contribution, exoneration.

#### *Headnotes:*

The legislator may, after defining the rights and obligations affecting working relations and conditions, leave it to employees and wage-earners or their representative organisations to specify through collective bargaining the arrangements for application of legislation. Where there is no collective agreement, provision may be made for these arrangements to be laid down by decree.

The legislator may exonerate the professional sport sector from payment of the statutory contribution to finance training leave, on account of the inappropriateness of such leave to the needs of this profession.

The legislator may, in accordance with the principle of equality, facilitate the financing of sports management companies and enable them to have funds available which are comparable to those of their European competitors.

The authenticity of sports competitions is a corollary of the principle of equality.

#### *Summary:*

The aim of the bill passed by both assemblies, and which was the subject of a referral on 30 November 2004 by over sixty senators, was to bring the economic, fiscal and social conditions prevailing for competitive sport in France closer to those prevailing in the rest of the European Union, in order to prevent our best athletes from moving abroad and to make French professional sport more competitive.

Taking account of the particular features of the remuneration of professional athletes, the legislator was, without failing to apply the principle of equality, able to provide that the portion of professional athletes' remuneration corresponding to the commercialisation of the collective image of the team shall not be treated as pay and shall be taxable in the category of non-commercial profits.

Not considered contrary to the principle of equality either was the elimination of employers' obligation to pay a percentage of the remuneration awarded to holders of fixed-term contracts to finance training leave.

By authorising a single individual to hold minority shares in more than one sports management company, but without being able to control more than one of



these companies, the legislator has taken sufficient precautions to guarantee the authenticity of sports events and to comply with the principle of equality.

#### *Languages:*

French.



#### *Identification:* FRA-2004-3-013

**a)** France / **b)** Constitutional Council / **c)** / **d)** 16.12.2004 / **e)** 2004-508 DC / **f)** Social Security Funding Act for 2005 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 21.12.2004, 21663 / **h)** CODICES (French).

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

3.10 **General Principles** – Certainty of the law.  
 4.10.1 **Institutions** – Public finances – Principles.  
 4.10.2 **Institutions** – Public finances – Budget.  
 5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.  
 5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.

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

Social security, funding / Revenue, forecast, preparation, criteria, procedure / Contribution, exoneration, State, compensation / Welfare rider.

#### *Headnotes:*

The genuineness of the forecasts of revenue from compulsory basic social security schemes has to be assessed in the light of three principles:

- the forecasts must be initially prepared by the government in the light of the information available on the date on which the social security funding bill is tabled. The government must inform parliament of any de facto or de jure circumstance likely to jeopardise the general conditions of financial balance and must correct the initial forecasts;
- when deciding the forecasts, the legislator must take account of all the facts known to him;

- the forecasts are inevitably affected by the risk factors inherent in such estimates.

In the absence of an explicit provision to the contrary, Article L 131-7 of the Social Security Code requires social contribution exoneration measures to be fully compensated for by the State for the schemes concerned, and the Finance Act and Social Security Funding Act to allow for this.

#### *Summary:*

The Social Security Funding Act adopted on 2 December 2004 was the subject of two referrals, one by over sixty deputies, the other by over sixty senators. Two articles were challenged: one (Article 14) concerning the revenue of social security agencies, and the other (Article 42) concerning what is known as the NOHIE (national objective for health insurance expenditure).

It was alleged that the forecasts of revenue were not genuine. The main point raised was the possible consequences of a new type of employment contract, which had been submitted to the legislator, the “future contract”. Would the State compensate for the loss of income suffered by the social security agencies, as provided for in such a situation by the Social Security Code?

The Constitutional Council considered that there had been no lack of genuineness, the government having announced in good time its decision to ask parliament to set aside the compensation rule in respect of future contracts.

The second complaint was about the lack of genuineness of the NOHIE forecast. Taking account of the risk factors affecting such forecasts, which were merely an objective, the Constitutional Council cannot penalise a manifest error of judgment by which the forecast was not considered to have been vitiated.

The two complaints were rejected.

In contrast, several provisions regarded as misplaced social provisions (“welfare riders”), as they were outside the scope of social security funding acts, were criticised by the Council of its own motion. The purpose of this criticism, notwithstanding the undisputed intrinsic merit of the provisions concerned, was to prevent social security funding acts from becoming “acts containing various social provisions”.

#### *Languages:*

French.



*Identification:* FRA-2004-3-014

**a)** France / **b)** Constitutional Council / **c)** / **d)** 29.12.2004 / **e)** 2004-511 DC / **f)** Finance Act for 2005 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 31.12.2004, 22571 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

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

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

3.18 **General Principles** – General interest.

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.

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

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

*Keywords of the alphabetical index:*

Finance Act, genuineness / Relocation, company, combating / Company, repatriation, tax credit / Employment, employment zone, number, limit / Local or regional authority, revenue / Local or regional authority, grouping, criterion, objective and rational / Unemployment, combating / Employment, employee, working at home.

*Headnotes:*

The genuineness of Finance Acts is judged in the light of the information available and the forecasts which may reasonably be based thereon. Where the annual Finance Act is concerned, genuineness means the absence of any intention to distort the broad lines of balance.

It is for the government to inform parliament when *de facto* or *de jure* circumstances occur likely to cast doubt on the initial forecasts, and to make the

necessary corrections. And it is for the legislator, when deciding these forecasts, to take account of all the information known to him and affecting balance. Nevertheless, forecasts of revenue are inevitably affected by the risk factors inherent in such estimates and uncertainties about economic developments.

The government may provide for a small percentage of appropriations to be placed in reserve at the start of the financial year in order to prevent a possible deterioration in the budgetary balance.

In setting up a tax credit solely for businesses which, having transferred some or all of their activities outside the European Economic Area, repatriate them to France, the legislator pursued an objective of general interest for the sake of the national economy and the combating of unemployment.

In excluding various activities from this arrangement, the legislator intended to comply with France's Community obligations and international commitments.

In providing that the business tax credit for "taxpayers based in employment zones experiencing great difficulty because of relocations" shall be paid by the State, the legislator ensured that the new measures would have a neutral effect on the amount of local or regional authorities' fiscal revenue and on the share of their own resources in relation to their resources as a whole.

In limiting to 10 the number of employment zones that the government will be authorised to declare, while others might be eligible, the legislator introduced a difference in treatment not justified by the objective pursued.

In grouping these authorities by category, on the basis of objective and rational criteria (urban and non-urban departments, population density, extent of road network, financial potential), the legislator did not fail to apply the final sub-paragraph of Article 72-2 of the Constitution, which states that equalisation mechanisms to promote equality between territorial units shall be provided for by statute.

In introducing an income tax reduction measure subject to a ceiling, in respect of expenditure incurred through the employment of a wage-earner working at home, so as to combat unemployment and undeclared employment, the legislator did not create an established breach of equality where public burdens are concerned.

*Summary:*

The Finance Act for 2005 was referred to the Constitutional Council by over 60 deputies.

The Finance Act for 2005 is particular for being the last to straddle both the amended ordinance of 2 January 1959 laying down the Organic Law on Finance Acts and the Organic Law (LOLF) of 1 August 2001, the provisions of which are being applied progressively.

The deputies making the referral challenged the genuineness of the Finance Act (cf. Article 32 of the LOLF). They particularly complained of an “overestimate of revenue” and the principle of the “placement in reserve” by the government of a percentage of the appropriations voted. The Constitutional Council, exercising minimum supervision in this field, considered that, as things stood, and in the light of economic uncertainties, the estimates for 2005 were not manifestly erroneous.

It also considered that the general interest justified the measures intended to prevent relocations, and to facilitate, through the granting of a tax credit, the repatriation to France of businesses transferred outside the European Economic Area, those activities excluded having been so in pursuance of Community provisions or international commitments.

Its position was similar on the tax credits relating to the trade tax for businesses operating in an employment zone at risk of relocations.

The legislator may not, however, set a maximum number of such zones without failing to apply the Constitution.

Lastly, the tax reduction granted to the employer of a wage-earner working at home, being intended to reduce unemployment while promoting family life, was not considered to have breached equality where public burdens are concerned.

*Languages:*

French.



## Germany

### Federal Constitutional Court

#### Important decisions

*Identification:* GER-2004-3-009

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 14.10.2004 / **e)** 2 BvR 1481/04 / **f)** / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 111, 307-332 / **h)** *Neue Juristische Wochenschrift* 2004, 3407-3412; *Europäische Grundrechte-Zeitschrift* 2004, 741-748; CODICES (German).

*Keywords of the systematic thesaurus:*

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

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

2.2.1.4 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and constitutions.

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

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

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

*Keywords of the alphabetical index:*

European Court of Human Rights, decision, effects in national law / Judge, duty to respect international law / Child, best interest / Child, parent, right to access to child / Child, custody.

*Headnotes:*

1. The principle that the judge is bound by the law (Article 20.3 of the Basic Law includes taking into account the guarantees of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the decisions of the European Court of Human Rights as part of a methodologically justifiable interpretation of the law. Both a failure to consider a decision of the European Court of Human Rights and the “enforcement” of such a decision in a schematic

way, in violation of prior-ranking law, may violate fundamental rights in conjunction with the principle of the rule of law.

2. In taking into account decisions of the European Court of Human Rights, the state bodies must include the effects on the national legal system in their application of the law. This applies in particular when the relevant national law is a balanced partial system of domestic law that is intended to achieve an equilibrium between differing fundamental rights.

3. The Federal Constitutional Court must if possible prevent and remove violations of international law that consist in the incorrect application of or non-compliance with duties under international law by German courts. This applies to a particularly high degree to the duties under international law arising from the Convention, which contributes to promoting a joint European development of fundamental rights. As long as applicable methodological standards leave scope for interpretation and weighing of interests, German courts must give precedence to the interpretation in accordance with the Convention. In any event, the Convention provision as interpreted by the European Court of Human Rights must be taken into account in making a decision; the court must at least duly consider it.

### *Summary:*

I. The complainant is the father of a child born illegitimate in 1999. The mother of the child gave the child up for adoption one day after its birth and declared her prior consent to the adoption by the foster parents, with whom the child has been living since its birth. Since October 1999, the complainant has unsuccessfully endeavoured in a number of judicial proceedings, including a constitutional complaint, to be given custody and granted a right of access. In response to his individual application, a chamber of the Third Section of the European Court of Human Rights, in a judgment of 26 February 2004, declared unanimously that the decision on custody and the exclusion of the right of access violated Article 8 ECHR. It held that in cases where family bonds to a child demonstrably existed the state had the duty to endeavour to reunite a natural parent with his or her child. It stated that the complainant must at least be enabled to have access to his child. Thereupon, the Local Court, in accordance with the complainant's application, transferred custody to him and granted him a right of access by way of a temporary injunction of the court's own motion. The Higher Regional Court overturned the temporary injunction on the complainant's right of access. It held that the judgment of the European Court of Human Rights bound only the Federal Republic of Germany

as a subject of public international law. The independent courts, however, were not bound by it because the European Convention on Human Rights was ordinary statutory law below the level of the Constitution and the European Court of Human Rights was not functionally a higher-ranking court.

In his constitutional complaint against this ruling, the complainant challenged the violation of his fundamental rights under Article 1 of the Basic Law (human dignity), Article 3 of the Basic Law (equality before the law) and Article 6 of the Basic Law (fundamental rights related to marriage, the family and children) and of the right to fair trial. He submitted that the Higher Regional Court had disregarded international law and had failed to recognise the binding effect of the decision of the European Court of Human Rights.

II. The Second Panel of the Federal Constitutional Court has overturned the challenged order of the Higher Regional Court because it violates the complainant's fundamental right under Article 6 of the Basic Law in conjunction with the principle of the rule of law.

The grounds of the decision are, in part, as follows: The European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) and its protocols are international treaties, each of which has been incorporated into German law by the federal legislature in a formal statute (Article 59.2 of the Basic Law). The Convention and its protocols thus have the status of federal German statutes. For this reason, German courts must observe and apply the Convention in interpreting national law. The guarantees of the Convention and its protocols, however, are not a direct constitutional basis for a court's review, if only because of the status given them by the Basic Law. But on the level of constitutional law, the text of the Convention and the case-law of the European Court of Human Rights serve as interpreting aids in determining the contents and scope of fundamental rights and fundamental constitutional principles of the Basic Law, to the extent that this does not restrict or reduce the protection of the individual's fundamental rights under the Basic Law – and this the Convention itself does not desire (see Article 53 ECHR). This constitutional importance of an international treaty demonstrates the commitment of the Basic Law to international law. If possible, the Constitution is also to be interpreted in such a way that no conflict arises with obligations of the Federal Republic of Germany under international law. However, the commitment to international law takes effect only within the democratic and constitutional system of the Basic Law. The Basic Law aims to integrate Germany into the legal community of peaceful and free states, but does not waive the



sovereignty contained in the last instance in the German Constitution. If a violation of fundamental principles of the Constitution cannot otherwise be averted, there is no contradiction with the aim of commitment to international law if the legislature, exceptionally, does not comply with the law established by international treaties.

The decisions of the European Court of Human Rights have a particular importance for the law of the Convention as the law of international agreements. Under Convention law, the States parties have agreed that in all legal matters to which they are party they will follow the final judgment of the European Court of Human Rights. For this reason, the judgments of the European Court of Human Rights are binding on all parties to the proceedings, but only on those parties. On the question of fact, the European Court of Human Rights makes a declaratory judgment, without revoking the challenged measure. The binding effect of a decision of the European Court of Human Rights extends to all legal bodies and in principle imposes on these an obligation, within their jurisdiction and without violating the binding effect of statute and law (Article 20.3 of the Basic Law), to end a continuing violation of the Convention and to create a situation that complies with the Convention.

The nature of the binding effect of decisions of the European Court of Human Rights depends on the sphere of responsibility of the state bodies and on the latitude given by prior-ranking law. The administrative authorities and courts are bound by statute and law, and this includes a duty to take into account the guarantees of the Convention and the decisions of the European Court of Human Rights as part of a methodologically justifiable interpretation of the law. Both a failure to consider a decision of the European Court of Human Rights and the "enforcement" of such a decision in a schematic way, in violation of prior-ranking law, may violate fundamental rights in conjunction with the principle of the rule of law. Courts are at all events under a duty to take into account a judgment that relates to a case already decided by them if they preside over a retrial of the matter in a procedurally admissible manner and are able to take the judgment into account without a violation of substantive law. In taking into account decisions of the European Court of Human Rights, the state bodies must include the effects on the national legal system in their application of the law. This applies in particular when the relevant national law is a balanced partial system of domestic law that is intended to achieve an equilibrium between differing fundamental rights. Above all in family law and the law concerning aliens, and also in the law on the protection of personality, it may be necessary to

balance conflicting fundamental rights by creating groups of cases and graduated legal consequences. It is the task of the national courts to integrate a decision of the European Court of Human Rights carefully into the partial area of law affected.

By these standards, the decision of the Higher Regional Court challenged violates Article 6 of the Basic Law in conjunction with the principle of the rule of law. The Higher Regional Court should have considered in an understandable way how Article 6 of the Basic Law could have been interpreted in a manner that complied with the obligations under international law of the Federal Republic of Germany. Here it is of central importance that the Federal Republic of Germany's violation of Article 8 ECHR established by the European Court of Human Rights is a continuing violation, for the complainant still has no access to his child. The Higher Regional Court should have considered the grounds of the European Court of Human Rights judgment in particular because the decision, which found that the Federal Republic of Germany had violated the Convention, was made on the matter which the Higher Regional Court had to consider again in a retrial. The duty to take the decision into account neither adversely affects the Higher Regional Court's constitutionally guaranteed independence, nor does it force the court to enforce the European Court of Human Rights decision without reflection. In the legal assessment in particular of new facts, in the weighing up of conflicting fundamental rights such as those of the foster family and in particular the best interest of the child, and in the integration of the individual case in the overall context of family-law cases with reference to the law of access, the Higher Regional Court is not bound in its concrete result.

#### *Languages:*

German.



#### *Identification:* GER-2004-3-010

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 26.10.2004 / **e)** 2 BvR 955/00 2 BvR 1038/01 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift* 2005, 560-567; *Europäische Grundrechte-Zeitschrift* 2004, 728-741; CODICES (German).



*Keywords of the systematic thesaurus:*

2.2.1.4 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – European Convention on Human Rights and constitutions.

3.1 **General Principles** – Sovereignty.

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

5.1.2.1 **Fundamental Rights** – General questions – Effects – Vertical effects.

5.2.2.5 **Fundamental Rights** – Equality – Criteria of distinction – Social origin.

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

*Keywords of the alphabetical index:*

International law, general principles, effects in national law / Expropriation, restitution, exclusion / Expropriation, by occupying power.

*Headnotes:*

The state governed by the Basic Law in principle has a duty to guarantee on its territory the integrity of the elementary principles of public international law, and, in the case of violations of public international law, to create a situation that is closer to the requirements of public international law in accordance with its responsibility and within the scope of its possibilities of action. However, this does not create a duty to return the property that was seized without compensation outside the state's sphere of responsibility in the period between 1945 and 1949.

*Summary:*

I. At the instigation of the Soviet Military Administration in Germany, expropriations without compensation, *inter alia* of all private landholdings of over 100 hectares, were carried out in all states and provinces in September 1945. There were no judicial means of legal protection against the measures. In the course of the negotiations concerning the accession of the German Democratic Republic to the Federal Republic of Germany, the governments of the two German states issued on 15 June 1990 a Joint Declaration on the Settlement of Open Property Issues. With regard to the retransfer of property rights in land and buildings, the Declaration stated that the expropriations under occupation law or on the basis of sovereign acts by occupying powers (1945-1949) were "no longer reversible" (exclusion of restitution). For the expropriations in the German Democratic Republic from 1949 to 1990, the principle "return before compensation" was laid down. The Joint Declaration, by Article 41.1, became part of the

Unification Treaty, which in turn, was laid down in Article 143.3 of the Basic Law.

Both complainants are heirs of landowners who had been expropriated in the course of the land reform. They had unsuccessfully sought legal protection before the administrative courts. In their constitutional complaints, they challenged the violation of their fundamental rights, and rights equivalent to fundamental rights, under Article 1.1 of the Basic Law (human dignity), Article 2.1 of the Basic Law (right to free development of one's personality) in conjunction with Article 25 of the Basic Law (precedence of public international law), Article 3 of the Basic Law (equality before the law), Article 14 of the Basic Law (right to property) and Article 79 of the Basic Law (amendment). In their opinion, the exclusion of restitution violates public international law.

II. The Second Panel rejected the constitutional complaints as unfounded and essentially gave the following reasons in the grounds of its decision:

The constitutional complaints cannot be based on the fundamental right to property (Article 14.1 of the Basic Law). If a legal system such as the Soviet occupation regime, which comes into existence lawfully under public international law, breaks the connection between the owner and the property owned, then, independently of the question of the legality of the expropriation, the formal legal position of the owner ends when the expropriation occurs. If the expropriation took place outside the temporal or territorial area of application of the Basic Law, the previous owner cannot rely on Article 14 of the Basic Law.

The general principles of international law, under Article 25 of the Basic Law, are part of German law, with a priority higher than that of federal constitutional law. The German state bodies, under Article 20.3 of the Basic Law, are bound by public international law. However, a duty to enforce public international law is not to be assumed indiscriminately for any and every provision of public international law, but only to the extent that it corresponds to the conception of the Basic Law. The Basic Law seeks to increase respect for international organisations that preserve peace and freedom, and for public international law, without giving up the final responsibility for respect for human dignity and for the observance of fundamental rights by German state authority. There may be a tense relationship between this duty and the international cooperation between the states and other subjects of public international law, which is also intended by the Constitution, in particular if a violation of law may be terminated only by cooperation. Then this manifestation of the duty of

respect can be put into concrete form only in interaction with and balanced against Germany's other international obligations.

Article 1.2 of the Basic Law and sentence 1 of Article 25 of the Basic Law adopt the recognition of the existence of mandatory provisions of public international law, which may not be excluded by the states either unilaterally or by agreement.

A violation of the constitutional duty to respect public international law cannot be established because the expropriations on the territory of the Soviet occupation zone of Germany in the years 1945 to 1949 were the responsibility of the Soviet occupying power and cannot be attributed to the state power of the Federal Republic of Germany.

After its foundation, the German Democratic Republic, as the new sovereign in the meaning of public international law, could on the basis of its territorial sovereignty reverse measures of the occupying power, but it waived the right to do so. On German unification, the Federal Republic of Germany attained the sovereign competence to decide on the continuation of the expropriations carried out on the basis of sovereign acts by occupying powers. The Hague Land Warfare Convention, which was binding even at the time of the occupation, may give rise to claims between the occupying power and the returning sovereign. A party to a conflict that does not observe the provisions of Hague law is obliged to pay damages. However, this right to damages of the states involved is subject to their disposition. In the Two-Plus-Four Talks, the Federal Republic of Germany impliedly waived the right to any claims it had under the Hague Land Warfare Convention. There are no rules of mandatory public international law preventing the waiver. At the date of the expropriations, there was no general legal conviction that the protection of property of the state's own citizens was part of universally applicable public international law in the sense of *ius cogens*. The Panel further held that it could also not be established that at a later date a rule of mandatory public international law arose that excludes *ex nunc* the possibility of treating the existing situation as lawful.

Universal public international law does not contain a guarantee of the property of a state's own citizens as a protective standard for human rights. Nor do the provisions of the Vienna Convention on the Law of Treaties and the International Law Commission's articles on state responsibility give rise to the legal consequence that the expropriations on the basis of sovereign acts by occupying powers – assuming they violated mandatory international law – are to be treated as void by the Federal Republic of Germany.

Instead, the legal consequence of voidness is laid down only to the extent that duties under treaties are directed precisely to performance that is prohibited by a mandatory norm. Apart from this, however, the states have merely a duty to cooperate with regard to the consequences.

The Federal Republic of Germany satisfied this duty to cooperate with regard to the consequences by bringing about reunification by way of peaceful negotiations. In this connection, the Federal Government was permitted to come to the conclusion that managing reunification cooperatively would be incompatible with treating the expropriations as void. No breach of the public-international-law duty of the state not to enrich itself from another state's breach of international law has occurred. Such a duty is not mandatorily directed to the regained assets being returned specifically to the former owners. Instead, it is required that the total amount of distribution is adequate. The Federal Government has adequately distributed the enrichment resulting from Articles 21-22 of the Unification Treaty by passing the Compensation and Equalisation Payments Act. The equalisation arrangements made are just as compatible with the constitutional requirements of a state under the rule of law and the social welfare state and with Article 3.1 of the Basic Law as they are in harmony with any goals required by public international law.

In this connection it should also be taken into account that German unification is a process in which the Federal Republic of Germany may classify the treatment of individual topics – such as dealing with the land reform – as parts of an overall conception of the balancing of interests. In this connection, the second Panel held as follows: "The consequences of the Second World War, a period of rule under occupation and a post-war dictatorship must be borne by the Germans as a community of fate and also, within particular limits, as the individual experience of injustice, without it being possible in every case to obtain adequate compensation, to say nothing of restitution in kind."

The decision does not conflict with the European Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights. By the established case-law of the European Court of Human Rights, Article 1 Protocol 1 ECHR protects not only property positions already existing under national law, but also acquired claims on the realisation of which the claimant was rightfully entitled to rely. This definition of property excludes reliance on the continuation in existence of earlier property rights that over a long period of time could not be effectively exercised. The European Court of Human Rights has several times

expressed the opinion that in the immediate post-war period, property rights removed as a consequence of the Second World War in principle created no “legitimate expectations” protected by Article 1 Protocol 1 ECHR for the former holders of rights.

III. Judge Lübke-Wolff added a dissenting opinion to the decision in which she states the following: The Panel replies to questions that are not raised in the case with constitutional principles that are not contained in the Basic Law: The question as to whether the contested expropriations are to be reversed is answered by the Basic Law itself (Article 143.3 of the Basic Law). The complainants’ fundamental rights may therefore be injured by the challenged decisions only subject to the condition that Article 143.3 of the Basic Law is unconstitutional constitutional law (Article 79.3 of the Basic Law). It was only necessary to examine whether Article 143.3 of the Basic Law, and consequently also the challenged decisions, violated the core of human dignity of fundamental rights of the complainants, which may not be violated even by a statute amending the Constitution. If the Panel had asked the original question in this way, it would have directly become obvious that it is to be answered *ipso iure* in the negative. This question has already been answered in the negative by decisions of the First Panel. If only because of their status, public-international-law aspects are not capable of casting doubt on the correctness of these decisions. The general principles of international law, as the Panel itself recently emphasised, take precedence over federal statutes, but not over the Constitution. They can therefore not be in a position to enrich the complainants’ fundamental rights with core contents that also stand up to the Constitution-amending legislature. Consequently, the case gave no occasion to undertake more detailed discussion of the position under public international law.

#### Languages:

German.



## Greece

### Council of State

#### Important decisions

*Identification:* GRE-2004-3-001

a) Greece / b) Council of State / c) Assembly / d) 26.07.2004 / e) 2176/2004 / f) g) / h).

*Keywords of the systematic thesaurus:*

- 2.1.2.2 **Sources of Constitutional Law** – Categories – Unwritten rules – General principles of law.
- 3.4 **General Principles** – Separation of powers.
- 3.9 **General Principles** – Rule of law.
- 3.10 **General Principles** – Certainty of the law.
- 3.13 **General Principles** – Legality.
- 3.18 **General Principles** – General interest.

*Keywords of the alphabetical index:*

Administrative act, reversal / Administration, good, principle.

*Headnotes:*

The authorities are obliged to re-examine the lawfulness of individual administrative decisions and if necessary reverse them if administrative decisions of a similar nature have been set aside by the courts and the courts made such an order because the decision in question was issued under a provision of legislation that was not in compliance with a higher legal rule or under a regulation for which there was no legislative authority.

*Summary:*

In this decision, which represents a change in case-law, the Council of State considered the question of the obligation to reverse administrative decisions. Under a general principle of law, which applies in the absence of any legislation to the contrary, the authorities are not in principle required to reverse individual unlawful administrative decisions that are not subject to judicial review because the time limit for lodging applications has expired, or that have been the subject of court proceedings that were unsuccessful for whatever reason. In either case, the

authorities have discretionary power when faced with a request to reverse an administrative decision and their refusal to accede to such requests does not constitute unlawful omission. The decision reported here modifies that principle. It stipulates that if an administrative decision has been set aside in a final court judgment, because the decision in question was made under a provision of legislation that was not in compliance with a higher legal rule, such as an article of the Constitution, or under a regulation for which there was no legislative authority, the aforementioned principle granting the authorities discretionary power to decide whether or not to reverse unlawful decisions does not apply if a citizen with a lawful interest requests the reversal of an administrative decision of a similar nature based on the same provision, within a reasonable time of the publication of the decision to set aside. In such cases the authorities are obliged to re-examine the lawfulness of the decision and reverse it under their discretionary or associated powers to issue the decision in question, taking into account any matters of public interest that may require or preclude reversal, the need to protect rights acquired in good faith by third parties and the time elapsed between the time the decision was taken and when the request for it to be reversed was lodged. The majority of the Assembly of the High Court considered that, far from contravening the principle of legal certainty and the requirement for administrative stability, reversing decisions in these circumstances is fully compatible with the rule of law and administrative legality, and the principles of good administration, which are not consistent with the continuation of situations, in law or in practice, created in flagrant breach of the law. Omitting to reverse an unlawful decision under such circumstances is an omission open to challenge of abuse of authority.

The dissenting opinion argued that the general principles of law, based on the body of legislation, are laid down by the courts in accordance with the separation of powers, as embodied in Article 26 of the Constitution. The Council of State has always accepted the general principle that authorities are only obliged to reverse unlawful administrative decisions if required to do so by the law or following a judicial order to set aside the decision. Social security law provides the only exception to this principle. This general principle of administrative law, which parliament tacitly accepted for years, is enshrined in administrative law, and the 1975 Constitution made no provision to the contrary. The Council of State, sitting as a full court, previously found that any exceptions to the principle had to be based on an express and special provision and could not be inferred from the spirit and purpose of the relevant constitutional provisions. The code of administrative proceedings, adopted a few years ago, does not

include any provisions incompatible with this well-established legal principle, even though it does include provisions on the reversal of administrative decisions. Nor was this general principle modified in the revision of the Constitution in 2001. The general principle in question is therefore long established and has been recently confirmed and there is nothing in the established body of law to justify any change in the case-law. Moreover the general principle in question has been acknowledged by the judicial institutions of the European Communities (Decision of 14 September 1999, C – 310/97 P) and reflects the majority approach in the member states of the European Union, in which legal certainty takes precedence over the lawfulness of administrative decisions and the principle of equal treatment of citizens. The dissenting opinion therefore concludes that parliament and not the courts should be responsible for modifying this general principle of law.

#### *Languages:*

Greek.



#### *Identification:* GRE-2004-3-002

**a)** Greece / **b)** Council of State / **c)** Assembly / **d)** 21.12.2004 / **e)** 3633/2004 / **f)** / **g)** / **h)**.

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

- 3.4 **General Principles** – Separation of powers.
- 3.9 **General Principles** – Rule of law.
- 3.13 **General Principles** – Legality.
- 3.18 **General Principles** – General interest.
- 5.2 **Fundamental Rights** – Equality.
- 5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
- 5.3.38 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law.
- 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

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

Regulation, administrative, legal validation.



*Headnotes:*

Retrospective validation, direct or indirect, of administrative decisions has no effect on cases already pending before the courts.

Restrictions on freedom to engage in economic activity may not be such as to make it impossible or excessively difficult to attain the lawful objectives of the activity, on whose fulfilment the survival of the undertaking as an economic unit depends.

*Summary:*

The decision marks a significant development in the case-law on relations between parliament, government and the courts. Retrospective legislation to validate regulations was standard practice for a long time. The Greek Constitution does not grant the authorities autonomous power to issue regulations so regulations issued without legislative authority have no legal basis. However, the procedure was used frequently, with parliament then intervening to directly validate such regulations, which were often not even published in the Official Journal. After a long period in which it dismissed claims that these practices were unconstitutional, in the 1990s the Council of State handed down a series of bold decisions in which it emphasised the principle that administrative decisions must be lawful, which prohibited the issuing of regulations without legislative authority. According to this case-law, legislation to validate regulations issued without statutory authority was applicable in the future but certainly did not give such unlawful regulations formal statutory endorsement, thus making them immune from scrutiny by the courts for abuse of authority. Moreover, even if it had retrospective effect, such validation could not make such regulations issued without statutory authority lawful. The case-law took a somewhat qualified approach to the applicability of retrospective legislation to pending cases. Setting aside cases where it was formally prohibited by the Constitution, particularly in the criminal and tax domains, retrospective legislation was generally deemed to be constitutional. Whether such legislation applied to pending cases depended on the circumstances. If it introduced a regulation or body of regulations of general nature the legislation was also applicable to cases pending before the courts, but if its scope was restricted to an individual case or cases it was deemed not to be compatible with the principle of separation of powers and the courts did not apply it to cases before them. In the case considered here, the Council had to consider whether retrospective legislation that modified the enabling legislation on which a regulation was based could include cases

pending before the courts in its scope. The majority of the judges thought not, irrespective of the reasons for the legislation or of the general nature of the new regulations.

The majority reasoned as follows: regulations issued by the executive in breach of Articles 26, 43, 44, 73 and 95 of the Constitution, which embody, respectively, the principles of separation of powers, the need for any regulations issued by the authorities to be sanctioned by legislation, parliament's legislative power and judicial scrutiny of administrative decisions, cannot be validated by retrospective legislation. As a consequence, legislation retrospectively validating a ministerial decree issued without statutory authorisation or otherwise in breach of the minister's underlying authority is in fact invalid, in so far as the regulation concerned is unconstitutional. If, however, the retrospective legislative validation concerns a regulation that has been issued in compliance with and within the limits set by the relevant enabling legislation but is incompatible with the material content of that enabling legislation, the validating legislation may have retrospective effect, but this will have no effect on cases pending before any courts required to examine, directly or indirectly, the lawfulness of the regulation in connection with these cases. Where cases are pending before the courts, retrospective validation of a regulation would amount to interference by parliament in the judicial function and therefore be incompatible with Articles 4, 20 and 26 of the Constitution, embodying the principle of equality, the right to judicial protection and the separation of powers. Similarly, retrospective legislation that, without directly validating an administrative decision or measure that fails to meet the requirements of the enabling legislation, either retrospectively modifies the enabling legislation itself or introduces a new provision with retrospective force giving force of law to the administrative decision or measure concerned, cannot apply to pending cases.

The substantive issue in this case was whether a regulation laying down maximum prices for medicines was constitutional. The court ruled that freedom to engage in economic activity was a constitutional right: that freedom includes the freedom to engage in commercial activity and has as an objective the guarantee of the profitable running of companies inside a competitive market. Both parliament, and the administrative authorities when issuing regulations, could impose restrictions on this freedom, if this was in the public interest. However, such restrictions must not be such as to make it impossible or excessively difficult to attain the lawful objectives of the activity, on whose fulfilment the survival of the undertaking as an economic unit depended. Measures to regulate markets, including controls on the prices of goods to



protect consumers, were acceptable restrictions on the freedom to practise a trade, so long as they did not place significant constraints on the undertaking's business activities.

*Languages:*

Greek.



## Hungary Constitutional Court

### Statistical data

1 September 2004 – 31 December 2004

Number of decisions:

- Decisions by the plenary Court published in the Official Gazette: 18
- Decisions by chambers published in the Official Gazette: 15
- Number of other decisions by the plenary Court: 42
- Number of other decisions by chambers: 9
- Number of other (procedural) orders: 40

Total number of decisions: 124

### Important decisions

*Identification:* HUN-2004-3-007

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 28.09.2004 / **e)** 34/2004 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2004/136 / **h)**.

*Keywords of the systematic thesaurus:*

- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 4.5.11 **Institutions** – Legislative bodies – Status of members of legislative bodies.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.
- 5.3.24 **Fundamental Rights** – Civil and political rights – Right to information.

*Keywords of the alphabetical index:*

Parliament, member, immunity, scope / Parliament, member, defamation, against public officials /

Parliament, member, defamation, against private persons.

*Headnotes:*

A member of parliament cannot be held responsible for their defamatory statements made in front of a plenary session or a committee, if the person about whom the remarks are made is another member of parliament or a politician acting in public. A member of parliament's defamatory statements concerning the commission of another member of parliament (or another public person) or their governmental activity falls within the range of parliamentary freedom of speech.

On the other hand, a statement of fact or a rumour capable of offending the honour of the authority or the persons referred to above or an expression directly referring to such a fact will be punishable if the person who made the statement, spread a rumour or used an expression directly referring to such a fact, knew the essence of his or her statement to be false or did not know about its falseness because of his or her failure to pay attention or exercise caution expected of him/her pursuant to the rules applicable to his or her profession or occupation, taking into account the subject matter, the medium and the addressee of the expression in question.

A member of parliament will also be held responsible for libel and defamation relating to persons not exercising public authority and non-public persons. The protection of honour and reputation has to be respected even during parliamentary debate and parliamentary activity, and the protection of this right has to be secured by legislation, in cases not associated with public affairs and relating to the honour of public or private persons.

*Summary:*

The basis of the case was a petition for the partial annulment of the second sentence of Article 4 of Act LV of 1990 on the legal status of members of parliament ("the Act"). According to the petitioners, that provision, according to which, during their activity members of parliament could be held responsible for their statements of fact or value judgment, violated the principle of freedom of expression in Article 61.1 of the Constitution and the right of access to public information.

The special position of the freedom of expression has been strengthened by the Constitutional Court several times, which has emphasised that while this position does not lead to the freedom of expression

being unlimited, it undoubtedly means that it has to yield only to very few other rights and that the freedom of expression can be restricted only exceptionally and exclusively for the protection of another fundamental right or another constitutional principle. The Court assigned free speech a privileged rank in the hierarchy of rights: it is protected regardless of its content and all other rights conflicting with it have to be interpreted restrictively.

Parliamentary freedom of speech is an essential part of the freedom of expression. An important scene for the manifestation of the freedom of expression is parliament, the place where members of parliament make decisions directly concerning the fate of the country, on the basis of arguments and counter-arguments. Constitutional lawmaking is unimaginable without public parliamentary debate and the right of members of parliament to speak. Real public debate and the free manifestation of the ensuing legislative intent, however, are endangered if members of parliament can be held criminally liable for their statements in the parliamentary debate. Parliamentary immunity is one of the main guarantees of parliamentary freedom of speech, which means that members of parliament can freely debate public affairs, without the fear that their statements can be used against them in a criminal proceeding or a civil action afterwards. An important part of the duty of members of parliament is to check on the legislation, for which access to necessary public information is indispensable.

Free parliamentary debate of public affairs is thus one of the indispensable preconditions of legislation. It also enables voters to form an accurate notion of the activity of members of parliament and other significant public persons, and to take part in political discourse and decision-making in possession of adequate information.

According to Decision 30/1992 the right to human dignity can be a barrier to the freedom of expression. In Decision 8/1990 the right to human dignity is considered a definition of the general personal right, one aspect of which is the right to privacy and the protection of honour. Means of protecting honour can be found in criminal and private law and as the Constitutional Court stated in Decision 36/1994 "The use of criminal law in the protection of human dignity, honour and reputation cannot be considered, in general, to be disproportionate, and thus unconstitutional". At the same time, the decision drew attention to the fact that because of the high constitutional value of the freedom of expression in public matters, the protection of the honour of authorities and public officials as well as other public figures can justify less

restriction on the freedom of expression than the protection of the honour of private persons.

The Court then examined the question, on the basis of the second statement of Article 4 of the Act, which behaviour parliamentary immunity does not protect and whether the threat of criminal liability can be justifiable in the case of such behaviour.

As regards the question of how statements of facts of libel and defamation can be constitutionally applied to the freedom of speech of politicians acting in public, Decision 36/1994 gives guidance. For the definition of the parliamentary immunity of members of parliament it is essential to consider the constitutional requirements contained in the decision. In relation to persons and institutions exercising public authority and politicians acting in public, the decision makes a distinction between a value judgment and a statement of fact, making the former unpunishable and the latter punishable in certain cases.

On the basis of the constitutional requirement stated in the decision, the expression of a value judgment capable of offending the honour of an authority, of an official person or of a politician acting in public, and expressed with regard to his or her public capacity, is not punishable under the Constitution.

In other words, parliamentary immunity should be extended to cover statements of opinion containing value judgements of members of parliament, concerning other members of parliament, persons exercising public authority or politicians acting in public, and relating to public affairs. In the case of a statement of fact or a rumour capable of offending honour or an expression directly referring to such a fact, parliamentary immunity can only be suspended if the member of parliament knew the statement to be essentially false.

On the basis of the first part of the previously mentioned constitutional requirement, members of parliament therefore have criminal liability only for deliberately untrue statements offending their fellow members, other persons exercising public authority or politicians acting in public. For the sake of political freedom of expression the decision defined the constitutional content of Articles 179 and 180 of the Criminal Code, and the Court has to consider this when judging cases relating to public affairs concerning public persons.

The present decision of the Court emphasises that the constitutional value of the freedom of expression and freedom of the press relating to public affairs is outstandingly high, as one of the essential elements of Article 61.1 of the Constitution is the free debate of

public affairs and the free criticism of public persons. In this way the Court found the above mentioned constitutional requirement authoritative according to the following.

On the basis of the constitutional requirement of the decision, persons exercising public authority or other public persons may only invoke libel or defamation within the limited scope defined by the Court. The criminal offence of libel defined in Article 179 of the Criminal Code can now only be committed deliberately, and it is enough to establish that the perpetrator is aware that the statement is capable of breaching honour.

The Court emphasised that the constitutional requirement of the decision can by no means mean that the legislature should make the Criminal Code suitable for the punishment of a criticism of public persons in the case of defamation if the perpetrator did not know about the falseness of his/her statement or rumour because of his or her failure to pay attention or exercise caution expected of him/her pursuant to the rules applicable to his or her profession or occupation, taking into account the subject matter, the medium and the addressee of the expression in question. This would violate the freedom of political expression enshrined in Article 60.1 of the Constitution. In this way the Court upheld the constitutional requirement stated in the decision.

The contested part of Article 4 of the Act is in this way not unconstitutional in itself, since the limitation of the freedom of expression can be justified in defence of the right to personal dignity of private persons and the protection of honour of public persons, in cases not relating to public affairs.

#### *Languages:*

Hungarian.



#### *Identification: HUN-2004-3-008*

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 23.11.2004 / **e)** 44/2004 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2004/176 / **h)**.

*Keywords of the systematic thesaurus:*

- 3.10 **General Principles** – Certainty of the law.
- 3.12 **General Principles** – Clarity and precision of legal provisions.
- 3.16 **General Principles** – Proportionality.
- 3.18 **General Principles** – General interest.
- 4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.32.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.

*Keywords of the alphabetical index:*

Crime, perpetrator, information, divulgation / Criminal prosecution, data, use by the police / Search, police.

*Headnotes:*

Public order and public safety do not require that a suspect's data be made widely public, even when giving information on crimes against public order or other serious crimes, and even more so, during police investigation.

*Summary:*

In the past decade several petitions have reached the Constitutional Court in relation to Act XXXIV of 1994 on the Police ("the Police Act"). The petitions were grouped together, then separated according to subject and judged in several steps. Decision 47/2003 (*Bulletin* 2003/3 [HUN-2003-3-006]) of the Constitutional Court dealt with control connected with crime prevention, Decision 65/2003 (*Bulletin* 2003/3 [HUN-2003-3-008]) of the Constitutional Court was concerned with questions related to the right to liberty and security, while Decision 9/2004 (*Bulletin* 2004/1 [HUN-2004-1-002]) of the Constitutional Court judged petitions concerning the use of fire-arms by police officers. In the present case the Constitutional Court judged petitions that had not been judged before.

1. The petitioners objected to the fact that under Article 36.4 of the Police Act the police can make public the data stated in Article 79.1 of the Police Act regarding a person who has committed a crime when they give information on crimes violating public order or other serious crimes. According to Article 79.1 such data is personal data and includes in the case of a foreign citizen their citizenship, the address and the criminal data relating to the crime committed by the person. The Police Act does not determine the range of personal data when applying the Act. In this

respect the definition of Act LXVI of 1992 concerning the personal data and address of citizens also has to be taken into consideration, which lists a relatively wide range of data. According to the Constitutional Court, however, public order and public safety do not require that a suspect's data be made widely public, even in cases of crimes violating public order or other serious crimes, especially not during police investigation. For this reason the Constitutional Court held that the contested provision constituted an unnecessary and disproportionate limitation of a fundamental right with respect to the constitutional goal to be achieved and was thus unconstitutional.

2. According to the petitioners the part "police, or else" of Article 77.1 of the Police Act violated Article 59.1 of the Constitution guaranteeing the right to the protection of personal data. The contested phrase meant that the personal data collected and kept for purposes of criminal prosecution could be used for police purposes as well, except for cases where the Police Act disposed differently. According to the Constitutional Court the use of personal data collected and stored for purposes of criminal prosecution was unambiguous, accurately defined and well-circumscribed, and constituted a constitutional goal which could restrict the right to the protection of personal data in association with Article 40/A.2 of the Constitution. The use of personal data for police purposes, however, did not relate to a particular task, but to a whole body, without any restriction on content. Thus the purpose of the further application of special data collected for criminal purposes could not be stated, and it could not be judged whether the restriction of the right to the protection of personal data was in harmony with the goal to be achieved, justified and necessary. The Constitutional Court held that the clause "police, or else" in Article 77.1 of the Police Act violated Article 59.1 of the Constitution and annulled it.

3. According to Article 80.1 of the Police Act the body handling police data can handle data concerning previous convictions or sensitive data exclusively in the case of a person suspected of committing a crime listed in Article 84.i-n of the Police Act. Article 84.i-n of the Police Act does not list particular crimes, and is not concerned only with the data of accused persons. According to the petitioners this lack of clarity also violates Article 59.1 of the Constitution. The Constitutional Court agreed, and stated that Article 80.1 of the Police Act was difficult to interpret and was ambiguous because of the wording of Article 84.i-n.

4. According to Article 85.1 of the Police Act the body handling police data cannot give information to those concerned on data defined in Article 84.i-n. According

to the petitioners this provision violates the Constitution, because it cannot be justifiable that individuals concerned cannot get information on where and for what purposes their personal data are used. During constitutional examination the Constitutional Court stated on the one hand, that the protection of state security, crime prevention or the rights of private persons could make it necessary to prohibit providing information on data listed in Article 84.i-n of the Police Act. However, it also stated that on the basis of this provision it cannot be defined or delimited precisely in which cases the police cannot inform the individuals concerned, that is, who is concerned according to the provision. When restricting fundamental rights no such legal uncertainty is permissible. Due to the difficulties of legal interpretation the application of the legal provision becomes unpredictable and legal security is violated. As a result, the Constitutional Court ruled that Article 85.1 of the Police Act did not conform to Article 2.1 of the Constitution, and thus also violated Article 59.1 of the Constitution.

#### *Supplementary information:*

The Constitutional Court rejected several petitions concerning the Police Act. Several constitutional justices expressed dissenting opinions in this regard.

1. Regarding personal and institutional security, Article 39.1 of the Police Act makes it possible for police officers to enter premises without an administrative decision. The relevant rules are defined in point c. of Article 46.1 of the Police Act. According to the petitioners this violates Article 59.1 of the Constitution. The Constitutional Court rejected this petition by a majority decision. Constitutional judge Árpád Erdei expressed a dissenting opinion, and argued for the unconstitutionality of the debated provision. Erdei's opinion was shared by constitutional judges Attila Harmathy, Éva Vasadi and István Kukorelli. According to the latter, further points of Article 39.1 of the Police Act were also unconstitutional.

2. Point c. of Article 97.1 of the Police Act provides that domicile is any dwelling (holiday home, country cottage or other premises, institution or place used for the purposes of inhabitation) and any premises, institution or enclosed area belonging to it. According to the petitioners the protection of domicile and private sphere also belongs to private premises not used for the purposes of inhabitation, even if they do not belong to the domicile. Non-public private institutions and private offices should get the same protection as domicile, but the debated disposition excludes this. The Constitutional Court rejected these petitions. Constitutional judges András Holló, Éva Vasadi and István Kukorelli however were of the opinion that this provision also violated the Constitution.

#### *Languages:*

Hungarian.



#### *Identification:* HUN-2004-3-009

a) Hungary / b) Constitutional Court / c) / d) 13.12.2004 / e) 54/2004 / f) / g) *Magyar Közlöny* (Official Gazette), 2004/198 / h).

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

- 1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
- 3.10 **General Principles** – Certainty of the law.
- 3.12 **General Principles** – Clarity and precision of legal provisions.
- 3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.
- 3.16 **General Principles** – Proportionality.
- 3.18 **General Principles** – General interest.
- 5.2 **Fundamental Rights** – Equality.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.4.19 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

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

Drug, possession, use, liability / Drug, public health, danger / Treaty, implementation.

#### *Headnotes:*

The use of drugs takes away part of the consumer's human dignity by making his/her ability to decide dependant on external factors. This brings into play the state's obligation of institutional protection supporting the right to health. Making the use of drugs permissible would eliminate the individual's right to free self-determination. "Self-overpowering" cannot be viewed as part of the right to free self-determination, since it has consequences for society and public safety. The "freedom of action creating and protecting values" can be practised only in a safe environment without fear. The relevant provisions of the Criminal Code protect the whole society from the dangers of drugs. In the field of special prevention, and because of the risk deriving from the "uncertainty



of consumer freedom”, the restriction of the right to free self-determination by making certain behaviour criminal cannot be viewed as either unnecessary or disproportionate.

### *Summary:*

Five petitions asked the Constitutional Court to review the constitutionality and the compatibility with international agreements of some provisions relating to drug consumption in the Criminal Code. They also asked the Constitutional Court to declare that the legislative organ had failed to fulfil its legislative task ensuing from international treaties.

Some of the petitions attacked the Criminal Code on the basis that the text currently in force does not secure the right to self-determination which follows from the right to human dignity. Furthermore, the petitions complained that the present regulation declares the use of certain narcotic and psychotropic substances punishable without, on the one hand, reasonable considerations, and, on the other, a differentiation on the basis of whether the perpetrator obtains or keeps drugs for his/her personal use or for commercial purposes. Two members of parliament argued that the provisions securing exemption from criminal liability violate the New York Single Convention on Narcotic Drugs and the Vienna UN agreement on the ban of narcotic and psychotropic substances. In their opinion the phrases used in the Criminal Code, like “on the occasion of a common use of drugs” or “for a personal purpose” are legal notions without a clear content, and thus violate the requirement of legal certainty enshrined in Article 2.1 of the Constitution. Furthermore, the petitions referred to the protection of the interests of the young children’s right to receive the protection and care of their family, the right to a healthy environment and the right to the highest level of physical and mental health.

The Court emphasised that the Constitutional Court is neutral and cannot take a stand either for or against criminal regulation relating to the use of drugs. Its review has to remain restricted to the duties relating to the state’s obligation of institutional protection. It can compare personal rights and the state’s related obligations with the effect of the use of drugs on the individual and society. Since the use of drugs creates an altered state of mind, the Court was of the opinion that the view according to which consumer behaviour only affects the individual was unsubstantiated, as the use of drugs took place in a social context. Thus, for the sake of protecting everybody’s right to human dignity it is the duty of the state to remove the dangers affecting its citizens.

The petitions attacking criminal liability for the use of drugs on the basis of the violation of the right to self-determination were all rejected by the Constitutional Court. The court viewed the right to human dignity as one definition of the general right to personality, which encompasses various aspects, such as the right to free self-determination. The Court stated that in order to fulfil its obligations the state needs to protect not only individual fundamental rights, but also the values and situations relating to them. In this respect, the Constitutional Court applied the necessity-proportionality test and examined only whether the obligation of institutional protection based on the right to life can justify the restriction of the right to free self-determination, and if yes, where the boundaries of the restriction lie.

The right to physical and mental health requires an active participation on the part of the state. The state fulfils its duty if it protects its citizens from irreversible sanitary risks. This duty of institutional protection extends to consumers, as personal consumption is not based on a free, informed and responsible decision. The “right to self-preoccupation” is part of the right to free self-determination; however, the unrestricted “right to intoxication” cannot be deduced from the Constitution, not even indirectly.

The Court did not find it disquieting that the legislature had declared the use of different narcotics and psychotropic substances criminally liable to a different extent. The review of political decisions in the criminal field does not fall into the sphere of the Court’s competence. The legal consequences of the use of substances affecting health are different in terms of age and culture: as their use dates back to hundreds of years, “European culture has ‘learned’ to live together with alcohol, nicotine and coffee”.

The Court partially found the petition substantiated in the part where it was alleged that the phrases “for personal use” and “common use” violate the principle of legal certainty, since on the basis of “common use” it cannot be stated which level of common perpetration it means. It is also unclear how many persons can participate in the actions. Similarly, the phrase “occasion of use” is ambiguous, as the provisions of the Criminal Code do not specify whether this condition applies to single use or regular use in the same or different locations and personal spheres. It is ambiguous whether the contents of active ingredients have to be counted up in the case of repeated handover, or the individual occasions of handover have to be valued according to the accumulative rules in the general part of the Criminal Code. The resulting ambiguity can produce discrimination among legal

entities. The questioned provisions violate the requirement of legal certainty.

Concerning the provision relating to “official licence” the Court found that the lack of harmony between underlying legal provisions and the Criminal Code creates an unconstitutional situation manifesting itself in omission.

The Court stated that the Criminal Code’s provisions securing immunity for dependant consumers are not in harmony with the international agreements. The Court also found further omissions relating to international treaties. Because of partial incorporation of the relevant international treaties, the lists of narcotics and psychotropic substances are not available in Hungarian, and national, international and European Union law material are still mixed.

#### *Supplementary information:*

Constitutional Judge Mihály Bihari handed in a separate opinion to the decision, in which he found the statement of omissions unacceptable, since the arguments do not give an adequate reason for the statement of an unconstitutional situation. Constitutional Judge István Kukorelli also handed in a separate opinion. He argued that for the sake of the protection of the public interest, with reference to an abstract danger the use of drugs can be punishable only where two conditions are met: the criminal punishment has to be adjusted according to the dangers of the individual substances and, if the legislature creates penal laws concerning unspecific dangers, then the legal practice has to leave space for the consideration of particular conditions. According to Judge Kukorelli a majority opinion was not sufficient for the statement of unconstitutionality based on legal certainty, and he questioned the supposition that the protection of the interests of children and young persons based on Articles 16 and 67 of the Constitution would only be achieved by criminal accountability that makes no exceptions possible.

#### *Languages:*

Hungarian.



## Republic of Korea Constitutional Court

### Important decisions

*Identification:* KOR-2004-3-002

**a)** Republic of Korea / **b)** Constitutional Court / **c)** / **d)** 29.04.2004 / **e)** 2003Hun-Ma814 / **f)** Dispatch of armed forces to the Iraq War Case / **g)** 16-1 *Korean Constitutional Court Report* (Official Digest), 601 / **h)** CODICES (Korean).

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

- 1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
- 1.3.5.14 **Constitutional Justice** – Jurisdiction – The subject of review – Government acts.
- 3.3.1 **General Principles** – Democracy – Representative democracy.
- 3.4 **General Principles** – Separation of powers.
- 3.18 **General Principles** – General interest.
- 4.4.1.6 **Institutions** – Head of State – Powers – Powers with respect to the armed forces.
- 4.5.7.3 **Institutions** – Legislative bodies – Relations with the executive bodies – Motion of censure.
- 4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.

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

Armed forces, use, abroad / Iraq, war / Judicial restraint.

#### *Headnotes:*

The President has the power to decide whether Korean armed forces should be dispatched to foreign countries. The National Assembly has the right to consent to the decision. They should consider many political concerns before making the decision (i.e. foreign relations).

It is inappropriate for the judicial branch to review and decide on the constitutionality of the dispatch of armed forces. Thus, the complainant’s constitutional complaint seeking a declaration of its unconstitutionality is not subject to review by the Constitutional Court.

*Summary:*

The President decided to dispatch Korean armed forces to Iraq to participate in the Iraq War. The National Assembly passed a resolution consenting to the decision on 2 April 2003. The complainant filed a constitutional complaint, arguing that because the Iraq War was an aggressive one, the dispatch of armed forces to Iraq to participate in the War was against Article 5 of the Constitution and violated the citizen's duty of national defence.

The Constitutional Court held by 5 to 4 that the President's decision to dispatch armed forces to the Iraq War was a political one and thus it should not be deemed as an exercise of public power subject to review by the Constitutional Court and dismissed the complaint.

The key features of the Court's decision are:

- The dispatch of armed forces to a foreign country is closely related to national security and the state's interest.
- It could be dangerous not only for members of the armed forces, but also ordinary citizens.
- It would affect the role and status of Korea in the international community and the relationship with other allied countries. Consideration must be given to national goals and the future direction of the state in view of the circumstances.

It would be desirable for the representative branch to determine whether to dispatch troops because it could seek the opinion of and consult with specialists in related areas. However, the Constitution provides the President with the necessary powers and the National Assembly with the right to consent. The Constitution contains a basic principle of a representative democracy, and political decisions made by the President and the National Assembly should be respected in all circumstances save for exceptional ones.

It is the duty of democratic representative bodies to decide whether the dispatch of armed forces is unconstitutional, whether it would violate international law which prohibits aggressive war, and whether it would contribute to lasting world peace and the common prosperity of mankind and thereby ensuring security, liberty and happiness for Koreans. The Court, as a judicial body with limited information, might not be able to review the decision. It cannot be ascertained whether the decision of the Court would be better than that of the President and the National Assembly and one on which the people could rely.

As the President made the dispatch decision with the National Security Council, the State Council deliberated on it, and the National Assembly passed the resolution of consent, all legal procedural requirements were satisfied.

Because it was a political decision, the Constitutional Court should exercise prudence in the judicial review of that decision. Therefore, the complainant's constitutional complaint was dismissed.

*Supplementary information:*

Four of the nine Justices delivered a concurring opinion. They stated that the decision to dispatch armed forces to Iraq to participate in the Iraq War did not infringe any of the complainant's constitutionally protected rights because the complainant is an ordinary citizen not a member of the armed forces. Thus, the complainant's constitutional complaint had to be dismissed.

*Cross-references:*

- Decision of 18.12.2003 (2003Hun-Ma255, 256).

*Languages:*

Korean.

*Identification:* KOR-2004-3-003

**a)** Republic of Korea / **b)** Constitutional Court / **c)** / **d)** 21.10.2004 / **e)** 2004Hun-Ma554-566 (consolidated) / **f)** Relocation of the Capital Case / **g)** 98 *Korean Constitutional Court Gazette*, 1095 / **h)** CODICES (Korean).

*Keywords of the systematic thesaurus:*

1.3.4.11 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of constitutional revision.

1.3.5.5.1 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law – Laws and other rules in force before the entry into force of the Constitution.

2.1.2.1 **Sources of Constitutional Law** – Categories – Unwritten rules – Constitutional custom.

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

5.3.29 **Fundamental Rights** – Civil and political rights – Right to participate in public affairs.

*Keywords of the alphabetical index:*

Constitutional custom, change, procedure / Capital, administrative, relocation / Referendum, amendment to constitutional customary law, right.

*Headnotes:*

Once a certain legal norm is recognised as customary constitutional law, the possibility of change inevitably follows. Customary constitutional law as part of the Constitution has the same legal effect as the written Constitution and the amendment thereof should also be carried out in the same manner as that of the written Constitution, in accordance with Article 130 of the Constitution.

Since Seoul is the national capital and has acquired the status of customary constitutional law and there has been no change of circumstances, the abrogation of the customary constitutional law should be carried out in the same manner as an ordinary constitutional amendment, i.e. by way of national referendum.

*Summary:*

The government proposed the Special Act on the Construction of the New Administrative Capital (hereinafter referred to as “the Act”), which provides for the relocation of the capital to the *Chungcheong* Province, 160 kilometres south of Seoul. The National Assembly passed the Act on 29 December 2003 with 193 votes from a total of 271 votes cast. The petitioners are public officials employed in the Seoul Metropolitan Government, members of Seoul Metropolitan Council and other citizens across the nation. They lodged a constitutional complaint, alleging that the Act should be declared unconstitutional *in toto* since it changed the location of the national capital without using the proper procedure to amend the Constitution and it infringed upon their rights to a national referendum, equality, property, pursuing happiness, freedom of movement and residence, freedom of occupation, and taxpayers’ right.

The Constitutional Court held that the Act was in violation of the Constitution as it infringed the people’s right to a national referendum, which was required for the process of constitutional amendment. The Act provided for the relocation of the capital in

the form of a general statute when it should have been in the form of a constitutional amendment. Seven of the nine Justices joined in the opinion of Court, with one concurring and one dissenting.

The key features of the decision are:

1. The concept of a national capital in the Constitution

The national capital is the place where important governmental offices are concentrated and where key governmental functions in politics and administration are exercised. It also symbolises externally the identity of the country. In deciding the location of the national capital, it is particularly important to ascertain where the legislature and the president are located since the legislature reflects the people’s political will as a representative body of the people and the president supervises the administration as the chief of the executive branch and represents the country as head of state.

2. Whether the Act contains the determination of relocation of the capital

The Act at issue stipulates that the new administrative capital is the “area as prescribed by statute... where the key functions of the state in politics and administration will be carried out.” (Article 2.1 of the Act). It also prescribes the anticipated location of the new administrative capital as “the area designated and announced ... in order to move major constitutional bodies and central administrative offices” (Article 2.2 of the Act). Therefore, there is a clear intention to locate major constitutional bodies and central administrative offices and to carry out key functions of state in politics and administration in the new administrative capital. Thus, even though the Act does not specify the individual governmental institutions to be relocated, the extent of the relocation would be large enough for the important political and administrative functions to be carried out in the new capital. Considering the scale of the relocation, the establishment of the new administrative capital by the Act amounts to the relocation of the national capital itself.

3. Whether the practice of the location of the national capital in Seoul is regarded as customary constitutional law

a. The written Constitution is primarily the main source of constitutional law. However, it is virtually impossible to stipulate all constitutional matters in the written Constitution. It thus leaves certain matters to be recognised as customary constitutional law even though they are not expressly dealt with in the written Constitution. In particular, matters which were self-



evident and were the premises upon which the Constitution was first drafted, may not be included in the written Constitution, but it does not mean that all customs and practices enjoy the status as customary constitutional law. They must meet strict requirements in order to be recognised as customary constitutional law and only then can customary constitutional law have the same legal effect as the written Constitution.

b. In order for certain matters to be considered as customary constitutional law, they should be constitutionally important basic matters to the extent that they must not be dealt with in the form of a general statute, but instead should be governed by the Constitution, whose legal effect prevails over that of general statutes. In addition, customary constitutional law must also satisfy the general requirements that ordinary customary law should meet to be recognised. First, there must be customs and practices concerning basic constitutional matters. Secondly, they must be repeated and continued over a substantial period of time so that people have acknowledged their existence and believe they will continue to exist (repetition or continuity). Thirdly, they must be consistent without being challenged (consistency). Fourthly, they must not be vague or open to different interpretations. That is, they should be clear enough for the meaning of their contents to be identified therein (clarity). Lastly, there must be a wide consensus among people approving and accepting the customs as customary constitutional law and believing in their enforceability (consensus).

c. There is no provision defining 'Seoul as the national capital' in the text of the Constitution. However, Seoul as the national capital is self-evident from its name, Seoul, which means national capital in Korean. People have consciously or unconsciously acknowledged it as a historical and traditional fact even before the Republic of Korea was established in 1948. When the Republic of Korea was first founded, Seoul as the national capital was taken to be a matter of course and it was so self-evident and clear that nobody dared question it. Therefore, it was meaningless and unnecessary to repeat the obvious rule in the constitutional text.

d. Seoul as the national capital has been accepted as an apparent normative fact since the establishment of the Joseon Dynasty in 1392, and has been regarded as a continuous governmental practice which has long been upheld (continuity). This practice has been consistently and effectively observed for over six hundred years without any change (consistency). The practice that the national capital is located in Seoul has a clear meaning and does not allow for any different interpretation to be inferred, regardless of individual personal preference (clarity). Furthermore,

the practice has already acquired wide consensus and approval by the people as it has long been adhered to and people believe the effectiveness and enforceability of the practice as a basic element of the state structure (consensus). Therefore, Seoul as the national capital has long been recognised as a traditional or customary constitutional rule, which was established before the existence of the written Constitution.

4. The constitutional process to abrogate the customary constitutional law that the national capital is Seoul

Once a certain legal norm is recognised as customary constitutional law, the possibility of change inevitably follows. Customary constitutional law as part of the Constitution has the same legal effect as the written Constitution and any amendments should be executed in the same manner as that of the written Constitution in accordance with Article 130 of the Constitution. Thus, the proposed constitutional amendment should first receive the vote of two-thirds or more of the total members of the National Assembly (Article 130.1 of the Constitution) and then it should be submitted to a national referendum and acquire more than one-half of all votes cast (Article 130.3 of the Constitution). In order to abrogate the customary constitutional law that the national capital is located in Seoul, the constitutional amendment procedure should be followed as stipulated in the Constitution. However, where a constitutional custom is challenged and opposing practices have developed over time due to the change of constitutional circumstances and violations of customary constitutional law become ordinary practices and consensus among people collapses, customary constitutional law perishes as a matter of course. In deciding whether customary constitutional law has died out, such reliable methods as a national referendum may be used to verify the consensus of the people. In the instant case, it is not confirmed that any change has arisen to affect the validity of customary constitutional law.

5. Whether or not the people's right to a national referendum was infringed

Seoul as the national capital is customary constitutional law and accordingly maintains its constitutional legal effect unless it is repealed by way of inserting an explicit provision negating the constitutional custom into the constitutional text pursuant to the constitutional amendment process. Therefore, the Act on the Construction of the New Administrative Capital practically amends the Constitution in the form of a general statute, whereas the matter should undergo



the proper constitutional amendment procedure. The Act, thus, infringed the people's right to a national referendum secured in Article 130.3 of the Constitution, as part of the amendment process, and is in violation of the Constitution.

*Cross-references:*

- Decision of 14.05.2004 (2004Hun-Na1), *Bulletin* 2004/2 [KOR-2004-2-001];
- Decision of 27.11.2003 (2003Hun-Ma694), *Bulletin* 2003/3 [KOR-2003-3-002].

*Languages:*

Korean.



## Latvia Constitutional Court

### Important decisions

*Identification:* LAT-2004-3-007

**a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 11.10.2004 / **e)** 2004-02-0106 / **f)** On the compliance of Article 155.6 of the Civil Law with the first sentence of Article 110 of the Constitution (*Satversme*) and Article 4 of the European Convention on the Legal Status of Children Born out of Wedlock / **g)** *Latvijas Vestnesis* (Official Gazette), 12.10.2004, 161(3109) / **h)** CODICES (English, Latvian).

*Keywords of the systematic thesaurus:*

2.1.1.4.12 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Convention on the Rights of the Child of 1989.  
5.3.33.1 **Fundamental Rights** – Civil and political rights – Right to family life – Descent.  
5.3.44 **Fundamental Rights** – Civil and political rights – Rights of the child.

*Keywords of the alphabetical index:*

Child, born out of wedlock, paternity, recognition / Paternity, recognition, mother's consent / Child, best interest / European Convention on the Legal Status of Children Born out of Wedlock.

*Headnotes:*

In legal relationships concerning a child, the rights and interests of the child shall prevail in all matters. It means that decisions have to be adopted on the basis of the interests of the child not only by the courts and other institutions, but also by the legislator, so that any adopted or amended legislation protects the interests of the child in the best possible way.

The fact that a man is the father of a child born out of wedlock may influence the financial situation of his family based on marriage, as well as the property rights of the family members. Therefore, it is important for family members to be informed about the recognition of paternity. It is possible to do so with the help of measures which would restrict the rights of

a child to a lesser degree, namely, by providing for the spouse to be informed about voluntary recognition of paternity.

### Summary:

Determination of affiliation of children in Latvia is regulated by the Civil Law. Article 154 of the Civil Law sets out that where the mother of a child is not married or if the court has established that the husband of the mother is not the father of the child, the determination of paternity of the child shall be based on voluntary recognition or on a judgment by a court. Moreover, the impugned provision – part six of the Article 155 of the Civil Law – provides that “the father of the child, who is married to another woman, may submit an application for recognition of paternity only with the consent of his spouse”.

The claimant – the State Human Rights Bureau – applied to the Court for a declaration that part six of Article 155 of the Civil Law is incompatible with the first sentence of Article 110 of the Constitution or Article 4 of the 15 October 1975 European Convention on the Legal Status of Children Born out of Wedlock.

The Constitutional Court found that Latvia had made no reservations at the time it ratified the Convention; therefore, Latvia had undertaken the duty of implementing the norms in the Convention.

In accordance with the Explanatory Report of the Council of Europe, Article 4 of the Convention incorporates the terms “to oppose” and “to contest” for the reason that while several States use the procedure of opposition, some States use that of contestation, and some States use both procedures. It follows from the above that the statement of objection mentioned in the Convention may be expressed in any form regardless of the term used in national legal texts. Therefore, a lack of consent by the spouse amounts to a contestation of paternity.

The Article 4 of the Convention prohibits raising objections to, i.e. opposing or contesting, voluntary recognition of paternity both before and after determination of the paternal affiliation of a child.

The Constitutional Court held that within the meaning of Article 4 of the Convention, the consent of the spouse, set out in part six of Article 155 of the Civil Law, was to be regarded as “contestation”.

The Constitutional Court considered the argument put forward by the parliament (*Saeima*) unfounded. The parliament argued that the impugned provision complied with the Convention, and asserted that the

laws of other States, namely French and Belgian laws, laid down restrictions to the voluntary recognition of paternity. The Constitutional Court noted that the Convention on the Status of Children Born out of Wedlock was not in effect in either France or Belgium.

The Court pointed out that Article 110 of the Constitution succinctly formulates what the State protects, but does not specify the manner in which the protection is to be implemented. When interpreting the fundamental rights enshrined in the first part of Article 110 of the Constitution, consideration has to be given simultaneously to the provisions included in international human rights instruments and how they are implemented in practice.

Article 110 of the Constitution provides for the protection of the interests of the child. Article 3.1 of the UN Convention on the Rights of the Child lays down the priority of the rights of the child. In legal relationships concerning the child, the rights and interests of the child shall prevail in all matters. It means that decisions have to be adopted on the basis of the interests of the child not only by the courts and other institutions, but also by the legislator, so that any adopted or amended legislation protects the interests of the child in the best possible way.

The Constitutional Court held that in cases where there are no obstacles against the voluntary acknowledgement of paternity, it may be secured at the time that the birth of the child is registered, if both parents have been determined. The Constitutional Court agreed with the view, expressed in the parliament’s written reply, that the impugned provision did not restrict the possibility of the father to undertake parental responsibilities “de facto”, i.e., to take care of and protect the child, to maintain a personal relationship with the child, etc. However, parental responsibilities are not the only legal consequences that arise with the establishment of paternity. Article 7 of the UN Convention on the Rights of the Child sets out that the child – from the moment of birth – has the right to obtain a surname. During the time that paternity has not been established, the child may not have his/her father’s surname, even if the parents want him/her to have it. Thus until paternity is established, the rights of the child are restricted.

The Constitutional Court considered that the provision in the Civil Law setting out “the father of the child, who is married to another woman, may submit an application for recognition of paternity only with the consent of his spouse” was incompatible with the first sentence of Article 110 of the Latvian Constitution

(*Satversme*) and Article 4 of the European Convention on the Status of Children Born out of Wedlock and declared it null and void as of the day of publication of the judgment.

*Supplementary information:*

A question was sent to the Venice Forum regarding this case.

*Languages:*

Latvian, English (translation by the Court).



*Identification:* LAT-2004-3-008

**a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 05.11.2004 / **e)** 2004-04-01 / **f)** On the compliance of the words “or a lay judge” in Section 75 of the Law on the Judiciary with Articles 84 and 92 of the Constitution (*Satversme*) / **g)** *Latvijas Vestnesis* (Official Gazette), 09.11.2004, 177(3125) / **h)** CODICES (English, Latvian).

*Keywords of the systematic thesaurus:*

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

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

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

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

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

*Keywords of the alphabetical index:*

Judge, temporarily appointed / Judge, lay.

*Headnotes:*

The procedure under which the Minister of Justice confers on a lay judge the duty of substituting for a judge of a particular district (or city) may cast doubt

on the potential independence of the appointed judge from the executive power, as well as on the legitimacy of the decisions adopted by him/her.

At the time the regulation allowing the Minister of Justice to appoint a lay judge to the office of judge was incorporated into the Law on the Judiciary, the legislator did not sufficiently assess other means that could be used to ensure the functioning of the judiciary in accordance with the requirements of an independent court and to avoid the potential influence of the executive power on the court. Even though at the time the impugned legal provision was adopted there were not enough judges in Latvia because of insufficient funding, the procedure for appointment of lay judges provided for by that legal provision is not proportionate to the aim of reaching the number of judges established by law, as it does not ensure the independence of judges who have been appointed to office in such a way.

*Summary:*

The impugned legal provision of the Law on the Judiciary provides that in case of a vacancy or a temporary absence of a judge of a district (or city) court, the Minister of Justice may, for a period not exceeding two years, assign a lay judge who meets the requirements for appointment as judge of a district (or city) court as set out in the Law to fulfil the duties of judge of a district (city) court, where the lay judge has given written consent.

The claimant brought a constitutional claim arguing that that legal provision gave the right to hear and determine judicial cases to a person whose appointment was not confirmed by the parliament (*Saeima*), and was therefore incompatible with Article 84 of the Constitution, which establishes that judicial appointments shall be confirmed by the parliament. To her mind the impugned legal provision also ran contrary to Article 92 of the Constitution, which provides that everyone has the right to defend his/her rights and lawful interests in a fair court.

The parliament argued that the impugned legal provision was not incompatible with the Constitution. The parliament pointed out that same guarantees of independence were conferred on a judge and a lay judge carrying out the duties of a judge. The parliament conceded that – with the constantly increasing workload of the courts – in certain cases of temporary absence of a judge, such as pregnancy or maternity leave, there was no possibility of ensuring that other judges would substitute for that judge.

Referring to its 5 March 2002 judgment, the Constitutional Court reiterated that the concept “a fair

court” incorporated into Article 92 of the Constitution includes two aspects: namely, “a fair court” as an independent institution of the judicial power, which adjudicates on a legal matter; and “a fair court” as an adequate process, characteristic of a law governed state, in which the courts review a legal matter.

The Court pointed out that an independent judicial power is one of the fundamental elements of a democratic state.

Referring to its 22 October 2002 judgment, the Court reiterated that the Constitution is a single whole, and its provisions are to be interpreted systemically. Chapter 6 (including Article 84 of the Constitution) shall be interpreted in conjunction with the provisions of Chapter 8 (including Article 92 of the Constitution) and Article 6.1 of the Convention.

The Constitutional Court held that by regulating the procedure of appointment of the judges, the objective of Article 84 of the Constitution was to implement the principle of separation of power and thereby ensure the existence of an independent judiciary. On the one hand, undoubtedly the Law on the Judiciary formally guarantees that the lay judge carrying out the duties of a judge is independent. However, on the other hand, it has to be taken into consideration that the procedure under which the Minister of Justice confers on a lay judge the duty of substituting for a judge of a particular district (or city) may cast doubt on the independence of the appointed judge from the executive power as well as cast doubt on the legitimacy of the decisions he/she adopts.

The Constitutional Court agreed with the point of view expressed by the Human Rights Institute of the Faculty of Law of the University of Latvia and the Administrative Cases Department of the Latvian Supreme Court Senate that in cases where the guarantees as to the period of authority of a judge are inadequate, then the judge may become easily influenced.

Consequently, neither the procedure of appointment of a lay judge nor the extremely short period of office complies with the concept “independent court”.

The Constitutional Court agreed with the point of view expressed by the Ministry of Justice that the legitimate aim of the impugned legal provision was to ensure the efficiency of court performance and involvement of the number of judges determined by law. The Court held that even though at the time that the impugned legal provision had been adopted there were not enough judges in Latvia because of insufficient funding, the procedure for appointment of lay judges provided for by that legal provision was not

proportionate to the aim of reaching the number of judges established by law, as it did not ensure the independence of judges appointed to office in such a way.

The Court declared the words “or the lay judge”, included in the provision of Article 75 of the Law on the Judiciary, incompatible with Articles 84 and 92 of the Latvian Constitution and null and void as of the day of publication of the judgment.

#### *Cross-references:*

Previous decisions of the Constitutional Court in cases:

- no. 2001-10-01 of 05.03.2002; and
- no. 2002-04-03 of 22.10.2002, *Bulletin* 2002/3 [LAT-2002-3-008].

#### *Languages:*

Latvian, English (translation by the Court).



#### *Identification:* LAT-2004-3-009

**a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 06.12.2004 / **e)** 2004-14-01 / **f)** On the compliance of Section 61.6 of the Immigration Law with Article 92 of the Constitution (*Satversme*) / **g)** *Latvijas Vestnesis* (Official Gazette), 08.12.2004, 195(3143) / **h)** CODICES (English, Latvian).

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

3.16 **General Principles** – Proportionality.  
 3.17 **General Principles** – Weighing of interests.  
 5.1.3.2 **Fundamental Rights** – General questions – Limits and restrictions – General/special clause of limitation.  
 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:*

Entry, prohibition, decision / Security, state.



### Headnotes:

The fact that a decision of the Minister of the Interior may be connected with interests of state security does not deny the right of the State to establish a procedure under which judicial bodies may in certain cases and under a set procedure examine materials connected with state security.

### Summary:

Section 61 of the Immigration Law provides for the circumstances under which persons may be included on the List of persons prohibited from entering Latvia, and lists the officials with the right to take decisions to add foreigners to the List. In accordance with Section 61.1, the Minister of the Interior takes the decision in several cases. The impugned provision sets out that a decision taken in these cases by the Minister of the Interior shall not be subject to appeal.

The Administrative Regional Court made a reference to the Constitutional Court in a case involving an appeal filed by Elvīra Petrjuka against a judgment delivered in January by the Riga Central District Court on a complaint in an administrative case against an unlawful act by the officials of the Ministry of the Interior.

Ms Petrjuka had submitted an application to the State Secretary of the Ministry of the Interior, requesting the quashing of a decision not to issue her with a permanent residence permit. The State Secretary of the Ministry of the Interior informed her that an order by the Minister of the Interior prohibited her from entering Latvia for an indefinite period of time and a decision had been adopted to include her name on the List of persons prohibited from entering Latvia.

The Riga Central District Court rejected her complaint against the unlawful acts by the officials of the Ministry of the Interior. The reason for the judgment was that her name was on the List of persons prohibited from entering Latvia.

In its decision, the Administrative Regional Court pointed out that an appeal did not lie against a decision of the Minister of the Interior that created a specific legal public relationship, and that accessibility to alternative and effective proceedings was not ensured. On 14 May 2004, when reviewing the appeal by Ms. Petrjuka against the judgment of the Central District Court, the Administrative Regional Court decided to stay the proceedings in the administrative case and make a reference to the Constitutional Court as to the compatibility of

Article 61.6 of the Immigration Law with Article 92 of the Constitution.

The Constitutional Court pointed out that Article 92 of the Constitution, like Article 6 ECHR, provides for the right to a fair court. However, that right may be limited where the limitations do not restrict or reduce the access left to the individual to such an extent that the very essence of the right is impaired.

The Constitutional Court stressed that even though the Constitution does not directly envisage cases in which the right to a fair court might be restricted, that right is not absolute.

The Constitutional Court pointed out that the limitation in question had a legitimate aim: to protect state and public security.

The Constitutional Court recalled that where a legitimate aim exists, it is necessary to assess whether there is proportionality between the concern for the protection of state security invoked by the authorities and the impact which the means they employed on the right of the applicant to address the court. To determine the proportionality of a limitation, it must be assessed whether that limitation amounts to the least restrictive means, namely, whether the aim could not have been reached with means that would less restrict fundamental rights.

The Parliamentary Assembly of the Council of Europe in Recommendation no. 1402 (1999) on Control of internal security services in Council of Europe member states pointed out that internal security services shall be empowered to fulfil their legitimate objective of protecting national security but they shall not be given a free hand to violate fundamental rights and freedoms. There must be a reasonable relationship of proportionality between the right of a democratic society to national security and the human rights of an individual. The judiciary should be authorised to exercise extensive *a priori* and *ex post facto* control.

The impugned provision is linked to the decision of the Minister, from which no appeal lies. The Constitutional Court held that the decision of the Minister was an administrative act, and, as such, it took effect with regard to the person concerned at the moment it was applied to regulate a specific relationship and was communicated to the addressee.

The Constitutional Court referred to the European Court of Human Rights judgments in the cases of *Tinnelli & Sons Ltd and Others* and *McElduff and Others v. the United Kingdom* and *C v. Belgium*, and

found that the impugned limitation was not the least restrictive means (it was possible to make use of measures which limited fundamental rights to a lesser degree for reaching the objective). It meant that the limitation was not proportionate to the legitimate aim. Consequently, the impugned provision disproportionately limited the right of a person to a fair court.

The fact that a decision of the Minister of the Interior may be connected with interests of state security does not deny the right of the State to establish a procedure under which the judicial bodies may in certain cases and under a set procedure examine materials connected with state security. The judicial body may even base its decision on appropriate separate documents that do not include state secrets.

Consequently, the impugned provision did not ensure the realisation of a person's right to a fair court, guaranteed in Article 92 of the Constitution.

The Constitutional Court declared the phrase "a decision taken in accordance with paragraph one of this Section shall not be subject to appeal", incorporated in Section 61.6 of the Immigration Law, to be incompatible with Article 92 of the Latvian Constitution and null and void as of 1 May 2005.

#### Cross-references:

European Court of Human Rights:

- Judgment of 10.07.1998 in case *Tinnelli & Sons Ltd and Others and McElduff and Others v. the United Kingdom*; and
- Judgment of 07.08.1996 in case *C v. Belgium*.

#### Languages:

Latvian, English (translation by the Court).



## Liechtenstein State Council

### Important decisions

*Identification:* LIE-2004-3-003

**a)** Liechtenstein / **b)** State Council / **c)** / **d)** 29.11.2004 / **e)** StGH 2003/48 / **f)** / **g)** / **h)** CODICES (German).

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

- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 3.19 **General Principles** – Margin of appreciation.
- 4.5.2 **Institutions** – Legislative bodies – Powers.
- 4.14 **Institutions** – Activities and duties assigned to the State by the Constitution.
- 5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.
- 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

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

Affiliation, compulsory / Chamber of Industry and Economy / Fundamental right, priority.

#### *Headnotes:*

According to Article 78.4 of the Constitution, specific public-law entities, establishments and foundations may be instituted by law to perform economic, social and cultural functions. However, the extensive freedom of organisation granted to the legislature cannot be misused by the legislature to circumvent the limits set by fundamental rights through the expedient of forming public-law entities, establishments and foundations – least of all if the legislature founds the organisation of a public-law entity on the principle of compulsory affiliation, which constitutes an appreciable interference with the freedom of trade and industry and freedom of association which rank as fundamental rights. The Chamber of Industry and Economy (GWK) performs functions whose fulfilment is meant to serve a major public interest. Yet this does not justify the Chamber's existence as a public law entity with compulsory affiliation. The reason is that the public service function performed by the GWK does not comprise goals outweighing the

interests represented by the fundamental rights secured in Article 36 of the Constitution, so that the attainment of those goals would make it necessary and even imperative to form and maintain a public-law entity with compulsory affiliation.

Compulsory affiliation to the GWK must also be assessed from the further standpoint of freedom of association. Membership in public-law corporations with compulsory affiliation may indeed impinge on freedom of association where, as in the instant case, a public-law corporation with compulsory affiliation, besides its economic functions, fulfils other non-economic functions. Substantively, according to Article 41 of the Constitution, freedom of association also secures the right to refrain from participating in, to leave or to dissolve existing corporations (negative freedom of association). The public interest can be deemed sufficiently compelling to warrant a restriction on freedom of association only where it has primacy in view of the overriding public interest constituted by the fundamental right of freedom of association. That may be so if there is a direct and cogent interest in applying restrictions to maintain order as set out in Article 11.2 ECHR. Neither public security nor order, health, morals or other third party rights necessitate compulsory affiliation to the GWK. Thus there are no overriding public interests that warrant compulsory affiliation to the GWK.

#### *Summary:*

In the context of litigation over billing for a professional subscription, the State Court, overturning established precedents, found compulsory affiliation to the GWK incompatible both with freedom of trade and industry and with freedom of association. It set aside the judgment in the matter and struck down the relevant statutory provisions.

As a particularly influential consideration, it was held that the legislature, in the time since it had founded the GWK in 1936 as a means of indirectly upholding responsibilities which embodied a heightened public interest, had progressively taken over and at the material time directly held itself all such responsibilities. Therefore the functions still left to the GWK could no longer take priority over the interests inherent in the fundamental rights of freedom of trade and industry, together with freedom of association.

#### *Languages:*

German.



## Lithuania Constitutional Court

### Important decisions

*Identification:* LTU-2004-3-006

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 13.12.2004 / **e)** 51/01-26/02-19/03-22/03-26/03-27/03 / **f)** On the state service / **g)** *Valstybės Žinios* (Official Gazette), 181-6708, 18.12.2005 / **h)** CODICES (English, Lithuanian).

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

3.9 **General Principles** – Rule of law.  
 3.16 **General Principles** – Proportionality.  
 3.17 **General Principles** – Weighing of interests.  
 3.18 **General Principles** – General interest.  
 4.6.9.1 **Institutions** – Executive bodies – The civil service – Conditions of access.  
 4.6.9.3 **Institutions** – Executive bodies – The civil service – Remuneration.  
 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:*

Public service, definition / Civil servant, activity, secondary.

#### *Headnotes:*

Although the “municipal service” is not separately mentioned in the Constitution, the constitutional concept of the state service comprises not only the relations of service at state institutions, but also at municipal institutions. The notion “state service” employed in the Constitution is thus identical to the notion “public service”. A single system of state service is a necessary pre-requisite for the effective interaction of state administration and local self-government, the two systems of public power.

The purpose of the state service is to ensure the public interest. Thus the public interest must dominate in relation to the private interest in the state service. In the state service the conflict between

public and private interests must be avoided and no conditions which might give rise to an appearance of such conflict should be created. The opportunities provided by the state service should not be used for private benefit.

The efficient functioning of the state service system depends upon material and financial stability as well. The state service is supported by the state (or municipal) budget. The professional activity of state servants is also to be remunerated from the state (or municipal) budget. For this reason, funding from the budget should be provided for all state tasks, otherwise the state service would become inefficient and this would reduce the trust of society and the citizens in the system of state service, degrade or even ruin its authority and ultimately diminish the trust of the people in the state itself and its law.

### *Summary:*

The case at the Constitutional Court was initiated by the Vilnius Regional Administrative Court, the Panevėžys Regional Administrative Court and the Alytus Local District Court. These petitioners presented 6 petitions with requests to investigate whether some legal acts whereby the relations of state service and those linked thereto are regulated were in compliance with the Constitution and laws.

The Constitutional Court investigated whether some norms of the Law on the State Service, the Law on Local Self-government, Government Resolution no. 686 "On Calculation of Remuneration for Work of State Servants for the Second Half-year of 2002" and other legal acts were in compliance with the Constitution. However, here is presented the part of the Constitutional Court ruling which includes constitutional interpretations connected with compatibility of other duties than state service with state service duties.

The Alytus Local District Court raised doubts *inter alia* as to whether Article 17.4 of the Law on the State Service establishing that certain activity is incompatible with the state service limits the right of the person to use his private property and to freely choose a job, and violates the constitutional principle of equality.

The Constitutional Court emphasised that the purpose of the state service is to ensure the public interest. Thus the public interest must dominate in relation to the private interest in the state service. In the state service the conflict between public and private interests must be avoided and no conditions which might give rise to an appearance of such conflict should be created. The opportunities provided by the state service should not be used for private

benefit. When ensuring the public interest, it is essential to avoid unreasonable and unlawful impact by interest groups, and, even more important, pressure on state servants who adopt decisions while exercising public administration and providing public services (or participate in drafting and executing these decisions, coordinating and/or controlling the implementation thereof, etc.).

The Court stressed that in the disputed provision of Article 17 (wording of 23 April 2002) of the Law on the State Service the legal regulation was established where the state servant was prohibited from working in another work place save the exceptions established in Item 4 of the said article, and from receiving any other remuneration save the exceptions established in Item 4 of the said article, and this regardless of any circumstances. Thus, under the said legal regulation the state servant was prohibited from working in such work place and receiving such remuneration even in the cases where this did not give rise to a conflict between public and private interests in the state service, where there were no preconditions for using state service in personal interests, where this did not discredit the authority of the state service or hinder the person who holds an office in the state service from properly performing the duties assigned to him, where the work was not in enterprises, establishments and organisations in whose respect the state servant enjoyed authoritative power or control and supervised their activity, or adopted certain other decisions in regard of this enterprise, establishment or organisation, and where there were not any other circumstances due to which state servants cannot work in another work place and receive remuneration. Such prohibition established in the disputed provision of Article 17 (wording of 23 April 2002) of the Law on the State Service was disproportionate to the objective sought, since it limited the right of state servants to work in another work place and receive remuneration more than was necessary to protect the constitutionally important objectives. By such legal regulation consolidated in Article 17 (wording of 23 April 2002) of the Law on the State Service one disregarded the constitutional concept of a state governed by the rule of law and violated the provision of Article 48.1 of the Constitution that each human being may freely choose a job and business.

### *Languages:*

Lithuanian, English (translation by the Court).





**Identification:** LTU-2004-3-007

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 29.12.2004 / **e)** 8/02-16/02-25/02-9/03-10/03-11/03-36/03-37/03-06/04-09/04-20/04-26/04-30/04-31/04-32/04-34/04-41/04 / **f)** On the restraint of organised crime / **g)** *Valstybės Žinios* (Official Gazette), 1-7, 04.01.2005 / **h)** CODICES (English, Lithuanian).

**Keywords of the systematic thesaurus:**

- 3.3 **General Principles** – Democracy.
- 3.9 **General Principles** – Rule of law.
- 3.16 **General Principles** – Proportionality.
- 3.18 **General Principles** – General interest.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.
- 5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
- 5.3.13.22 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Presumption of innocence.

**Keywords of the alphabetical index:**

Crime, organised / Preventive measure / Suspect, fundamental rights.

**Headnotes:**

The majority of especially dangerous crimes, for example, terrorism, trafficking in people, criminal trade in weapons and drugs, money laundering, financial crimes and crimes related to corruption, are often committed by organised criminal groups (syndicates). If organised crime were not prevented and organised criminal groups (syndicates) were not prosecuted, the constitutional values, *inter alia* the rights and freedoms of the person, the legal bases of the life of society entrenched in the Constitution, the state as an organisation of the entire society and the entire society would be under threat. In the modern world organised crime often reaches beyond state borders and threatens the international community as well. If the activity of organised criminal groups (syndicates) were not persecuted at the time when it is spreading from one country to another, the most important values of both the communities of democratic states and the international community would become threatened.

The Constitution establishes the concept of a democratic state, whereby the state not only seeks to protect and defend the person and society from crimes and other dangerous violations of law, but is also able to do this efficiently. Such a state must create and efficiently apply a system of measures restricting and reducing crime, especially organised crime, which would also comprise preventive measures adequate to the threat caused by organised crime. Otherwise, the state would not fulfil its constitutional duty to ensure the security of each human being and the entire society, as well as the legal order based on the constitutional values.

**Summary:**

The case at the Constitutional Court was initiated by the Šiauliai City District Court, the Klaipėda City District Court, the Panevėžys Regional Court, the Marijampolė Local District Court, the Panevėžys City District Court and the Alytus Local District Court. These petitioners presented 17 petitions with requests to investigate hereafter whether some norms of the Law on the Restraint of Organised Crime (the Law) were not in conflict with the Constitution.

Article 3 (wording of 26 June 2001) of the Law establishes that if the bases provided for in Article 4 of the Law exist, one may apply preventive measures; such as an official warning or court injunctions. In disputed Article 4 of the Law, preventive measures may be applied to persons if the data received according to the procedure established by laws about the relations of these persons with organised groups, criminal syndicates or their members constitute a sufficient basis for considering that these persons may commit serious crimes. Such preventive measures are to be applied in order to guarantee the safety of society and the state and to ensure public order and the rights and freedoms of persons. According to some petitioners, the said provisions of the Law may be applied to persons who have not been found guilty according to the procedure established by the law and who are only suspected of having relations with organised groups, criminal syndicates or their members. The petitioners had doubts as to whether such legal regulation is not in conflict with Article 31 of the Constitution, wherein it is established that a person is presumed innocent until proven guilty and declared guilty by an effective court judgement.

In the opinion of the petitioners, the court injunctions in Article 8 of the Law not to maintain relations with specifically named persons, not to change one's place of residence, to be present at the place of residence at the appointed time and not to frequent

the places indicated, restrict the rights and freedoms of citizens, which are entrenched in Articles 18, 22, 24, 31 and 32 of the Constitution.

Article 30.1 of the Constitution provides that a person whose constitutional rights or freedoms are violated has the right to apply to court. However, in the opinion of the petitioners, Article 6.3 (wording of 26 June 2001) of the Law does not provide an opportunity for a person to appeal against the decision of a police officer giving the official warning.

The court injunctions which are provided for in Article 8 of the Law are similar to the measures of suppression, house arrest and written commitment not to leave which are provided for in Articles 132 and 136 of the Code of Criminal Procedure (hereinafter referred to as the CCP) and restriction of freedom, provided for in Article 48 of the Criminal Code (hereinafter referred to as the CC). Under Article 121.2 of the CCP, measures of suppression may be imposed only in cases where one has enough evidence providing reason to believe that the suspect committed a criminal deed, while the restriction of freedom provided for in the CC is imposed only upon persons who have committed a criminal deed. Article 249 of the CC consolidates criminal liability for participation in or organisation of the activity of a criminal syndicate or leading a criminal syndicate. However, under Article 4 of the Law, court injunctions are issued against a person who has not committed a criminal deed but where there exists a reason to believe that he may commit serious criminal deeds. In other words, restrictions of rights, which correspond to a criminal punishment, are imposed upon persons whose guilt in committing criminal deeds has not been established. Therefore, the petitioners doubted whether Articles 3, 4 and 8 of the Law were not in conflict with the principle of a state governed by the rule of law which is entrenched in the Preamble to the Constitution and Article 31 of the Constitution.

The Constitutional Court emphasised that the majority of especially dangerous crimes are often committed by organised criminal groups (syndicates). If organised crime were not prevented and organised criminal groups (syndicates) were not prosecuted, the constitutional values, *inter alia* the rights and freedoms of the person, the legal bases of the life of society entrenched in the Constitution, the state as an organisation of the entire society and the entire society would be under threat.

The Constitutional Court has considered that Article 3 (wording of 26 June 2001), Article 4 (wordings of 26 June 2001 and 3 April 2003), Article 6.3 (wording of 26 June 2001) and Article 8.1 (wording of 26 June 2001) of the Law on the Restraint of Organised Crime were not in conflict with the Constitution.

*Languages:*

Lithuanian, English (translation by the Court).



# Luxembourg Constitutional Court

## Important decisions

*Identification:* LUX-2004-3-004

**a)** Luxembourg / **b)** Constitutional Court / **c)** / **d)** 03.12.2004 / **e)** 23/04, 24/04 / **f)** Article 17, first sub-paragraph, and Article 27 of the amended law of 10 August 1991 on the profession of barrister / **g)** *Mémorial, Recueil de législation* (Official Gazette), A no. 201 of 23.12.2004 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

4.7.15.1.5 **Institutions** – Judicial bodies – Legal assistance and representation of parties – The Bar – Discipline.

*Keywords of the alphabetical index:*

Lawyer, disciplinary measure / Bar, Council, powers.

*Headnotes:*

The first sub-paragraph of Article 17 of the amended law of 10 August 1991 on the profession of barrister, which does not give the Bar Council any power to set or apply sentences, is not affected by Article 14 of the Constitution, according to which “No penalty may be fixed or applied except in pursuance of the law”.

Article 27 of this law is compatible with Article 14 of the Constitution as it has to be taken in conjunction with chapter V of the same law, stipulating the rights and duties of barristers.

*Summary:*

In the context of disciplinary proceedings against two barristers, the barristers' disciplinary and administrative board of appeal put the following questions to the Constitutional Court:

“Is the first sub-paragraph of Article 17 of the amended law of 10 August 1991 on the profes-

sion of barrister compatible with Article 14 of the Constitution?”

If so,

“Is Article 27 of the amended law of 10 August 1991 on the profession of barrister compatible with Article 14 de la Constitution?”

See the headnotes for the replies.

*Languages:*

French.



## Moldova

### Constitutional Court

#### Important decisions

*Identification:* MDA-2004-3-006

**a)** Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 02.09.2004 / **e)** 21 / **f)** Review of the constitutionality of Government Decree no. 782-37 of 8 July 2004 on the regulation of the telecommunications networks situation in the Republic of Moldova / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

*Keywords of the systematic thesaurus:*

- 3.13 **General Principles** – Legality.
- 3.15 **General Principles** – Publication of laws.
- 3.25 **General Principles** – Market economy.
- 4.6.2 **Institutions** – Executive bodies – Powers.
- 5.2 **Fundamental Rights** – Equality.
- 5.3.24 **Fundamental Rights** – Civil and political rights – Right to information.

*Keywords of the alphabetical index:*

Licence, granting, authority, competent / Telephone, mobile, service provider / Tax, amount / Government act, *ultra vires*.

*Headnotes:*

Pursuant to the Constitution, the government adopts decrees in order to ensure the implementation of laws. However, Decree no. 782-37 does not include an express clause stating which legal provisions it is supposed to implement. By adopting such a decree, the government exceeded the restrictions of Article 102 of the Constitution.

Furthermore, by conferring a confidential character to the decree, the government infringed the provisions of Article 34 of the Constitution guaranteeing the right of the citizens to access to any information of public interest. Moreover, public authorities are obliged to ensure that citizens are correctly informed about public affairs.

*Summary:*

The Head of the State brought an application to the Constitutional Court for the review of the constitutionality of Government Decree no. 782-37 of 8 July 2004 on the regulation of the telecommunications networks situation in Moldova.

The applicant asserted that in that decree, the government had favoured the public limited company, “Interdnestrcom”, (hereinafter referred to as “Interdnestrcom”) over other commercial agents and established a tax on licensing, which was discriminatory in relation to the taxes imposed on other enterprises providing the same services. The applicant maintained that by conferring a confidential character to the abovementioned decree, the government had infringed Article 34 of the Constitution on the right to information. The government had affected the transparency of telecommunications activity by confidentially identifying a new operator and granting it a license, which was also in contravention of Articles 9 and 126 of the Constitution.

The Government Decree obliged the State Register Office to make a provisional registration of the public limited company, “Interdnestrcom”, and to deliver a certificate showing that company’s registration in the State Register of Enterprises and Organisations (point 1). Point 2 of the Decree provides for “Interdnestrcom” to found an affiliated company having its head office in Chisinau and to register that company in the State Register Office within 10 days from its own provisional registration. ANRTI (the National Agency for the Regulation of Telecommunications and Information Technology) was under an obligation to grant the necessary licences to “Interdnestrcom” for carrying on its activity in telecommunications on the territory of Moldova (point 3). The government imposed a tax of 1 million USD for the grant of an individual license for providing CDMA standard (WLL) fixed and mobile cellular telephone services (point 4). The Ministry of Transport and Communications was obliged to make the necessary number of channels available to “Interdnestrcom” and, together with ANRTI, to take measures to restore the telecommunications networks between the two banks of Dniester River, thereby ensuring the conclusion of an interconnection agreement between “Moldtelecom” and “Interdnestrcom” (points 5 and 6).

The Court observed that, according to Articles 6.1, 8.1, points 51 and 52, and Article 18.5 of the Law on licensing certain kinds of activity, Chapter IV of Law no. 520-XIII on telecommunications of 7 July 1995 and the Regulations on licensing telecommunications



and information technology approved by ANRTI, an individual license for providing local, trunk and international telephony and mobile or satellite telephony is granted only by ANRTI on a competitive basis, where the Licensing Commission does not decide otherwise.

According to Article 126.2.b of the Constitution, the State must ensure the freedom of trading and entrepreneurial activity, the protection of loyal competition, and the setting up of an appropriate framework for developing all factors capable of stimulating production.

In accordance to Article 18.5 of the Law on licensing certain kinds of activity, the government fixes only the amount of the tax on the delivery of the licence, which is not less than the equivalent sum in MDL (Moldavian lei) of 1 million USD (US dollars).

The Court held that the government had infringed constitutional and legal provisions by imposing an obligation on ANRTI to grant an individual license for providing (CDMA (WLL) standard) fixed and mobile telephony services to "Interdnestrcom".

The Court declared unconstitutional Government Decree no. 782-37 of 8 July 2004 on the regulation of telecommunications networks of Moldova.

#### *Languages:*

Romanian, Russian.



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

**a)** Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 04.11.2004 / **e)** 25 / **f)** Review of constitutionality of certain provisions of Law no. 547-XIII of 21 July 1995 on education as amended and supplemented by Law no. 559-XV of 25 December 2003 / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

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

3.18 **General Principles** – General interest.  
4.5.2 **Institutions** – Legislative bodies – Powers.  
5.2 **Fundamental Rights** – Equality.

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

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

Education, private, establishment, condition.

#### *Headnotes:*

The constitutional provisions and the legal rules guarantee the citizens' right to education, including in establishments that are not financed by the State, and fulfil the obligatory condition of every legislative act to protect the fundamental rights and freedoms, as well as legal interests of citizens.

The right to education may be realised through state (public) educational establishments and non-public educational establishments that are set up and administered in accordance with the law.

The activity of education is not one of production, but an organised process of instruction and education, by which a person attains the level of physical, intellectual and spiritual instruction that has been established by the State. In light of the importance and the special nature of education, the legislature imposes a condition on natural and legal persons wishing to carry on an activity in the field of education to obtain the permission of the Ministry of Education to do so. Such a legal condition, justified by the national priority given to education and the role of the Ministry of Education in realising this priority, does not infringe on a natural and legal person's right to set up, reorganise or dissolve private educational establishments.

The aim of a private educational establishment is to ensure an organised process of instruction and education of persons in accordance with State educational standards. This process supposes the acquisition of the technical and material equipment (study rooms, laboratories, libraries, etc) considered to be an integral part of the educational system. Without such equipment, it would be difficult to ensure an organised process of instruction and education of persons. The obligation to own sufficient and adequate technical and material educational equipment corresponds to the Convention against Discrimination in Education, the word "education" referring to different types and levels of education and includes access to education, its standard and quality, as well as the conditions under which it is given (Article 1.2).

The parliament, as the supreme representative body and the sole legislative authority of the State, has the right to regulate the organisational and legal

framework of private educational establishments, as well as to establish a special regime for their activity.

### *Summary:*

With a view to developing constitutional provisions and exercising powers conferred by Articles 66.a and 72.3.k of the Constitution, the parliament approved, by Decision no. 337-XIII of 15 December 1994, the Plan for the development of education in Moldova. Law no. 547-XIII on education, approved 21 July 1995, set out the State policy as to the educational system and the organisation and the functioning of the educational system.

The applicant challenged the provisions of Law no. 547-XIII that establish the conditions of the setting up, reorganisation and dissolution of educational establishments that are not financed by the State (Article 36.1); the statutory conditions relating to the capital of the establishment: inviolability of the capital, fixed capital and statutory minimum capital (Article 36.5, 36.6 and 36.7); the obligation to own technical and material equipment, including study rooms, laboratories, libraries with a minimum of 3,000 books (Article 36.20); and the revocation of the licence on the ground of lack of adequate space and equipment for the educational process (Article 37.2.h).

The Constitutional Court recalled that under Article 35 of the Constitution, the right to education is realised through secondary and vocational education, including higher education and other forms of instruction and training.

Under the International Covenant on Economic, Social and Cultural Rights, the State undertook to respect the liberty of parents to choose for their children schools, other than those established by public authorities, which conform to the minimum education standards laid down or approved by the State.

Law no. 547-XIII establishes the State policy in education and regulates the organisation and functioning of the educational system.

Article 3 of aforementioned Law provides that the education in Moldova is a national priority, and Article 13.1 states that it may be State or private education.

In accordance with the Plan for the development of education, the Ministry of Education sets out and co-ordinates the school and university policy of the national educational system, establishes the criteria for the evaluation of the activities of educational establishments (including private educational establish-

ments) and the system of the evaluation of teaching staff, on the basis of internationally-used instruments and standards.

Law no. 547-XIII on education includes similar provisions that define in detail the powers of the Ministry of Education for the realisation of the strategy of the state policy in education.

The Court declared that the expression "with the permission of the Ministry of Education" would be assessed in accordance with the provisions of abovementioned laws and with other provisions of Article 36 of Law no. 559-XV. Thus, Article 36.9 states that the transfer of pupils and students from educational establishments that are not financed by the State to those financed by the State is made under the conditions established by the Ministry of Education. Where a private educational establishment has not been accredited, the students must take, with the agreement of the Ministry of Education, graduation exams in an accredited educational establishment (Article 36.10).

The impugned expression does not infringe upon a natural and legal person's right to set up, reorganise or dissolve private educational establishments. It imposes statutory conditions that are justified by the national priority given to education and the role of the Ministry of Education in realising this priority.

The Ministry of Education may, at any time, reject a request to set up, reorganise or dissolve a private educational establishment, a fact that, in the applicant's opinion, infringed the right protected by the Constitution. The Court found that statement to be unfounded because every person who claims to have his or her legal right infringed by a public authority or by an administrative act has the right to apply to the administrative courts for relief.

The Court noted that a private educational establishment, as a legal person, should be organised in such a way as to conform to the provisions of the Civil Code defining a legal person. Article 55.1 of the Civil Code defines a legal person as an organisation that has distinct property and that must use that property to cover its liabilities, that may acquire and enjoy property rights in its own name, that may acquire liabilities, and that may sue or defend itself in its own name in the courts of justice.

The establishment, as a non-commercial organisation, is a legal person who has an object other than a profit-making one; it is created by the founder (founders) in order to exercise certain administrative, social, cultural, educational functions and other non-commercial functions.

The Court stressed that public educational establishments are created and financed by the State. The State provides annual funds from the budget in order to ensure their activity. Consequently, the Court declared unfounded the allegations in the application that the legal provisions of Article 36 relating to the statutory capital of the establishment and the requirement for it to own certain equipment amounted to an unequal and discriminating treatment of private educational establishments in relation to public educational establishments.

The main function of the statutory capital of the establishment is to guarantee that the private educational establishment carries on its activity under normal conditions and respects the responsibility of executing the obligations and commitments it has undertaken. The carrying out of this function requires that the establishment is bound by the principle of inviolability of the capital and that of fixed capital. The inviolability of the capital does not exclude its use in matters linked to organisation of the educational process. The establishment of a legal minimum capital and the book fund for such educational establishments aims to ensure their effective functioning and does not constitute an impediment for the exercise of rights and freedoms of natural and legal persons.

According to Article 72.3.k of the Constitution, the organic law establishes the general organisation of the educational system and it is up to the discretionary power of the parliament to resolve these problems.

#### *Languages:*

Romanian, Russian.



#### *Identification:* MDA-2004-3-008

**a)** Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 14.12.2004 / **e)** 28 / **f)** Constitutional review of Article 2.i of Law no. 411-XIII of 28 March 1995 on health and of Article 11.1.a of Law no. 1585-XIII of 27 February 1998 on obligatory medical assistance insurance / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

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

**3.5 General Principles** – Social State.  
**5.4.14 Fundamental Rights** – Economic, social and cultural rights – Right to social security.  
**5.4.19 Fundamental Rights** – Economic, social and cultural rights – Right to health.

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

Doctor, family, choice / Medical establishment, choice / Health care, access / Health, protection / Genetic heritage, common, preservation.

#### *Headnotes:*

A citizen's right to medical assistance includes the right to freely choose and change doctor or medical establishment, as well as the right to receive adequate and quality medical assistance.

By establishing the right to freely choose a family doctor and the primary medical establishment, the contested provisions do not restrict the possibility for a patient to apply for the assistance of other doctors or other medical establishments. In fact, by those legal provisions, which are of a purely permissive nature, the state does not limit the right to a free choice of the doctor and medical establishment and does not create the premises for the restriction of this right.

#### *Summary:*

A group of Members of parliament submitted an application to the Constitutional Court for the review of the constitutionality of Article 2.i of Law no. 411-XIII of 28 March 1995 on health and of Article 11.1.a of Law no. 1585-XIII of 27 February 1998 on obligatory medical assistance insurance. Both articles lay down the structure of the national health system and the means of citizens' medical assistance, including by way of the system of obligatory insurance.

The application stated that the abovementioned provisions restricted the patient's ability to choose freely and were contrary to the provisions of Articles 1.3, 8.1, 36.1 and 54.2 of the Constitution, as well as Article 12 of the International Covenant on Economic, Social and Cultural Rights.

Article 2.i of the Law on health provides for the freedom of the patient to choose his family doctor and primary medical institution.

Article 11.1.a of the Law on obligatory medical assistance insurance states that every insured person has the right to choose his or her primary medical institution and his or her general practitioner.

The applicant observed that the right to health security, guaranteed by Article 36.1 of the Constitution, implies the freedom to choose the doctor and the medical institution, expressly set out in Article 25.1 of the Law on health.

Article 36.3 of the Constitution provides that organic laws are to establish the structure of the national health security system and the means necessary for the protection of the physical and mental health of the citizens.

The organic law in this field is the Law on health, whose Article 2 lays down the fundamental principles of the health security system, including the patient's freedom to choose his or her family doctor and his or her primary medical institution (subparagraph i).

The right to health security, guaranteed by Article 36.1 of the Constitution, is developed in Article 25 of the Law on health, which provides that citizens of the Republic of Moldova have the right to freely choose their doctor and the kind of medical assistance. Under Article 25.1 and 25.3 of that Law, according to the international treaties and agreements to which Moldova is a party, Moldavian citizens have the right to ask for medical assistance from medico-sanitarian institutions, regardless of the kind of ownership or legal organisation, within the country and abroad (paragraphs 1 and 3).

According to Article 25.1 of the Universal Declaration of Human Rights, everyone has the right to a standard of living adequate for his health and well being.

Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by parliamentary Decision no. 217-XII of 28 July 1990, recognises the right of everyone to social security, including social insurance, and Article 12 ICESCR obliges a State Party to the Covenant to take steps in order to achieve the full realisation of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

The Constitutional Court noted that according to the legal framework, the right to health security, a fundamental human right, is ensured by preserving the common genetic heritage of the country, by creating working and living conditions, by guaranteeing medical assistance that meets modern

medical standards, as well as through judicial protection against any harm that is caused to health.

The responsibility for the guarantee of the individual's right to health security falls, in the last resort, to the State. It is the State, through its public authorities, that establishes and ensures free minimum health assistance.

In pursuance of the Law on health and the Law on obligatory medical assistance insurance, the objective of the State is to implement the basic strategies of the development of the health system in Moldova. According to the provisions of those Laws, every citizen has the right to obtain qualified and appropriate medical care, including preventive, as well as the right to the free choice of his or her doctor and the medico-sanitary institution.

The Court declared constitutional Article 2.i of the Law on health and Article 11.1.a of the Law on obligatory medical assistance insurance.

#### *Languages:*

Romanian, Russian.



#### *Identification: MDA-2004-3-009*

**a)** Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 20.12.2004 / **e)** 26b / **f)** Interpretation of Article 35.4 of the Constitution / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

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

1.3.3 **Constitutional Justice** – Jurisdiction – Advisory powers.

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

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

Constitution, interpretation, jurisdiction / Education, free / Constitutional complaint, admissibility.

*Headnotes:*

One of the exclusive responsibilities of the Constitutional Court is the interpretation of the Constitution. As a general rule, only objectively unclear and incomplete provisions, or constitutional provisions whose application in a particular case raises ambiguities are to be submitted for interpretation.

*Summary:*

The parliament lawyer (Ombudsman) submitted an application to the Constitutional Court for the interpretation of Article 35.4 of the Constitution, which provides that State public education is free.

The application stated that, given that state public education is free under the Constitution, all education levels and stages should be free too. The applicant requested the interpretation of Article 35.4 of the Constitution in order to determine which education levels/stages are free and whether there is a possibility of collecting financial contributions from the beneficiaries.

The Constitutional Court declared that one of its exclusive responsibilities is the interpretation of the Constitution. As a general rule, only objectively unclear and incomplete provisions, or constitutional provisions whose application in a particular case raises ambiguities are to be submitted for interpretation.

Given the importance of the interpretation opinions of constitutional provisions, the Constitutional Court accepts for examination only applications on ambiguous or incomplete constitutional provisions.

The Court held that the applications for Constitutional interpretation should not have a mere intellectual aim. They should show certain indisputable indications of the ambiguous perceptions of the constitutional provisions in question by subjects.

The applicant challenged the interpretation of some constitutional rules that are clear. The provision stating that the State public education is free may be interpreted in no way other than that provided for by the Constitution.

The Court considered that the application did not invoke circumstances of law that entailed an imperative need to interpret the provisions of Article 35.4 of the Constitution.

For the reasons stated above, the application by the parliamentary Attorney was not accepted for examination on its merits.

*Languages:*

Romanian, Russian.





# Norway

## Supreme Court

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### Important decisions

*Identification:* NOR-2004-3-003

**a)** Norway / **b)** Supreme Court / **c)** / **d)** 10.09.2004 / **e)** 2004/721 / **f)** / **g)** *Norsk retstidende* (Official Gazette) / **h)** CODICES (Norwegian).

*Keywords of the systematic thesaurus:*

3.18 **General Principles** – General interest.  
 5.1.1.4.1 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Minors.  
 5.3.14 **Fundamental Rights** – Civil and political rights – *Ne bis in idem*.

*Keywords of the alphabetical index:*

Detention, compulsory, treatment and training institution / Detention, order, social welfare board, reason / Minor, serious behavioural problems.

*Headnotes:*

The County Board for Social Welfare made an order to place a child in a treatment and training institution. Subsequent criminal proceedings for the same actions upon which the administrative order was based could not be deemed to be repeated criminal proceedings within the terms of Article 4.1 Protocol 7 ECHR because the criminal proceedings could not be said to relate to the same offence as the administrative order.

*Summary:*

The issue in the case was whether the criminal proceedings related to the same offence as the administrative order to place a child in an institution pursuant to Section 4-24.2 (see 4-24.1 alternative 1) of the Child Welfare Act, in breach of Article 4.1 Protocol 7 ECHR.

In a decision dated 22 December 2003 [NOR-2003-3-010], a majority (4 justices to 1) of the Supreme Court held that an order made pursuant to Section 4-24.2 (see 4-24.1 alternative 1) of the Child Welfare Act for

the compulsory detention of juvenile offenders in a child welfare institution is punishment for the purposes of Article 6 ECHR and, therefore, also falls within the terms of Article 4.1 Protocol 7 ECHR. The case before the Supreme Court was an appeal against an interlocutory order of the Court of Appeal. Since the Court of Appeal had not determined whether the criminal proceedings related to the same circumstances upon which the administrative order for compulsory detention was based, the Supreme Court was not empowered to consider this question. In its hearing of the merits of the case, the Court of Appeal held that the criminal proceedings must be deemed to relate to the same circumstances as the administrative order, and the Court of Appeal therefore dismissed the criminal proceedings.

The prosecution appealed against that Court of Appeal decision to the Appeals Selection Committee of the Supreme Court, which referred the appeal to the Supreme Court. The Supreme Court held unanimously that the criminal proceedings could not be deemed to relate to the same circumstances as the child welfare case. In reaching that decision, the Supreme Court recalled that for an order for compulsory detention of a juvenile pursuant to Section 4-24.2 (see 4-24.1 alternative 1) to be made, it is not sufficient for the objective and subjective requirements of criminal liability to be satisfied. There is an additional and fundamental requirement that the juvenile has displayed “serious behavioural problems”. Furthermore, there is a requirement that the juvenile “needs more long-term treatment”. Thus, the conditions for making an order pursuant to Section 4-24.2 (see 4-24.1 alternative 1) of the Child Welfare Act differ in essential elements from the conditions of criminal liability pursuant to the criminal provisions that were relevant in the case (robbery, burglary, car theft, drug abuse and carrying dangerous weapons). Secondly, the Supreme Court recalled that the purpose behind a compulsory detention order is quite different to the purpose behind punishment for a criminal offence. Thirdly, the Supreme Court attached weight to the fact that whilst an order pursuant to the Child Welfare Act is made exclusively to protect the interests of the juvenile, criminal proceedings for the offences in question in the instant case were intended to protect partly the interests of the victims and partly the interests of society and the public at large. On that basis, the Supreme Court held that the case should be heard by the District Court on its merits.

*Languages:*

Norwegian.

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*Identification:* NOR-2004-3-004

a) Norway / b) Supreme Court / c) / d) 12.11.2004 / e) 2004/686 / f) / g) *Norsk retstidende* (Official Gazette) / h) CODICES (Norwegian).

*Keywords of the systematic thesaurus:*

3.18 **General Principles** – General interest.  
 3.19 **General Principles** – Margin of appreciation.  
 4.5.2 **Institutions** – Legislative bodies – Powers.  
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.  
 5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.  
 5.3.23 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

*Keywords of the alphabetical index:*

Advertising, political, television, prohibition.

*Headnotes:*

Legislation that prohibits political advertising on television does not represent a violation of Article 100 of the Constitution or Article 10 ECHR (see Section 3 of the Human Rights Act).

It is essential that the prohibition's purpose was to regulate political debate and not to prohibit freedom of political expression. Failing a common European opinion as to what the law regulating political advertising should be, the political authorities must have a wide margin of appreciation when determining what measures there should be in this area.

*Summary:*

Section 3-1.3 of the Broadcasting Act prohibits the broadcasting of denominational and political advertisements on television. Prior to the local and county elections in 2003, a local television station – TV Vest – broadcast an advertisement for the Rogaland Pensioners' Party. The National Mass Media Authority imposed a fine on TV Vest AS for breach of the prohibition.

TV Vest brought a civil action against the State and submitted that the fine was invalid on the grounds

that the prohibition in Section 3-1.3 of the Broadcasting Act constituted a violation of both Article 100 of the Constitution and Article 10 ECHR. The Oslo City Court found in favour of the State and dismissed the proceedings. TV Vest appealed and the Appeals Selection Committee of the Supreme Court granted leave to bring the appeal directly to the Supreme Court.

The majority of the Supreme Court upheld the judgment of the City Court. With regard to Article 100 of the Constitution, the Supreme Court emphasised in particular that Section 3-1 of the Broadcasting Act did not prohibit political expression itself, but only the use of television for paid political statements. The Norwegian parliament had viewed the Act as regulating the way in which political debate could best take place. This is an area where the views of the parliament as to the constitutionality of the measure must be accorded particular weight. Furthermore, the courts should in general be bound by the purposes that the parliament had for the adoption of legislation. The majority held that there was no breach of Article 100 of the Constitution.

On 30 September 2004, the Norwegian parliament passed an amendment to Article 100 of the Constitution following the recommendations of the Government Commission on Freedom of Speech (*Norwegian Official Reports* 1999:27). The amendment was not directly applicable to the case, since the relevant provision was the provision as it was worded at the time the political advertising took place. Furthermore, it was to be assumed that parliament intended Section 3-1 of the Broadcasting Act to be enforceable after the amendment of the Constitution.

Further, the majority of the Supreme Court held that there had been no violation of Article 10 ECHR, on the ground that the prohibition in Section 3-1 of the Broadcasting Act fell within the exception in Article 10.2 ECHR. The prohibition was "provided by law" and had a purpose as provided in Article 10.2 ECHR. Consequently, the only remaining question was whether the prohibition was "necessary in a democratic society". The majority of the Supreme Court held that that requirement was fulfilled. The fact that a majority of the parliament during the debate on the constitutional amendment in September 2004, had found that the prohibition against political advertising was awkward from a freedom of expression point of view did not mean that the prohibition was unconstitutional. That would imply that the legislator had renounced its margin of appreciation despite clear statements to the effect that parliament did not wish to bind future developments in one direction or the other.

One justice found that the prohibition in Section 3-1 of the Broadcasting Act constituted a violation of Article 10 ECHR. In matters concerning political expression, the State has a narrow margin of appreciation. In light of the judgment of the European Court of Human Rights in *VgT v. Switzerland* (Application no. 24699/94, Judgment of 28 June 2001), a minority of the Supreme Court found that an unqualified prohibition against political television advertising is in breach of Article 10 ECHR. In view of the fact that the parliament had changed its views on political advertising, there was little credibility in the argument that there is such an absolute necessity for an unqualified prohibition that it can be considered to be consistent with Article 10.2 ECHR.

#### *Languages:*

Norwegian.



#### *Identification:* NOR-2004-3-005

a) Norway / b) Supreme Court / c) / d) 12.11.2004 / e) 2004/848 / f) / g) *Norsk retstidende* (Official Gazette) / h) CODICES (Norwegian).

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

3.18 **General Principles** – General interest.

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

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

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

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

Arm, firearm, use, control / Search, private home, conditions / Police, powers.

#### *Headnotes:*

Legislation that empowers the police, subject to prior warning, to control the storage of firearms in private homes is not in breach of Article 102 of the Constitution, which prohibits the search of private homes, except in criminal cases. Nor does such a police control represent a violation of Article 8 ECHR,

insofar as the weight of public interest justified the limited interference in privacy that the control represented.

#### *Summary:*

A. kept about 40 registered weapons in his home. Section 27a of the Firearms Act provides that the police, subject to prior warning, may control the storage of firearms. After A. had received such a warning, he resisted control and argued that the authority given to the police by Section 27a of the Firearms Act was, in his opinion, in breach of the prohibition against the search of private homes in Article 102 of the Constitution. As a consequence, A.'s firearms licence was withdrawn. A. brought a civil action against the State and claimed that the withdrawal of the firearms licence was invalid. In the District Court, the proceedings against the State were dismissed. A. appealed and the appeal was referred directly to the Supreme Court.

The issue before the Supreme Court was whether the power of control pursuant to Section 27a of the Firearms Act was in breach of Article 102 of the Constitution and Article 8 ECHR concerning the right to respect for the home. The Supreme Court referred in particular to three elements of the power of control: firstly, the purpose of the power was to prevent misuse of firearms or prevent them going astray, and not to investigate whether there had been a criminal offence; secondly, control could only occur in places to which the owner of the weapon gave access; and thirdly, control was subject to prior warning. The Supreme Court held that Section 27a was not in breach of Article 102 of the Constitution.

The same three issues were also relevant when considering whether the power of control pursuant to Section 27a of the Firearms Act represents a violation of Article 8 ECHR. The interference was found to be “necessary in a democratic society” for the reasons mentioned in Article 8.2 ECHR. The Supreme Court therefore upheld the judgment of the District Court.

#### *Languages:*

Norwegian.



*Identification:* NOR-2004-3-006

a) Norway / b) Supreme Court / c) / d) 22.12.2004 / e) 2004/759 / f) / g) *Norsk retstidende* (Official Gazette) / h) CODICES (Norwegian).

*Keywords of the systematic thesaurus:*

3.17 **General Principles** – Weighing of interests.  
 4.5.2 **Institutions** – Legislative bodies – Powers.  
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.  
 5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

*Keywords of the alphabetical index:*

Fishing, right, gratuitous / Land, ownership, private, limitation.

*Headnotes:*

Legislation that grants children under the age of 16 limited and gratuitous fishing rights does not violate Article 105 of the Constitution nor Article 1 Protocol 1 ECHR.

The legislature is entitled to adjust the dividing line between the landowner's right of user and the rights of the general public without this giving rise to a claim for compensation. This also applies to the expansion of public rights to include rights of user that differ in character from rights traditionally enjoyed by the public.

*Summary:*

Section 18 of the Salmon and Freshwater Fishing Act provides that children under the age of 16 are entitled, free of charge, to fish for freshwater fish – except anadromous salmon – with rods and hand-held lines between 1 January and 20 August. The Act does not provide for compensation to the landowner.

The owner of extensive outlying land in Vinje in the County of Telemark, A., alleged that Section 18 of the Salmon and Freshwater Fishing Act violated Article 105 of the Constitution, which provides that a landowner who is required to surrender his right to real property for public use is entitled to full compensation from the treasury. He brought legal proceedings against the State (the Ministry of the Environment) and requested a judgment declaring that children below the age of 16 were not entitled to fish free of charge from waters on his property. Alternatively, he sought judgment that the State was

liable to pay compensation for any financial loss. Both the District Court and the Court of Appeal dismissed A.'s claims and found in favour of the State.

The Supreme Court unanimously upheld the judgment of the Court of Appeal. In its judgment, the Court recalled that when applying Article 105 of the Constitution, a distinction has traditionally been drawn between interferences that simply limit the right of user and interferences that transfer rights to others. The right of children to fish pursuant to Section 18 had elements of both of these categories. The Court also referred to developments in the creation of public rights of user of other person's property, for instance, rights of way for recreation purposes, which are generally accepted today. These rights have been granted without any corresponding right being granted to the landowner to claim compensation. Section 18 granted a new right to a section of the public, limited by age.

The legal position with regard to Article 105 of the Constitution must be determined on the basis of an assessment of all the circumstances of the case, where certain elements had to be given particular weight. The Supreme Court recalled that the legislature is entitled to adjust the dividing line between the landowner's right of user and the rights of the general public without giving rise to a claim for compensation. This also applies to the expansion of public rights to include rights of user that differ in character from rights traditionally enjoyed by the public. The Court also recalled that Section 18 of the Salmon and Freshwater Fishing Act is formulated in general terms and directed towards all landowners with waterways and watercourses on their property. Due to the general development in modern society, these landowners have over time had to accept substantial restrictions of their property rights without compensation. Moreover, the Court recalled that the purpose of the provision was to exploit natural resources in an appropriate manner for the common good and in the interests of development.

The Supreme Court also attached particular weight to the fact that Section 18 of the Salmon and Freshwater Fishing Act would presumably only represent a small interference in the landowner's fishing rights. Section 18.4 contains a provision pursuant to which the Ministry can regulate the right of children to fish if such rights would be harmful to fish culture or would seriously supplant the landowner's fishing rights. This must be interpreted to mean that the right of children to fish shall be limited if the conditions in Sub-section 4 are fulfilled, i.e. if the interference must be deemed to be more than insubstantial. Thus, Sub-section 4 serves to prevent a situation where the right of children to fish can

constitute an interference that gives rise to a right to compensation pursuant to Article 105 of the Constitution.

A. had not applied for an exception pursuant to Section 18.4 and the courts had therefore not considered whether there were grounds for regulating fishing rights on his property. The Supreme Court had not been called upon to consider whether A. had suffered a loss in excess of the acceptable loss.

A. also alleged that Section 18 of the Salmon and Freshwater Fishing Act was in violation of Article 1 Protocol 1 ECHR. That allegation was also dismissed.

#### Languages:

Norwegian.



## Poland Constitutional Court

### Statistical data

1 September 2004 – 31 December 2004

Decisions by type:

- Final judgments: 28
- Cases discontinued: 19 (12 fully, 7 partially discontinued)

Decisions by procedure:

- Abstract review *ex post facto*: 12 judgments, 4 cases discontinued (2 fully, 2 partially)
- Questions of law referred by a court: 5 judgments, 3 cases discontinued (2 fully, 1 partially)
- Constitutional complaints: 11 judgments, 12 cases discontinued (8 fully, 4 partially)

### Important decisions

*Identification:* POL-2004-3-019

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 06.09.2004 / **e)** SK 10/04 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2004, no. 202, item 2080; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 8, item 80 / **h)** CODICES (French, Polish).

*Keywords of the systematic thesaurus:*

- 1.3 **Constitutional Justice** – Jurisdiction.
- 3.9 **General Principles** – Rule of law.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.13.4 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Double degree of jurisdiction.
- 5.3.13.22 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Presumption of innocence.
- 5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.



**Keywords of the alphabetical index:**

Interim measure, judicial review / Criminal procedure / Interim measure, purpose.

**Headnotes:**

The adoption of an interim (or provisional) measure to guarantee a payment – regardless of whether the purpose is to ensure that a debtor will remain solvent in civil proceedings or to ensure that pecuniary penalties are enforced in criminal proceedings – amounts to a restriction on ownership and other property rights. The temporary inconvenience for the potential debtor or accused ensures that the courts' decisions will be carried out in accordance with one of the basic tenets of the rule of law.

It follows from the fundamental nature of interim measures in criminal proceedings – and the fact that they are temporary – that their application in the preparatory stages of proceedings cannot be viewed as an infringement of the principle of presumption of innocence (Article 42.3 of the Constitution).

It is the Constitutional Tribunal's task to review the conformity of legislative enactments with the Constitution, not to eliminate errors in the application of such enactments.

**Summary:**

In the course of preparatory proceedings (prior to filing an indictment), a prosecutor ordered an interim measure in accordance with the code of criminal procedure, freezing certain assets as security for payment of a fine and of the expected compensation. Payment was to be secured through the forfeiture of wages and income from the accused's bank accounts, a prohibition on transferring or encumbering his joint ownership rights in a flat and the imposition of a compulsory mortgage on a piece of property. The accused applied to the courts for the prosecutor's order to be set aside but his application was dismissed and the court bailiff began executing the prosecutor's decision. In a constitutional appeal, the accused challenged the constitutionality of the provisions of the Code of Criminal Procedure on which the measures were based and that of the provisions setting out that there was only one instance of judicial review of the measures ordered by the prosecutor.

The Tribunal found that the impugned measure was not a penalty imposed on the accused, simply a means of guaranteeing that any penalty eventually imposed by the court would actually be applied. Such

measures can also be ordered in civil proceedings (including cases concerning pecuniary claims relating to liability for neither a crime nor an offence – Article 730 *et seq.* of the Code of Civil Procedure). The reference in Article 292.1 of the Code of Criminal Procedure to the provisions applied in civil cases proves that measures to freeze assets have nothing to do with the guilt of the person whose assets are frozen.

The right to appeal to a higher court referred to in Article 176.1 of the Constitution relates only to proceedings of a clearly judicial nature linked with the courts' task of administering justice, not to those of a so-called “mixed” nature, in which the court engages in activities which have to do with legal protection but which do not involve any final decision settling a legal dispute.

During the preparatory proceedings, the decision to order an interim measure is taken by the prosecutor on his or her own authority, and in taking that decision he or she does not rule on the criminal liability of the accused. The court, for its part, then acts as the review body for the prosecutor's actions. The standard by which situations of this sort must be assessed is set not by Article 176.1 of the Constitution but by Article 78.

It follows from the finding that the impugned provisions are in conformity with Article 176.1 of the Constitution that the allegation that they infringe the constitutional principle of the rule of law (Article 2 of the Constitution) is unfounded.

**Cross-references:**

- Judgment P 13/02 of 02.04.2001, *Bulletin* 2001/2 [POL-2001-2-013]; and
- Judgment SK 38/02 of 12.05.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003/A, no. 5, item 38.

**Languages:**

Polish, French.



**Identification:** POL-2004-3-020

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 09.09.2004 / **e)** K 2/03 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2004, no. 204, item 2092; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 8, item 83 / **h)** CODICES (English, Polish).

**Keywords of the systematic thesaurus:**

3.13 **General Principles** – Legality.  
 3.18 **General Principles** – General interest.  
 4.5.2 **Institutions** – Legislative bodies – Powers.  
 4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.  
 4.10.7.1 **Institutions** – Public finances – Taxation – Principles.  
 4.14 **Institutions** – Activities and duties assigned to the State by the Constitution.  
 5.3.23 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.  
 5.3.42 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

**Keywords of the alphabetical index:**

Media, licence, fee, determination / Media, audiovisual council, powers / Regulation, executive, regulating statutory matters.

**Headnotes:**

The requirement that civil obligations be defined exclusively by statute (Article 217 of the Constitution) is particularly strong in the case of taxes and other public levies. This represents not only a reinforcement of requirements in comparison with those stemming from Article 92 of the Constitution (conditions for authorising the issuing of a regulation), but also a significant shift of competences within the context of the separation of powers. The introduction, construction and level of levies, together with the principles governing their collection, belong to the sphere of the legislature's exclusive responsibility. Only such issues as have no substantial significance on the construction of this levy may be regulated by means of an executive act.

Any "corrections" of binding law should not lead to a legitimisation of behaviour infringing the law. The Tribunal's finding that the reviewed legal provisions, adopted under provisions of the previous Constitution, fail to conform to the 1997 Constitution, for reasons concerned solely with the hierarchy of the

sources of law, whilst at the same time approving the merited grounds for such a provision, should not and may not give rise to claims by citizens. For these reasons, any license fees collected to date, on the basis of the provisions still remaining in force, are not subject to reimbursement.

**Summary:**

I. Polish public radio and television broadcasting is sustained by compulsory fees paid by radio listeners and television viewers and from advertisement revenues. Compulsory fees, referred to by statute as "license fees", are lump sums collected for the use of radio receivers and television sets, with no regard paid to whether (or how often) they are actually used to receive public broadcasters' programmes. Revenues collected from license fees are earmarked for realisation of a "public mission" carried out by public radio and television broadcasters.

Article 48 of the 1992 Broadcasting Act ("the Act") represented the statutory basis for the obligation to pay license fees. Defining certain general principles directly the Act authorised the National Council of Radio Broadcasting and Television (*Krajowa Rada Radiofonii i Telewizji* – "NCRBT"; cf. Articles 213-215 of the Constitution) to specify, by means of a regulation, the level of license fees and the manner and procedure of payment thereof. This authorisation permitted the NCRBT to specify cases when outstanding license fees will be remitted or accepted in instalments, together with the power to grant reductions or exemptions to certain categories of persons.

The abovementioned statutory authorisation was challenged by the Commissioner for Citizens' Rights.

## II. The Tribunal ruled that:

- Article 6.2.6 of the Act, insofar as it authorises the NCRBT to set license fees, does not conform to Article 217 of the Constitution but does conform to Article 213.1 of the Constitution (tasks of the NCRBT).
- Article 48.3 of the Act (authorisation to issue a regulation concerning license fees) does not conform to Article 92.1 and Article 217 of the Constitution but does conform to Article 213.1 of the Constitution.
- The abovementioned provisions lose their binding force on 30 September 2005.
- Any fees collected on the basis of these provisions are not subject to reimbursement.

According to Article 213.1 of the Constitution, the NCRBT shall safeguard the freedom of speech and independence of the media. Furthermore, it is responsible for achieving a public mission in respect of radio and television, enshrined in the “public interest” reference in the aforementioned constitutional provision. Realisation of the first goal need not be directly connected to the necessity of securing appropriate financial means for the activities of public radio and television broadcasting; however, the execution of tasks constituting this mission requires the provision of appropriate financial means. These may be either budgetary means or direct fees of a public legal nature.

In the light of Article 213, read in conjunction with Article 92.1 of the Constitution, the NCRBT is authorised to issue, within constitutionally permissible limits, executive regulations concerning license fees.

According to Article 50 of the Act, license fees are payments in favour of the “public interest” within the meaning of Article 213.1 of the Constitution. This interest implies the fulfilment by public radio and television broadcasters of a mission referred to, *inter alia*, in Articles 1.1, 21.1, 24.1-24.3 and other provisions of the Act. Accordingly, license fees may be recognised as a compulsory, non-refundable public legal duty serving to implement the State’s constitutional tasks. As such, they constitute a public levy within the meaning of Article 217 of the Constitution, distinguished from taxes and certain other public levies by virtue of their extra-budgetary nature and by the fact that their disposition is pre-determined for a particular purpose.

In addition to its failure to conform to Article 217 of the Constitution, the reviewed authorisation for the NCRBT to issue a regulation, contained in Article 48.3 of the Act, does not fulfil the requirement of sufficient precision stipulated in Article 92.1 of the Constitution, since it does not contain guidelines concerning the content of such a regulation. It is also impossible to determine such guidelines on the basis of other provisions of this Act.

#### Cross-references:

- Judgment K 8/93 of 14.12.1993, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1993, item 43;
- Judgment K 12/94 of 12.01.1995, *Bulletin* 1995/1 [POL-1995-1-003];
- Judgment U 9/97 of 16.06.1998, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 4, item 51;

- Judgment U 1/98 of 01.09.1998, *Bulletin* 1998/3 [POL-1998-3-015];
- Judgment U 4/98 of 09.02.1999, CODICES [POL-1999-X-002];
- Judgment P 7/00 of 06.03.2002, *Bulletin* 2002/3 [POL-2002-3-021];
- Judgment P 6/02 of 10.12.2002, *Bulletin* 2003/1 [POL-2003-1-009].

#### Languages:

Polish, English.



#### Identification: POL-2004-3-021

a) Poland / b) Constitutional Tribunal / c) / d) 21.09.2004 / e) K 34/03 / f) / g) *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2004, no. 211, item 2151; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 8, item 84 / h) CODICES (English, French, Polish).

#### 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.  
 3.9 **General Principles** – Rule of law.  
 3.13 **General Principles** – Legality.  
 3.16 **General Principles** – Proportionality.  
 5.1.3.2 **Fundamental Rights** – General questions – Limits and restrictions – General/special clause of limitation.  
 5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.  
 5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.  
 5.3.43 **Fundamental Rights** – Civil and political rights – Right to self fulfilment.

#### Keywords of the alphabetical index:

Seller, cash-register, obligatory / Tax, value added, assessment.

### Headnotes:

The fact that a particular solution adopted by law is inappropriate, impractical or counter-productive does not automatically imply that such a solution does not conform to the Constitution. Allegations as to the non-conformity of a particular legal solution with Article 2 of the Constitution (the rule of law), read in conjunction with Article 31.3 of the Constitution (general clause on the limitation of constitutional rights and freedoms), may only be substantiated by demonstrating that the introduction of such a solution, deprived of its functional attributes, prevents, for example, the exercise of a constitutional right or introduces an excessive and disproportionate burden in comparison to alternative solutions.

As a result of the principle of interpretation requiring domestic law to be construed in such a manner as to enable the efficient functioning of the economy within the framework of European integration, an expectation arises that any interpretation of domestic law will ensure conformity with European law. Such an obligation stems from Article 10 EC. The aim of this obligation is to ensure the compatibility of domestic law with Community law. This means that interpretations of domestic legal provisions leading to conflict with obligations stemming from Community law may not be approved.

### Summary:

I. Article 29.1 of the VAT and Excise Duty Act 1993 (“the Act”) obliged taxpayers who sell goods or provide services to natural persons not acting in pursuit of an economic activity (consumers) or to persons pursuing solely farming activities (individual farmers) to record turnover and payable tax amounts with the use of cash-registers. Such taxpayers could deduct the cost of purchasing the cash-register from their payable tax or reimburse the cost, within specified limits. On the basis of Article 29.3 the Minister of Finance issued executive acts regulating in detail the deduction or reimbursement of such costs and temporarily exempting certain taxpayers and activities from the obligation to record turnover with the use of cash-registers. The Minister of Finance’s Regulation of 2002 (“the Regulation”) provided such exemption for the period until 31 December 2003 in respect of, *inter alia*, the “carriage of persons and cargo by means of passenger and baggage taxi cabs”.

A group of Deputies to the Polish Parliament challenged Article 29.1 of the Act and the Regulation insofar as they imposed the abovementioned obligations on taxpayers exempted from VAT. The background of this application concerned wide-scale

and spectacular forms of protest by taxi-drivers in response to the Regulation’s envisaged abolition of the temporary exemption from the obligation to possess cash-registers, effective from the outset of 2004.

II. The Tribunal ruled that Article 29.1 of the Act and the Regulation conform to Article 2 of the Constitution (the rule of law), Article 7 of the Constitution (principle of legality), Article 31.1 of the Constitution (personal freedom), Article 87.1 of the Constitution (exhaustive list of sources of universally binding law), Article 92.1 of the Constitution (conditions for authorising the issuing of a regulation) and Article 217 of the Constitution (legal reservation in relation to tax law – exclusivity of statutes).

The obligation for VAT taxpayers to keep records of turnover fulfils several functions that are realised even given the existence of individual exemptions. In particular, it is indispensable for allowing the beneficiaries of tax exemptions to calculate their turnover, since the absence of reliable turnover records would render it impossible to verify one of the prerequisites for taking advantage of individual exemptions made conditional upon the level of turnover. The recording of turnover is also in the interests of consumers since, even where the provider of goods or services is permitted to take advantage of an individual exemption, consumers retain an interest in the recording of data allowing them to identify the other contracting party, lodge a claim, protect their interests and so on.

The introduction of clear recording in relation to activities subject to VAT is a consequence of the duty to implement into the Polish legal system the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of laws of the EC Member States relating to turnover taxes – common system of value added tax: uniform basis of assessment. This Directive creates the obligation to keep records “in sufficient detail to permit application of the value added tax and inspection by the tax authority” (Article 22.2). Whilst the issue of accuracy and the manner of keeping records is left to domestic law, it is beyond doubt that, at the very least, the recording of turnover falls within the aforementioned obligation.

The Polish legislator’s decision concerning the universal use of cash-registers to record turnover (Article 29 of the Act) was taken in 1993 and implementation of this decision proceeded gradually, extending to broader and broader groups of taxpayers (the gradual removal and restriction of exclusions and exemptions). The mere existence of such exemptions and exclusions may not, by itself, substantiate submissions concerning an alleged



infringement of the principle of equality (Article 32.1 of the Constitution), in the light of the applicant's failure to challenge the criteria governing applicability of those exemptions and exclusions to particular entities or to particular activities. Furthermore, the fact that the requirement to use cash-registers has been introduced progressively does not in itself indicate an infringement of the constitutional limits of the State's regulatory freedom, nor is it evidence of a violation of the constitutional principle of equality.

The application in the present case does not allege an infringement of the constitutional principle of proportionality (Article 31.3). As an aside, however, it may be remarked that the current cost of purchasing a cash-register does not represent an excessive, disproportionate burden in comparison with the possible adaptation of existing taxi-meters for the purposes of recording turnover, which would also require additional expenditure.

#### *Cross-references:*

- Judgment K 14/03 of 07.01.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 1, item 1.

#### *Languages:*

Polish, English, French.



#### *Identification:* POL-2004-3-022

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 05.10.2004 / **e)** U 2/04 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2004, no. 223, item 2269; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 9, item 88 / **h)** CODICES (English, French, Polish).

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

3.13 **General Principles** – Legality.

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

Sport, insurance, compulsory / Insurance, compulsory, competence to determine / Regulation, executive, exceeding statutory criteria.

#### *Headnotes:*

Pursuant to Article 92.1 of the Constitution, a regulation is an executive act issued on the basis of a statute and for the purpose of implementation thereof. In order to be found to conform to the Constitution, a regulation must be enacted on the basis of detailed statutory authorisation. It is not permissible to presume that matters other than those listed in the authorising provision fall within the scope of the authorisation. Such a provision may not be subject to an expansive or teleological interpretation. Furthermore, the regulation may not be inconsistent with constitutional norms or statutory acts which indirectly or directly relate to the subject-matter of the regulation.

#### *Summary:*

I. The Physical Culture Act 1996 ("the 1996 Act") contains special provisions governing the practice of alpinism, motor-sports, kick-boxing, as well as shooting and self-defence sports. Pursuant to Article 53.2 of the 1996 Act, the Council of Ministers should, by way of a regulation, define certain issues concerning detailed requirements, entitlements and safety principles related to the practice of the aforementioned sports disciplines (excluding aviation sports).

The Commissioner for Citizens' Rights challenged one provision of that Regulation before the Constitutional Tribunal – § 19.2, which imposes an obligation on persons organising or practising alpinism to obtain accident insurance. The applicant alleged that this obligation was introduced without statutory authorisation, since Article 53.2 of the 1996 Act, referred to in the Regulation, does not contain any authorisation to introduce such an obligation. In the Commissioner's opinion, the challenged provision also failed to conform to Article 4.4 of the Compulsory Insurance, the Insurance Guarantee Fund and the Transport Insurers' Polish Office Act 2003 ("the 2003 Act"), which stipulates that compulsory insurance may only be introduced by statute or as a result of provisions contained in ratified international agreements.



## II. The Tribunal ruled that:

- The challenged provision does not conform to Article 53.2 of the 1996 Act and Article 92.1 of the Constitution (conditions for authorising the issuing of a regulation).
- This provision also fails to conform to Article 4.4 of the 2003 Act.
- The Tribunal discontinued the proceedings regarding the conformity of the challenged provision with Article 87.1 of the Constitution (exhaustive list of sources of universally binding law), given the withdrawal of the application – pursuant to Article 39.1.2, read in conjunction with Article 39.2 of the Constitutional Tribunal Act 1997.

The Council of Ministers, by imposing the obligation to obtain accident insurance, in § 19.2 of the Regulation, exceeded the framework of statutory authorisation contained in Article 53.2 of the 1996 Act.

Article 4.4 of the 2003 Act unambiguously states that the categories of compulsory insurance are limited to those listed in points 1-3 of that article, together with other categories of insurance defined in separate statutory provisions or international agreements ratified by Poland. Consequently, in the reviewed provision of the Regulation, the Council of Ministers regulated matters reserved for statute, which also leads to the conclusion that this provision fails to conform to Article 4.4 of the 2003 Act.

### Cross-references:

- Judgment P 11/00 of 05.02.2001, *Bulletin* 2001/1 [POL-2001-1-009].

### Languages:

Polish, English, French.



### Identification: POL-2004-3-023

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 13.10.2004 / **e)** Ts 55/04 / **f)** / **g)** / **h)** CODICES (English, French).

### Keywords of the systematic thesaurus:

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

1.3 **Constitutional Justice** – Jurisdiction.

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

1.3.5 **Constitutional Justice** – Jurisdiction – The subject of review.

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

4.7.15.2 **Institutions** – Judicial bodies – Legal assistance and representation of parties – Assistance other than by the Bar.

### Keywords of the alphabetical index:

Tax, advisor, participation in administrative proceedings / Legislator, omission.

### Headnotes:

Only provisions which constitute the legal basis for a final decision of a court or an administrative organ as regards the complainant's constitutional rights and freedoms may be the subject of a constitutional complaint (Article 79.1 of the Constitution). Moreover, the complainant should prove that the contents of the challenged provisions were the source of the alleged infringement of his/her constitutionally guaranteed freedoms and rights. In other words, the complaint should make a *prima facie* case that elimination of the regulation leading to impermissible interference with his/her constitutional status is a prerequisite to restoring a state of conformity with the Constitution.

The absence of a defined legal regulation, anticipated by the author of the constitutional complaint, in the legal system (i.e. the legislator's failure to act) may not be removed by a so-called interpretative judgment of the Constitutional Tribunal, i.e. the Tribunal's finding that the reviewed provision is constitutional or unconstitutional provided that it is understood in a defined manner. The Tribunal does not have the competence to "supplement" law in force with a new legal norm; the creation of such a new norm is only possible via the legislative procedure.

### Summary:

I. A tax advisor lodged a constitutional complaint challenging provisions permitting persons of that profession to appear before administrative courts as representatives of parties in tax cases. In the complainant's opinion, this legal regulation led to an

unconstitutional prohibition on the participation of tax advisors as representatives in judicial proceedings other than those concerning tax issues. No such limitations have been set forth for persons admitted to the profession of an advocate or legal advisor.

The constitutional complaint was lodged with the Tribunal in connection with a decision of the Supreme Administrative Court refusing to allow the complainant to appear as a representative in proceedings concerning customs law. The applicant made reference to the Constitutional Tribunal's judgment of 10 July 2000 SK 12/99. In the aforementioned judgment the Tribunal ruled that Article 1 of the Civil Procedure Code 1964, understood as excluding financial liabilities stemming from administrative decisions from the notion of "civil cases" examined by common courts, was unconstitutional.

II. The Tribunal refused to admit the complaint against the preceding procedural decision of the Tribunal refusing to proceed further with the constitutional complaint.

The situation occurring in the case SK 12/99 (judgment of 10 July 2000) was different. In that case, the Tribunal eliminated the legal norm, inferred from the challenged provision, which represented the unconstitutional narrowing of the scope of application of that provision.

#### *Languages:*

English, French.



#### *Identification:* POL-2004-3-024

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 19.10.2004 / **e)** K 1/04 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2004, n° 236, item 2371; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 9, item 93 / **h)** CODICES (English, French, Polish).

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

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

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

3.16 **General Principles** – Proportionality.

3.18 **General Principles** – General interest.

4.6.9.2 **Institutions** – Executive bodies – The civil service – Reasons for exclusion.

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

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

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

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

Customs, civil servant, responsibilities / Civil servant, dismissal, ground.

#### *Headnotes:*

Being a public servant cannot be treated solely as conferring privileges; it should also be viewed in terms of providing service, performing duties and showing unselfish regard for the common good. Particular requirements and responsibilities may attach to performing a public-law function. The freedom of the legislator to place persons exercising such functions in specific legal categories is proportional to those requirements and responsibilities.

The fundamental purpose of presumption of innocence (Article 42.3 of the Constitution) is to provide the accused with specific guarantees in criminal proceedings. This principle, which forms part of the list of constitutional rights and freedoms, also applies in coercion procedure other than criminal procedure. It does not apply, however, to assessment of prescribed procedure intended to provide various types of safeguards against infringements of the law.

#### *Summary:*

The new wording of Article 25.1 of the Customs Service Act, complained of by the Commissioner for Citizens' Rights, provided that customs officers would be dismissed both if they were indicted for an intentional offence liable to public prosecution and if they were detained pending trial. Filing an indictment brings the proceedings before the court whereas detention pending trial is a provisional measure, which can be applied by the court before the indictment is filed. Detention pending trial may be ordered, where justified, when it is feared that the suspect may flee or go into hiding, hamper proceedings (e.g. by inducing someone to provide false

testimony) or commit certain offences, or also where the suspect may be liable to a heavy penalty.

The Tribunal found that the rule complained of was in accordance with Article 32 of the Constitution (principle of equality) and not inconsistent with Article 42.3 of the Constitution (presumption of innocence) read in conjunction with Article 2 of the Constitution (principle of the rule of law).

Article 42.3 of the Constitution read in conjunction with the principle of the rule of law (Article 2 of the Constitution) is not the appropriate basis on which to review the impugned provision of the Customs Service Act, which provides for dismissal of a civil servant upon his or being indicted for an intentional offence liable to public prosecution or being detained pending trial.

The requirement that all legal persons in the same specified class or category are to be treated equally stems from the principle of equality enshrined in Article 32.1 of the Constitution. It also follows that all legal persons characterised to an equal degree by a (relevant) feature must be treated equally. When deciding whether a particular provision is in accordance with the principle of equality, it is vitally important to determine what the significant feature is and why this, and not another distinguishing feature, was chosen.

The impugned provisions concerning customs officers are much stricter than the rules relating to officers in the other “uniformed services”. However, this in itself does not amount to an infringement of the constitutional principle of equality. The “uniformed services” is a composite category, covering occupational groups with varying goals, functions, competences, powers and operating methods. There are many aspects to the work of the Customs Service, which encompasses areas traditionally associated on the one hand with police investigation and on the other with the tax authorities. It is very important to the national finances that the Customs Service perform its work properly. The nature and extent of the dangers of the work are common knowledge, particularly as regards the pressures of corruption and the frequency of contact with criminals. Because of customs officers' large powers, the rules applying to them are commensurately strict. The fact that they are stricter than for other services does not mean that stricter requirements could not be placed on other services if the situation called for it.

While it found no grounds to rule that the impugned provisions were unconstitutional to the extent alleged by the applicant, the Tribunal did concede that it was necessary to introduce legislation providing a

comprehensive, rational and constitutional solution to the effects of a finding that a dismissal was unjustified, the officer having been acquitted, criminal proceedings discontinued or the decision to detain the officer pending trial set aside.

#### Cross-references:

- Judgment K 29/95 of 23.04.1996, *Bulletin* 1996/1 [POL-1996-1-007];
- Judgment K 13/99 of 03.11.1999, *Bulletin* 1996/1 [POL-1996-1-007];
- Judgment SK 17/00 of 11.09.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 6, item 165;
- Judgment K 19/01 of 29.01.2002, *Bulletin* 2002/2 [POL-2002-2-013];
- Judgment P 12/01 of 04.07.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002/A, no. 4, item 50;
- Judgment K 16/02 of 10.06.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003/A, n° 6, item 67; and
- Judgment K 4/02 of 07.10.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003/A, no. 8, item 80.

#### Languages:

Polish, English, French.



#### Identification: POL-2004-3-025

a) Poland / b) Constitutional Tribunal / c) / d) 10.11.2004 / e) Kp 1/04 / f) / g) *Monitor Polski* (Official Gazette), 2004, no. 48, item 826; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 10, item 105 / 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.
- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.

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

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

5.3.28 **Fundamental Rights** – Civil and political rights – Freedom of assembly.

*Keywords of the alphabetical index:*

Gathering, participant, right to disguise / Gathering, organiser, liability.

*Headnotes:*

Prohibiting participation of persons “whose appearance renders their identification impossible” in assemblies and gatherings would restrict the freedom of assemblies in a way which is not necessary to guarantee the peaceful nature thereof. The right of a participant in a public assembly to remain anonymous is an essential element of the normative contents of the constitutional freedom of assembly.

The peaceful nature of assemblies is a fundamental element of the democratic principle of freedom of assembly as well as a precondition for enjoyment thereof.

Limitations on the freedom of assembly, including on the possibility for participants in an assembly to remain anonymous, may only be justified where the non-peaceful nature of an assembly violates the fundamental values specified in Article 31.3 of the Constitution (principle of proportionality).

The principle of the specificity of legal provisions, especially where they provide the possibility for imposition of penalties, is one of the elements of the principle of the certainty of law and the citizens’ trust in the State stemming from the rule of law clause (Article 2 of the Constitution).

*Summary:*

I. The amendment to the Assemblies Act 1990 and the Road Traffic Act 1997 adopted in April 2004 introduced a prohibition on participants in assemblies concealing their faces and established joint civil liability of the organiser of the assembly and the perpetrator of the damage. The amendment was introduced following the violation of the peaceful nature of numerous assemblies involving, in particular, attacks on public order officers and material damage.

The President of the Republic challenged the amendment before the Constitutional Tribunal, in preventive review proceedings (Article 122.3 of the Constitution). The applicant alleged a failure to conform to the constitutional guarantee of the freedom of assembly, read in conjunction with the principle of proportionality, and to the principle of the rule of law.

II. The Tribunal ruled that the challenged provisions do not conform to Article 2 of the Constitution (rule of law), Article 31.3 of the Constitution (proportionality) and Article 57 of the Constitution (freedom of assembly).

A prohibition on persons “whose appearance renders their identification impossible” from participating in assemblies would restrict the freedom of assembly in a way which is not necessary to guarantee the peaceful nature thereof. This restriction would cover not only persons voluntarily hiding their identity whose disguise could suggest aggressive behaviour and a possible threat to the constitutional values enshrined in Article 31.3 of the Constitution. It would also concern persons who may not be identified for ordinary reasons or for voluntary disguise which is, nevertheless, a means of expressing a certain attitude with regard to a given problem, situation or fact, and not a sign of aggressive behaviour and possible threat to the peaceful character of the assembly. In such situations, the prohibition on assembly would constitute an obvious, excessive interference in the constitutional freedom of assembly.

The persons organising an assembly are not, however, endowed with the right to remain anonymous. Their responsibility for the assembly is determined by the proper exercise of the activities required by statute.

The absence of a definition of the crucial notion “a person whose appearance renders their identification impossible” makes the decision as to the ultimate restrictions dependent upon the discretion of public authorities. The application of the provision containing such a definition would aggravate legislative imperfections.

The permissible restrictions on the freedom of assembly may also be connected with introducing explicit grounds for civil liability of the organiser of the assembly for damage committed therein. That does not, however, permit the legislator to establish any possible sort of liability without taking into account the need to achieve a rational compromise between the public interest, connected with, on the one hand, peaceful and safe assembly and, on the other hand,



the freedom of assembly itself. The measures introduced by the legislator may not exceed the limits of proportionality (Article 31.3 of the Constitution).

Strict liability (not fault-based) for damage committed, which is a form of aggravated liability *ex delicto*, should always be justified by the explicit legislative purpose indicating the expediency of departing from the general rule. As regards the reviewed legal regulation, it is difficult to define the motive which would justify the imposition of an aggravated form of liability. Prevention may not constitute such a motive, since even the utmost diligence of the persons organising the assembly would not exclude their liability. The aim of aggravated liability is rather the discouragement of persons organising any potential assemblies.

The excessive liability of organisers of assemblies for damage committed during an assembly would lead, in practice, to shifting the possible risk of liability on to such persons, together with imposing duties upon them which would be impossible to fulfil.

#### *Supplementary information:*

According to a dissenting opinion expressed, the Tribunal's ruling that the challenged provisions are unconstitutional may lead to the erroneous conclusion that the hitherto statutory provisions are sufficient or that their modification is not indispensable.

Public order requires the imposition of real liability for damage committed. In the light of Article 31.3 of the Constitution, this may justify the statutory restriction on the anonymous character of public assemblies.

The reviewed amendment constituted an attempt at complex regulation of matters concerning liability for damage occurring during the assembly. The basis of the aforementioned regulation was the just assumption that the existing legal institutions on liability for damage committed, contained exclusively in the Civil Code 1964, were insufficient. Therefore, the prohibition in question seems to be a rational solution which would facilitate detection of the perpetrator of such damage by the person organising the assembly. The joint nature of liability of such a person and of the perpetrator means that, should the former compensate for the damage, he has the real possibility to recover payment from the actual perpetrator.

#### *Cross-references:*

- Judgment K 39/97 of 10.11.1998, *Bulletin* 1998/3 [POL-1998-3-018];

- Judgment K 27/00 of 07.02.2001, *Monitor Polski* (Official Gazette), 2001, no. 6, item 99; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 2, item 29.

#### *Languages:*

Polish.



#### *Identification:* POL-2004-3-026

**a)** Poland / **b)** Constitutional Tribunal / **c)** / **d)** 15.12.2004 / **e)** K 2/04 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2005, no. 273, item 2722; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 11A, item 117 / **h)** CODICES (French, Polish).

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

- 3.5 **General Principles** – Social State.
- 3.9 **General Principles** – Rule of law.
- 3.10 **General Principles** – Certainty of the law.
- 3.16 **General Principles** – Proportionality.
- 3.18 **General Principles** – General interest.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2.2.4 **Fundamental Rights** – Equality – Criteria of distinction – Citizenship or nationality.
- 5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.
- 5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

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

Property, abandoned, resettlement, compensation.

#### *Headnotes:*

The constitutional guarantee of equal protection of property rights (Article 64.2 of the Constitution) refers to rights in a specific category. However, the principle of equal protection does not apply to the actual content of the protected rights. The content must be determined by appropriate legislation in each case.

Restricting compensation rights to persons with Polish nationality who were permanently resident inside Poland's borders after their relocation is reasonably commensurate with the "social and compensatory" duties of the Polish state in this connection, as described in the republican agreements. However, the requirement for persons to reside permanently in Poland after the entry into force of the impugned Act is an arbitrarily adopted condition, lacking sufficient justification.

The statutory limit on the amount of compensation payable is disproportionate and hence inconsistent with the principles of protection of acquired rights and the trust of citizens in the state arising from the constitutional principles of the rule of law and social justice (Article 2 of the Constitution).

### Summary:

After the Second World War, Poland's eastern and western borders were shifted westwards. The Polish inhabitants in the eastern territories were relocated within Poland's new borders. Under the so-called republican agreements negotiated in September 1944 by the Polish Committee of National Liberation (a provisional legislative and executive organ of the Communist government in Poland) with the governments of the neighbouring Soviet republics (Lithuania, Belarus and Ukraine), the question of compensation for property abandoned by Polish citizens in these territories (referred to as the property "beyond the Bug", from the name of the river which now forms part of Poland's eastern border) was supposed to be settled under domestic Polish law.

The impugned Act (of 12 December 2003) is the first comprehensive attempt to settle the problem of compensation for property beyond the Bug. It is based on offsetting part of the value of such property against the purchase price of real estate or the fee for perpetual use of property owned by the State Treasury. The impugned Act established the rules and arrangements for this compensation. It provided, among other things, for a kind of dual limit on compensatory reduced-cost acquisition of property owned by the State Treasury, in that compensation could not exceed 15% of the value of the abandoned property and the value of that property could not exceed 50,000 Polish zlotys. The law also made compensation conditional on possession of Polish nationality and permanent residence in Poland since the entry into force of the Act at the latest. These requirements also applied to the heirs of former owners. Under the Act, advantages obtained on the basis of other laws, regardless of their amount, would be viewed as having fully satisfied the claimants' rights to compensation for their former property.

Complaints concerning the above restrictions and other procedural regulations were lodged with the Tribunal by a group of Polish members of Parliament.

The Tribunal found, *inter alia*, that the impugned provisions did not comply with Article 2 of the Constitution (rule of law), Article 31.3 of the Constitution (proportionality), Article 32 of the Constitution (equality) and Article 64.1 and 64.2 of the Constitution (protection of property rights). On the other hand, the requirement that claimants had to be Polish nationals to be entitled to compensation was not found to be inconsistent with the Constitution. The Tribunal also ruled that the impugned provisions accorded with the constitutional principles of the protection of ownership and inheritance rights (Article 21 of the Constitution) and the freedom to choose one's place of residence (Article 52.1 of the Constitution).

The right to compensation is to a certain extent a substitute for the right to property, but it also has a social aspect. It is covered by protection of property rights (Article 64.1 and 64.2 of the Constitution), but not by Article 21 of the Constitution, which relates only to the right of ownership.

The main aim of the compensation promised sixty years ago was to provide "aid to relocated citizens", helping them to make a fresh start in life. There is a need therefore for the state's duty of compensation to be assessed flexibly, in keeping with the passage of time, when current instruments for the protection of property rights are applied.

In the light of historical facts, there are no grounds for the allegation that persons repatriated from the territories beyond the Bug were discriminated against in comparison with other citizens who lost property during the war or immediately afterwards.

However, applying a uniform ceiling of 50,000 zlotys on the compensation payable to all entitled claimants does result in unequal treatment, in contravention of the principle of equality (Article 32.1 of the Constitution), and in unequal protection of their property rights, contrary to Article 64.2 of the Constitution.

Disqualifying from compensation anyone who, on the basis of other statutes, acquired ownership or permanent use of property with a value lower than that which can be offset under the impugned Act – and hence only partly benefited from the right to compensation – amounts to an unjustified difference in treatment between persons as yet uncompensated and those who were compensated but received less than the law at issue allows. These rules are unfair and undermine citizens' trust in the state.

*Cross-references:*

- Judgment K 36/98 of 13.04.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 3, item 40;
- Judgment K 5/99 of 22.06.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 5, item 100;
- Judgment P 11/98 of 12.01.2000, *Bulletin* 2000/1 [POL-2000-1-005]; Judgment K 23/00 of 29.06.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 5, item 124;
- Judgment K 33/02 of 19.12.2002, *Bulletin* 2003/1 [POL-2003-1-012];
- Judgment of the European Court of Human Rights of 22.06.2004, *Case Broniowski v. Poland*, request no. 31443/96.

*Languages:*

Polish, French.



## Portugal

### Constitutional Court

#### Statistical data

1 September 2004 – 31 December 2004

Total: 172 judgments, of which:

- Abstract *ex post facto* review: 5 judgments
- Appeals: 132 judgments
- Complaints: 31 judgments
- Political parties and coalitions: 1 judgment
- Political parties' accounts: 1 judgment
- Referenda: 1 judgment

#### Important decisions

*Identification:* POR-2004-3-008

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 06.10.2004 / **e)** 589/04 / **f)** / **g)** *Diário da República* (Official Gazette), 259 (Serie I-A), 04.11.2004, 6549-6557 / **h)** CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

3.16 **General Principles** – Proportionality.  
5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.

*Keywords of the alphabetical index:*

Association, international, establishment, procedure / Organisation, non-governmental, aim pursued.

*Headnotes:*

The term “international associations” does not denote the international legal persons to which the Civil Code relates, for the purpose of determining the applicable law. The term can only cover legal persons under domestic law (national or foreign). The word “association” must be understood in the sense given to it by the Portuguese legal system, i.e. legal persons whose purpose is not to make profits for distribution to the members. With regard to the word “international”, the term “international associations” is

used to denote associations formed under a state legal system with international aims of a scientific, religious or other nature, which, in all probability, will pursue their activities in more than one state.

The term “international associations” therefore denotes legal persons under domestic law (national or foreign) which carry on their activities at international level. They are legal persons similar to those defined in public international law as “non-governmental organisations” (NGOs), although the term may sometimes not altogether correspond to this reality. International associations are non-profit-making bodies (unlike transnational companies). They are set up outside of any intergovernmental agreement by a group of persons (private or public, natural or legal), pursue very different aims and seek to influence or correct the action of states and “international organisations”.

Article 46.1 of the Constitution is narrow in scope, stipulating that “citizens have the right to form associations freely and without prior authorisation, provided that the associations are not intended to promote violence and that their objectives are not contrary to the criminal law”. In other words, the setting up of associations is not subject to any authorisation, except in the case of associations intended to promote violence and whose aims are contrary to the criminal law. The constitutional provision governs the positive freedom to form an association without any constraint and, further still, clearly rules out any administrative interference consisting in making the setting up of associations dependent on the approval of a public body. The text of the Constitution thus places an absolute ban on making the promotion and setting up of associations, whatever their nature and framework, subject to a system of authorisation (in the sense of an “administrative decision by virtue of which a person is able to exercise a right or legal powers” or a “decision whereby an administrative body allows a person to exercise a right or a pre-existing power”).

### Summary:

The *Provedor de Justiça* (ombudsman) applied to the court for a finding of unconstitutionality having general binding force in respect of the legislative provision making the promotion and setting up of “international associations” subject to authorisation by the government, given that this governmental authorisation restricted freedom of association viewed as a positive right of association. Article 46.1 of the Constitution stipulates clearly that citizens may form associations without requiring any authorisation, provided such associations do not encourage violence and their aims are not contrary

to the criminal law. These two conditions are the only limits which the Constitution sets on freedom of association.

First of all, the provision was unconstitutional because it was generally accepted that only the lack of any constraint at the time of forming associations made it possible to preserve that “progressive” or “negotiable” element which was the basis for the self-determination of associations. This self-determination of associations, viewed as the lack of any external limits to the formation of groups, was itself a requirement of the pluralist dynamics of contemporary liberal societies.

Even those who accepted the possibility of public-authority involvement at the setting-up stage of associations would acknowledge that such involvement could never take the form of a system of prior administrative authorisation that was not linked to a set of legally defined premises. In the case in point, such involvement could perhaps be based on the idea that international associations must not serve as a pretext for para-diplomatic activities which could affect the conduct of the Portuguese state’s foreign policy. But the requirement of prior authorisation in order to be able to achieve that aim was a manifestly disproportionate restriction. This did not mean that there was total freedom of association and, accordingly, that all conditions introduced by the ordinary legislature were necessarily unconstitutional, as the setting of constitutive conditions could not be confused with a system of prior authorisation. Notwithstanding the fact that these conditions were legitimate in view of the specific nature of certain associations – the possibility of having different constitutive conditions depending on the type of association must not be ruled out –, the constitutional ban on prior authorisation applied to all forms of association.

Even if international associations, to which the provision in question related, were recognised as being of a “special nature”, one failed to see how this “special nature” could justify a system of prior authorisation by the government, which, moreover, did not serve any objective purpose and had no basis that could be readily perceived in the interpretation of that provision, and for which a sufficient constitutional basis was lacking. In fact, this idea made it impossible to interpret the impugned provision in a manner consistent with the Constitution.

Three judges voted against the finding of unconstitutionality.



*Supplementary information:*

The Court affirmed the large body of Portuguese constitutional case-law on freedom of association. It also based its decision on international texts providing for freedom of association (Articles 20 and 23.4 of the Universal Declaration of Human Rights, Article 11.1 of the European Convention on Human Rights, Article 16 of the Inter-American Convention on Human Rights, Article 22.1 of the International Covenant on Civil and Political Rights, Articles 10 and 11 of the African Charter of Human and Peoples' Rights and the Charter of Fundamental Rights of the European Union) and on the case-law of the European Court of Human Rights (concerned mainly with defining the negative aspect of freedom of association).

*Languages:*

Portuguese.

*Identification:* POR-2004-3-009

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 06.10.2004 / **e)** 590/04 / **f)** / **g)** *Diário da República* (Official Gazette), 283 (Serie II), 03.12.2004, 18129-18135 / **h)** CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

- 3.5 **General Principles** – Social State.
- 3.11 **General Principles** – Vested and/or acquired rights.
- 3.17 **General Principles** – Weighing of interests.
- 3.19 **General Principles** – Margin of appreciation.
- 5.2.3 **Fundamental Rights** – Equality – Affirmative action.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.33 **Fundamental Rights** – Civil and political rights – Right to family life.
- 5.3.34 **Fundamental Rights** – Civil and political rights – Right to marriage.
- 5.4.13 **Fundamental Rights** – Economic, social and cultural rights – Right to housing.

*Keywords of the alphabetical index:*

Positive discrimination, appropriate means / Social right, gradual achievement / Housing, access, criteria, young family / Housing, ownership, promotion measures / Family, protection / Right, essence.

*Headnotes:*

The constitutional provisions on promotion of the right to housing are aimed mainly at the state.

Low-interest loans are not a home ownership measure required by the Constitution. Neither are they essential to the adoption by the state of the policies which either Article 65 or Article 9 of the Constitution require it to implement. Parliament has many other ways of discharging its responsibility for promoting home ownership. The Constitution requires Parliament to promote a home ownership policy, which must be reflected in the adoption of practical measures, the choice of which lies exclusively with Parliament. The only conditions set by the Constitution are the existence of measures, irrespective of the form those measures take, and the need to distinguish between these measures to promote home ownership and rent incentives.

However, the abolition of the system of low-interest loans for home ownership does not automatically lead to a situation of unconstitutionality through violation of the right to housing. It is important to understand the role of low-interest loans for home ownership in the policies on access to housing which the Constitution requires the state to adopt. Admittedly, the adoption by the state of policies geared especially to home ownership is a condition for implementing the right to housing. The right provided for under Article 65 of the Constitution may be seen as a right to benefits. State intervention is required to put into practice the constitutional requirements contained in this provision. The legal theory and case-law of other countries also consider the right to housing as a right applicable solely through the intervention of Parliament, which should be given wide room for manoeuvre. Parliament can intervene, for example, in such fields as that of the principles governing the operation of the housing market (construction, ownership and rent), an increase in the stock of vacant housing (for the benefit mainly of the most deprived social groups), or financial assistance to certain categories of citizens. However, as regards specifically the acquisition of property, the choice can be made, for example, to promote the setting up of housing co-operatives and other incentives to private construction for rental purposes; the granting of preferential rights for the purchase of rented housing; an increase in the stock of vacant housing under

public financing and construction schemes; the assignment of publicly-owned housing; the setting up of mechanisms to encourage savings with a view to home ownership, or tax incentives (income tax, deductibility of sums spent on home ownership). Furthermore, it must not be forgotten that, according to Article 9.d of the Constitution, it is for the state (as one of its basic tasks) to promote the effective exercise of all economic, social and cultural rights. It is necessary to combine the different constitutional rights and objectives for this purpose. It is essential, therefore, to reconcile the right to housing with other equally important social rights and public interests such as environmental protection, town planning and appropriate spatial planning.

### *Summary:*

A group of MPs applied to the court for a finding of unconstitutionality having general binding force in respect of the provisions abolishing the low-interest loan scheme to promote home ownership and the scheme under which low-interest loans were granted to young people in connection with new operations to finance the purchase and construction of homes, the carrying out of regular and extraordinary maintenance work, and improvements to a main dwelling owned by its occupants.

The Court pointed out that the right to housing consisted in the “right to a dwelling of adequate size, that meets satisfactory standards of hygiene and preserves personal and family privacy”. It was recognised as a fundamental right in Article 65 of the Constitution, in the chapter devoted to social rights and obligations. The right in question was undeniably important since it was a consequence flowing from the principle of the dignity of the human person. It was essential for the implementation of other fundamental rights, such as the protection of privacy.

The constitutional provisions on promotion of the right to housing were aimed mainly at the state. The Constitution provided for various ways of realising this aim, in particular the adoption of a policy for the institution of a system of rents that were compatible with family incomes, and a policy to promote home ownership (Article 65.3 of the Constitution). These were two distinct policies which necessarily complemented one another. Consequently, the pursuit of one of them did not make it unnecessary to pursue the other and could not take the place of the other.

One measure to promote home ownership was the low-interest loan, which had become increasingly important over the last few decades. Low-interest loans for home ownership and low-interest loans to

young people had taken on a particular importance as a result of the macroeconomic situation in the 1970s and 80s.

After considering in turn each of the questions raised, the Constitutional Court held that low-interest loans were not a home ownership measure required by the Constitution.

With regard to the right to found a family, the constitutional provision did not impose a duty on the state to facilitate home ownership as a measure aimed at the effective exercise of the fundamental rights in question. Neither did it require the adoption of any other concrete measure. The Constitution guaranteed the individual freedom to found a family and to marry, and the existence of the legal institution of marriage. Specifically, the Constitution stipulated only that the state must guarantee the existence of the legal institution of marriage and, at the same time, refrain from any behaviour which would prevent citizens from exercising those rights or make it difficult for them to do so. The Constitution allowed the state a considerable margin of discretion in the choice of concrete measures for pursuing that aim. It mentioned only, by way of example, a few aspects which must not be overlooked (Article 67.2 of the Constitution). Home ownership by families was not one of those aspects.

With regard to youth protection policy, it could be implemented through measures of various kinds. It was important to see, therefore, whether the legal system comprised instruments – of whatever kind – able to ensure, with some degree of legal effectiveness, the special protection of young people required by the Constitution. The abolition of one measure implementing the provisions of Article 70.1.c of the Constitution would only raise an issue of constitutionality if there was no other measure in this field, resulting in non-compliance with the constitutional provision. This non-compliance would amount, in its basic premises, to unconstitutionality by omission. But there was at least one legislative measure discriminating in favour of young people in the area of access to housing: this was the scheme introducing a “rent incentive for young people”. It was aimed at young people under the age of 30 who were tenants of property which they occupied on a permanent basis, and consisted in the payment of a monthly subsidy.

Lastly, with regard to the rule against reducing the level of protection of social rights, the court’s case-law stipulated that, in cases where the Constitution imposed a sufficiently precise and concrete obligation to legislate, the scope available to Parliament for reducing the level of protection already achieved was

necessarily very small. In other circumstances, however, the rule against reducing the level of protection could only operate in borderline cases, firstly because the principle of democratic alternation of power entailed the reversibility of political and legislative choices, even if they were fundamental choices. With this in mind, the question that arose was whether, in the instant case, the Constitution imposed a precise and concrete obligation to legislate in order to identify the instruments which the state must use to implement the constitutional rules. The constitutional provisions concerning the right to housing and the special protection of young people in access to housing did not entail an obligation to legislate in the terms specified above. Parliament could choose how to apply the constitutional rules. Consequently, the reduction of protection prohibited by the Constitution appeared only in borderline cases, where the essence of a fundamental right established in the Constitution was no longer guaranteed. Hence, owing mainly to the continued existence of other legal instruments implementing the right to housing and the right to special protection of young people, the necessary conclusion was that the "reduction in the level of protection of social rights" resulting from the abolition of the low-interest loan scheme did not impair the essence of those rights. The solution contained in the provision in question must therefore be viewed in the context of the reversibility of the legislative choices resulting from the principle of democratic alternation of power.

#### *Cross-references:*

- On the question of the prohibition on reducing the level of protection of social rights, see Judgment 509/02, *Bulletin* 2003/3 [POR-2002-3-009].

#### *Languages:*

Portuguese.



#### *Identification:* POR-2004-3-010

**a)** Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 04.11.2004 / **e)** 631/04 / **f)** / **g)** *Diário da República* (Official Gazette), 291 (Serie II), 14.12.2004, 18637-18641 / **h)** CODICES (Portuguese).

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

- 3.9 **General Principles** – Rule of law.
- 3.20 **General Principles** – Reasonableness.
- 5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.
- 5.3.39 **Fundamental Rights** – Civil and political rights – Right to property.

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

Trust, principle, protection / Trust, breach / Property, obligation to return, fraudulent non-compliance / Debt, imprisonment, prohibition.

#### *Headnotes:*

The prohibition of so-called "imprisonment for debt" must be regarded as a constitutional principle, although the principle applies only to "good-faith debtors", excluding cases of fraudulent non-compliance. The grounds adduced in support of the prohibition of imprisonment for debt are not applicable where the obligation in question is not a contractual one, but a legal one.

The guarantee that no one will be deprived of his liberty on the sole ground of inability to perform a contractual obligation remains linked to its historic premise (which was the mere impossibility of performing contractual obligations). The substance of the prohibition was, however, general insofar as, under that premise, it comprises all forms of deprivation of liberty, whether or not they are means of coercion. This historic origin accounts for the fact that the European Commission of Human Rights considered the remaining cases of imprisonment for debt to see whether they were consistent with the Convention.

The essential ingredient in the offence of breach of trust relating to a sum of money was that the person responsible appropriates the legal value of a sum of money which has been handed to him on a provisional basis and uses it as if he were the owner. In addition to this appropriation (in contrast to the typical *Unterschlagung* offence of the German Criminal Code), there was a new element, namely the bond of trust between the offender and the owner, or between the offender and the thing itself. In committing the offence, the offender breaks that bond. To this extent, one can and must say that breach of trust was a special offence, specifically in the form of the offence of breach of duty. The offender can only be a person who was in a specific situation stemming from the bond of trust between himself and the owner of the thing he has received

without any transfer of ownership, which was the basis of the special duty to return property.

### Summary:

The question was whether the interpretation of the provision in Article 205.1 of the Criminal Code according to which this provision covered sums of money held by an employee because they were intended to form part of the company's corporate assets was unconstitutional by virtue of a violation of the following principle: no one may be deprived of his liberty for the sole reason that he was unable to perform a contractual obligation. The right to freedom and security recognised in Article 27.1 of the Constitution entailed that principle in accordance with Article 1 Protocol 4 ECHR.

According to the Constitutional Court, when the offender, as in the instant case, acted in his capacity as an employee and representative of a company – and, in the performance of his duties, received certain fungible assets which would have to be handed over to the company or incorporated into the corporate assets –, it was obvious that these things were entrusted to him without any transfer of ownership on the basis of a mere “bond of trust” between him and the owner of the money. By appropriating the sum in question and diverting it from its intended use, the offender unlawfully transferred ownership of these fungible sums and at the same time broke this “bond of trust”. If the act was fraudulent, it was one that could lead to a criminal conviction.

The inability to perform the contractual obligation of handing over certain sums to one's employer was not an essential element of the offence of breach of trust. The important element was the appropriation of “fungible” money, resulting from the breaking of the bond of trust, the act being fraudulent. This appropriation impaired the bond of trust built around the moral protection given to the right of ownership by the person who held the sum of money on a provisional basis, without transfer of ownership.

In conclusion, in a social and democratic state governed by the rule of law, whose substantive principle was the preservation of trust and good faith and respect for the rights recognised by the legal system, including the right of ownership as a fundamental right, Parliament's decision to place this appropriation of moveable goods under the protection of criminal law, even if they were fungible goods, did not represent a discriminatory, unnecessary or excessive measure such as would violate Article 18.2 of the Constitution.

### Supplementary information:

The Constitutional Court has already dealt with the issue of imprisonment for debt in other cases, both in connection with the provision in the 1982 Criminal Code under which suspension of the enforcement of the sentence may be made conditional on the accused paying the compensation owed to the victim within a certain time, or in connection with the criminal-law provisions, particularly of a procedural nature, relating to cheques, or in connection with the legal conformity of the offence of tax evasion.

### Languages:

Portuguese.



### Identification: POR-2004-3-011

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 17.12.2004 / **e)** 704/04 / **f)** / **g)** *Diário da República* (Official Gazette), n° 304 (Serie I-A), 30.12.2004, 7390-7395 / **h)** CODICES (Portuguese).

### Keywords of the systematic thesaurus:

1.3.4.6 **Constitutional Justice** – Jurisdiction – Types of litigation – Admissibility of referenda and other consultations.

1.3.5.1 **Constitutional Justice** – Jurisdiction – The subject of review – International treaties.

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

### Keywords of the alphabetical index:

European Union, Constitution, ratification / Referendum, specific conditions / Referendum, preliminary, legislative.

### Headnotes:

The question forming the subject of the referendum must be formulated in an objective, clear and precise way and must permit an answer of the “yes” or “no” type, without suggesting, directly or indirectly, the significance of the answer. The Constitutional Court checks whether these conditions have been met



while bearing in mind, on the one hand, that it is not its role to check whether the question is formulated in the best possible way, but only to satisfy itself that it fulfils the constitutional and legal conditions, and on the other hand, that the criterion of clarity must be combined with those of objectivity and precision. This presupposes a more complex wording and accurate terminology in order to avoid subsequent ambiguities.

In the case in point, the question “Do you agree with the Charter of Fundamental Rights, the qualified majority voting rule and the new institutional framework of the European Union under the Constitution for Europe?” combines three questions within one, for which a single answer is required. It is a question which was unclear in relation to the constitutional and legal provision; there must be a clear, explicit and unambiguous question. The lack of clarity stems mainly from the fact that there are three questions in one.

The question is worded in such a way that one could say that the aim is to ask voters whether they agree with the Charter of Fundamental Rights, the qualified majority voting rule and the new institutional framework of the European Union, in all three cases under the Constitution for Europe. The mere fact of assigning more than one meaning to the question shows its ambiguity and the resulting lack of clarity.

Not only was the question as a whole not worded in a clear, explicit and unambiguous manner, but also, none of the individual questions complies with the condition of clarity, because they can be assigned several meanings.

An interpretation to the effect that the question comprises three separate questions rolled into one infringes the constitutional and legal provision requiring the question to be formulated in such a way as to permit an answer of the “yes” or “no” type. The aim in formulating the question in such a way is to ensure that the purpose and content of the vote are fully in agreement.

### *Summary:*

Since it was the role of the Constitutional Court to give a binding opinion on the constitutionality and lawfulness of referendum proposals, the President of the Republic applied for prior review of the constitutionality and lawfulness of a proposal for a referendum which had been approved by Parliament and whose content was as follows: “Do you agree with the Charter of Fundamental Rights, the qualified majority voting rule and the new institutional framework of the European Union under the Constitution for Europe?”

Notwithstanding the fact that the Treaty establishing a Constitution for Europe had already been signed by the heads of state and government of the European Union, the referendum could still be held because Parliament had not yet finally approved it with a view to ratification by the President of the Republic. The referendum proposal formed part of the procedure for deciding on a future legislative act, complying with the requirement that it must be an international treaty or convention which had not yet been finally approved.

In conclusion, the Constitutional Court ruled that:

- a. the proposal for a referendum on a Constitution for Europe did not meet the requirements of clarity and formulation of a question calling for an answer of the “yes” or “no” type, in accordance with Article 115.6 of the Constitution and Article 7.2 of the Organic Law on Referendums;
- b. consequently, that the proposed referendum was neither constitutional nor legal.

### *Cross-references:*

- On the status of the referendum and also the referendum on the Treaty of Amsterdam, see Judgment 531/9, *Bulletin* 1998/2 [POR-1998-2-2002].

### *Languages:*

Portuguese.



# Romania

## Constitutional Court

### Important decisions

*Identification:* ROM-2004-3-004

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 23.09.2004 / **e)** 352/2004 / **f)** Decision on a preliminary objection of unconstitutionality in respect of the provisions of Article 145<sup>1</sup> of the Code of Criminal Procedure / **g)** *Monitorul Oficial al României* (Official Gazette), 14.10.2004, 942 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

5.3.5.1.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Non-penal measures.

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

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

*Keywords of the alphabetical index:*

Preventive measure, reason, length / Travel abroad, prohibition / Criminal proceedings, prosecution stage / Criminal proceedings, trial stage.

*Headnotes:*

The imposition on an accused person or a person under judicial investigation of a prohibition of travel abroad, for a maximum of 30 days, only before the trial stage in criminal proceedings is justified by the need to try criminal cases promptly and prevent any impediment to the criminal investigation.

The fact that there is no such time-limit during the trial stage, i.e. once the case has been brought before the court, is warranted by the difference between the legal status of persons under judicial investigation and that of persons during the trial stage.

*Summary:*

An application was made to the Constitutional Court challenging the constitutionality of Article 145<sup>1</sup> of the Code of Criminal Procedure.

In the application, it was alleged that Article 145<sup>1</sup> of the Code of Criminal Procedure infringed Articles 21.3, 124.2 and 53 of the Constitution because it failed to determine the procedure for the extension or continuation of a prohibition of travel abroad during the trial stage of the proceedings, after the case had been referred to the court. The applicant submitted that Article 145<sup>1</sup> restricted the parties' right to a fair trial and procedural safeguards.

On examining the application, the Court found that the fact that the imposition on a defendant or an accused person of a prohibition of travel abroad for a maximum of 30 days applied only to the stage before the trial could not lead to the conclusion that there was any unjustified discrimination as compared to persons whose cases had already reached the trial stage, or that this preventive measure should be available to the relevant authority for the entire duration of the trial. The rule was justified by the need to try criminal cases promptly and to avoid hampering the judicial investigation. Clearly, the situations in which these persons found themselves differed, so it was logical that the legal approach to them would also differ. Furthermore, under Article 139 of the Code of Criminal Procedure, it was possible at any time for a prohibition of travel abroad to be waived, of the court's own motion or at the accused's request, where there was no longer any reason for a preventive measure to be continued. Likewise, under Article 141 of the Code of Criminal Procedure, interlocutory decisions issued during first-instance or appeal proceedings, ordering the taking, discharge, replacement or continuation of a preventive measure such as a prohibition of travel abroad could be appealed against separately.

Article 145<sup>1</sup> of the Code of Criminal Procedure did not infringe Article 21.3 of the Constitution and complied with Article 6 ECHR. The impugned statutory provisions did not affect the completion of procedural acts or the proper conduct of a trial, without interruptions or adjournments likely to delay the legal decision on the parties' individual rights, and did not undermine the existence of a court system comprising several levels of courts.

Article 145<sup>1</sup> was also consistent with Article 126.2 of the Constitution as the Constitutional Court had held in previous decisions that there could be legislation introducing special procedural rules applying to the investigation of certain specific situations – such as

the rules relating to prohibition of travel abroad – as well as different arrangements for the exercise of procedural rights.



Preventive measures prohibiting travel abroad were restrictions on the right to freedom of movement fully in keeping with Article 53 of the Constitution. Such a measure was necessary for judicial investigations to be conducted properly, and the situations and conditions in which it was applicable were determined by the law, in accordance with the second sentence of Article 25.1 of the Constitution, without prejudice to the existence of that right.

#### *Supplementary information:*

Article 145 of the Code of Criminal Procedure provides that a movement restriction order imposed by the public prosecutor before the trial phase or by the court during the trial, shall prohibit an accused or a person under judicial investigation from leaving the locality in which he or she lives without prior approval of the authority that issued the order. This measure may only be taken if the conditions laid down in Article 143.1 are satisfied.

During the stage before trial, the length of the measure provided for in paragraph 1 may not exceed 30 days, save where it is extended in accordance with the law. A movement restriction order may be extended before the trial stage where this is necessary, provided that reasons are given. Extensions shall be granted by the authority with power to decide on the merits of the case, and no extension may exceed 30 days. The provisions of Article 159.7-9 shall be applied accordingly. The maximum length of the measure provided for in paragraph 1 before the trial stage shall be one year. Exceptionally, where the statutory penalty for the offence is life imprisonment or a prison sentence of ten years or more, the maximum length shall be 2 years.

A copy of the public prosecutor's order or, where appropriate, the final interlocutory decision of the relevant authority shall be communicated to the accused or the defendant and to the police force responsible for the area where the accused or the defendant lives.

If such an order is violated, another preventive measure may be taken against the accused or person under judicial investigation, provided that the statutory conditions for the taking of such measures are met.

#### *Languages:*

Romanian.

#### *Identification:* ROM-2004-3-005

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 14.10.2004 / **e)** 417/2004 / **f)** Decision on an application challenging the constitutionality of Articles 504.3 and 506.2 of the Code of Criminal Procedure / **g)** *Monitorul Oficial al României* (Official Gazette), 11.11.2004, 1044 / **h)** CODICES (French).

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

4.5.2 **Institutions** – Legislative bodies – Powers.  
4.7.2 **Institutions** – Judicial bodies – Procedure.  
5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.  
5.3.17 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

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

Compensation, claim, time-limit / Detention, unjustified, compensation.

#### *Headnotes:*

The circumstances in which wrongfully convicted persons or persons whose liberty has been unlawfully restricted are entitled to compensation from the State for the damage incurred are laid down by Article 504.3 of the Code of Criminal Procedure. Anyone not in the circumstances set out in Article 504.3 of the Code of Criminal Procedure may make use of their right of free access to justice through other legal remedies, as prescribed by law.

The limitation period of 18 months set by Article 506.2 of the Code of Criminal Procedure is a reasonable length of time, offering any injured person the best possible conditions for taking legal action to obtain compensation.

#### *Summary:*

An application was made to the Constitutional Court challenging the constitutionality of Articles 504.3 and 506.2 of the Code of Criminal Procedure. It was alleged in the application that the provisions of Article 504 relating to the circumstances entitling wrongfully convicted persons or persons whose

liberty had been unlawfully restricted to claim compensation for pecuniary or non-pecuniary damage were unconstitutional in so far as they infringed Articles 20.1, 21.1 and 53 of the Constitution and Article 6 ECHR. The applicant also submitted that the provision of Article 506.2 of the Code of Criminal Procedure which limited the time within which legal action for reparation could be brought was unconstitutional under the same articles of the Constitution and international instruments.

On examining the application, the Court ruled that it was ill-founded.

It decided that Article 504.3, which described the circumstances in which cases give rise to compensation for pecuniary or non-pecuniary damage in the event of wrongful conviction or illegal deprivation or restriction of liberty, put into practice the principle provided for in Article 52.3 of the Constitution, under which "The State shall bear liability in tort for any damage caused by miscarriages of justice. Liability of the State shall be determined according to the law [...]". Consequently, the entitlement to compensation from the State for damage caused by miscarriages of justice was implemented in accordance with the law.

Not only could Article 504.3 not be said to restrict free access to justice, but it actually established the circumstances in which this right could be exercised, in full compliance with Article 126.2 of the Constitution.

The specific rules concerning the circumstances in which individual liberties had been violated were not such as to limit the free access to justice of persons who were not in any of the circumstances described in Article 504.3, as it was possible for them to exercise their right to justice through other legal remedies. Any person with an interest could refer their case to the courts in accordance with the conditions and procedures prescribed by law.

Under the Constitutional Court's case-law, free access to justice implied that any person could take their case to a court if they considered that their rights, freedoms or legitimate interests had been violated, but did not mean that this access was always unconditional. Under Article 126.2 of the Constitution, the power to lay down the rules on the conduct of court proceedings lay with the legislature. This view had also been reflected in the case-law of the European Court of Human Rights in cases such as *Ashingdane v. the United Kingdom* of 1985, Series A of the Publications of the Court, no. 93.

The Constitutional Court noted that Article 506.2 of the Code of Criminal Procedure was in conformity

with the Constitution. No provision was made in the Constitution or in the international covenants or treaties to which Romania was a party for no limitation period on the right of persons unlawfully imprisoned to take legal action to obtain compensation, but neither did any of these instruments set a specific time-limit for the exercise of the right. Through the expression "determined according to the law", the second sentence of Article 52.3 of the Constitution entrusted the legislature with the task of establishing the procedural framework for exercising the right to compensation. The same idea could be found in Article 3 Protocol 7 ECHR.

The 18-month time-limit set by Article 506.2 provided the best possible conditions for the injured person to take legal action to obtain compensation. The determination of claims for compensation and the rules concerning the referral of the case to a trial court did not infringe Article 53 of the Constitution, which could be applied only if there had been a restriction on the fundamental rights and freedoms of citizens, and no such restriction had been found in the instant case.

#### *Languages:*

Romanian.





# Russia

## Constitutional Court

### Statistical data

1 January 2004 – 31 December 2004

Total number of decisions: 19

Categories of cases:

- Rulings: 19
- Opinions: 0

Categories of cases:

- Interpretation of the Constitution: 0
- Conformity with the Constitution of acts of state bodies: 19
- 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: 10
- Individual complaints: 12
- Referral by a court: 8  
(Some proceedings were joined with others and heard as one set of proceedings)

### Important decisions

*Identification:* RUS-2004-3-001

a) Russia / b) Constitutional Court / c) / d) 29.01.2004 / e) 17 / f) / g) *Rossiyskaya Gazeta* (Official Gazette), 04.02.2004 / h) CODICES (Russian).

*Keywords of the systematic thesaurus:*

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

5.4.16 **Fundamental Rights** – Economic, social and cultural rights – Right to a pension.

*Keywords of the alphabetical index:*

Employment, period, calculation of supplementary entitlement / Pension, law, retrospective effect / Pension, supplementary entitlement.

*Headnotes:*

Withdrawal of a supplementary entitlement for certain periods of employment does not result in a degradation of the situation of the corresponding category of pensioners provided that the necessary compensation mechanisms are implemented, and cannot be regarded as a limitation of their pension rights.

*Summary:*

The case originated in applications by a group of members of the State Duma of the Russian Federation and the State Assembly of the Sakha Republic (Yakutia) and by members of the public.

The applicants challenged the provisions of the Federal Pensions Act, under which pension entitlement was calculated on the basis only of periods of work prior to 1 January 2002.

The applicants pointed out that the Act had withdrawn the supplementary entitlement accrued for periods of employment in the regions of the Far North (formerly increased by fifty percent, meaning that one year of work in these regions had been considered the equivalent of one-and-a-half years of normal employment). Not only had the Act deprived them of this bonus, but it had also done so with retrospective effect because, once the law had entered into force, a new method of calculating periods of employment for pension purposes had been introduced which took no account of supplementary entitlement.

The Constitutional Court noted in its judgment that the reform of pensions legislation had changed the functional role of the total period of employment. Employment periods of citizens who had become entitled to a pension before 1 January 2002 had been converted into a capital equivalent for pension purposes. In so doing, parliament had effectively done away with the calculation of supplementary entitlement for the total period of employment, excluded certain periods from this, and given the rule retrospective effect.

However, at the same time, parliament had established a minimum pension rate which exceeded the maximum amount of retirement pension set previously. Consequently, the impugned rule which

had been given retrospective effect had not worsened the situation of citizens, but improved it. In addition, pensioners now had the right to choose which legislation was to be applied – the old or the new – for the calculation of their pensions.

The Court also noted that, for pensioners who had previously worked in regions of the Far North, parliament had provided an additional compensation mechanism (taking account, when assessing pension rights, of a higher proportion of their monthly pay than for other citizens, along with the addition of a regional coefficient to the basic rate of retirement pensions).

Having regard to the fact that the situation of pensioners had not worsened, the Court ruled that the impugned provisions were not contrary to the Constitution.

#### *Languages:*

Russian.



#### *Identification:* RUS-2004-3-002

a) Russia / b) Constitutional Court / c) / d) 25.02.2004 / e) 4 / f) / g) *Rossiyskaya Gazeta* (Official Gazette), 03.03.2004 / h).

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

3.4 **General Principles** – Separation of powers.  
 3.9 **General Principles** – Rule of law.  
 3.10 **General Principles** – Certainty of the law.  
 3.22 **General Principles** – Prohibition of arbitrariness.  
 4.7.1.1 **Institutions** – Judicial bodies – Jurisdiction – Exclusive jurisdiction.  
 4.9.1 **Institutions** – Elections and instruments of direct democracy – Electoral Commission.  
 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.

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

Election, electoral commission, powers / Election, electoral dispute, power to determine jurisdiction / Election, electoral right, protection.

#### *Headnotes:*

Granting the Central Electoral Commission a right to determine jurisdiction, independently and at its own discretion, in certain cases relating to the protection of citizens' electoral rights is contrary to the principle of the separation of powers and the independence of the judiciary. The resolution of the issue of whether to initiate judicial proceedings must lie exclusively with the court itself.

#### *Summary:*

The case was heard by the Constitutional Court on an application by the Supreme Court, which requested a ruling on the constitutionality of certain provisions of the Federal Law on "the main measures guaranteeing citizens' electoral rights" and the Code of Civil Procedure.

The impugned provisions empowered the Central Electoral Commission, entirely of its own motion, to refer certain cases concerning the protection of electoral rights to the Supreme Court for a first-instance ruling. Cases could be referred to the Supreme Court if the violation of electoral rights affected a large number of citizens or if, owing to other circumstances, the violation had become a particularly important social issue.

In its application the Supreme Court pointed out that the Act gave the Central Electoral Commission discretion to determine jurisdiction in cases relating to the protection of electoral rights. The Court also complained of the uncertainty of the criteria by which a case could be referred to the Supreme Court (particularly with regard to the expressions "a large number of citizens" and "a particularly important social issue").

The Constitutional Court noted that, in the law which determines jurisdiction over cases, criteria must be laid down which establish clearly and unequivocally which court must hear which case. The equality of all before the law and the courts cannot be secured unless a statutory provision is interpreted and applied in the same way by everyone. Uncertainty about the content of a legal rule leads to arbitrariness and an infringement of the principle of equality and the rule of law.

In the impugned provisions, the criteria for a change in jurisdiction are worded vaguely. It is unclear, for instance, what standards can be used to determine what a "large" number of citizens is and what is meant by the "other" circumstances which make the violation of electoral rights "a particularly important

social issue". It must also be borne in mind that most cases relating to the protection of electoral rights affect the interests of a large number of citizens and are of major social importance.

Furthermore, the impugned provisions affect the independence of the courts. Under the Constitution, the courts are required to act independently and so a resolution of the issue of whether to initiate proceedings must lie with the courts alone. The Central Electoral Commission cannot be empowered to take decisions relating to the jurisdiction of a court and have a special position in relation to other parties in proceedings.

The Court ruled that the impugned provisions were contrary to the Constitution.

#### Languages:

Russian.



#### Identification: RUS-2004-3-003

a) Russia / b) Constitutional Court / c) / d) 23.04.2004 / e) 18 / f) / g) *Rossiyskaya Gazeta* (Official Gazette), 28.04.2004 / h) CODICES (Russian).

#### Keywords of the systematic thesaurus:

3.6.3 **General Principles** – Structure of the State – Federal State.

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

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

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

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

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

#### Keywords of the alphabetical index:

Land, state, property rights / Land, plot, ownership, foreigner / Federation, subject, joint jurisdiction, decision-making / Foreigner, right.

#### Headnotes:

The possibility *per se* of granting foreigners and foreign legal entities the right to acquire, possess, enjoy and transfer ownership of plots of land is not contrary to the constitutional provisions on the sovereignty and territorial integrity of the state.

Conciliatory procedures are not a prerequisite for the constitutional process of adopting federal laws in areas under the joint jurisdiction of the Federation and its subjects. They must not prevent the Federal Assembly from adopting federal laws independently.

#### Summary:

The Constitutional Court heard the case following an application by a regional legislative assembly complaining of the content of a number of the provisions of the Land Act of the Russian Federation and the procedure by which the Act as a whole was adopted.

The impugned provisions related to the right of foreigners, stateless persons and foreign legal entities to purchase plots of land in the Russian Federation and the priority right of foreign owners of constructions and buildings to acquire or rent land on which these constructions or buildings stand.

The applicant considered that since land is the basis of the life and activity of the country's peoples, the law could not demarcate land and redistribute it to non-Russian citizens. Granting aliens land-ownership rights created the possibility of ownership being transferred to a foreign state and could result in an infringement of national sovereignty.

The applicant also submitted that, under joint jurisdiction rules, parliament should have referred the bill to the bodies of state authority of the subjects of the Russian Federation. Where over a third of the subjects are against a bill as a whole, the federal parliament must appoint a conciliatory commission. Although over a third of the legislative bodies of the subjects of the Federation had actually expressed their disapproval of the bill, no such conciliatory commission had been appointed.

The Constitutional Court noted that the fact that the land was the basis of life implied that the state had to ensure that it was used rationally and effectively as an integral part of nature and that it was preserved and cared for.

When land became the object of property rights, it should be regarded as plots of land or, in other

words, specified areas of land located within the borders of a country. What owners obtained when acquiring land was not a part of the territory of the state but just a plot of land. Consequently, this affected neither the sovereignty nor the territorial integrity of the state.

The substrata of the land contained in a plot were the property of the state and could not be subject to sale, donation or any other form of transfer.

The Court also noted that foreigners and stateless persons enjoyed the same rights as Russian citizens save in exceptional circumstances provided for by federal law. The possibility *per se* of granting foreigners and stateless persons the right to acquire, possess, enjoy and transfer ownership of plots of land was not contrary to the Constitution. The land did not, under such circumstances, cease to be the public property of the multinational people of the Russian Federation.

In protecting Russian citizens' priority right to own land, the federal parliament had introduced reasonable restrictions on foreigners' rights in respect of the use of land. For example, the Land Act prohibited foreigners from owning land in border areas. It was also specified that agricultural land was available only for lease by foreign individuals and legal entities. Furthermore, where land was granted to foreigners, it always had to be paid for, whereas it could be granted to Russian citizens free of charge.

The aim of these legal rules was to secure the sovereign rights of the Federation to its natural resources, protect the interests of the national economy in a period of transition and offer its citizens relatively equal competitive conditions with foreign investors.

Consequently, the Constitutional Court ruled that the impugned provisions of the Land Act were not contrary to the Constitution.

Neither did it find that the adoption procedure for the Land Act had infringed the Constitution.

It also emphasised that the fact that the opinions of the subjects of the Federation were taken into account when a law was adopted in an area of joint jurisdiction helped to ensure that the adopted law reflected the interests both of the Federation and of its subjects. However, conciliatory procedures were not an absolute prerequisite for the constitutional procedure of adopting federal laws. Joint jurisdiction implied neither that federal bills falling within this area had to be submitted to the subjects of the Federation before adoption nor that subjects' bills had to be submitted to the Federal Assembly.

### *Languages:*

Russian.



### *Identification:* RUS-2004-3-004

**a)** Russia / **b)** Constitutional Court / **c) / d)** 23.04.2004 / **e)** 19 / **f) / g)** *Rossiyskaya Gazeta* (Official Gazette), 28.04.2004 / **h)** CODICES (Russian).

### *Keywords of the systematic thesaurus:*

3.9 **General Principles** – Rule of law.  
 4.5.2 **Institutions** – Legislative bodies – Powers.  
 4.5.6 **Institutions** – Legislative bodies – Law-making procedure.  
 4.10.2 **Institutions** – Public finances – Budget.  
 4.10.6 **Institutions** – Public finances – Auditing bodies.  
 5.1.1.4.4 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Military personnel.  
 5.3.38.3 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Social law.

### *Keywords of the alphabetical index:*

Budget, law on finance, scope / Army, law, federal, amendment.

### *Headnotes:*

The federal law on finance is a special type of legislative act adopted following a special procedure. The law sets out prescriptions for state revenue and expenditure and establishes the necessary financial conditions to attain the norms laid down in other federal laws. As such, the law on finance does not engender and does not cancel rights and obligations. It may not amend the provisions of other federal laws and, *a fortiori*, may not remove their legal force.

### *Summary:*

The case was examined at the request of the members of the Federation Council of the Federal Assembly and an application lodged by a citizen.



The applicants challenged the constitutionality of certain provisions of federal laws on finance for the years 2002, 2003 and 2004, which had suspended the effects of certain articles of other federal laws. In particular, the effect had been suspended of a provision of the Law "On the Court of Auditors", which had obliged the Court of Auditors to present the report on execution of the federal budget to the Federal Assembly. The suspended provision of the Law "On the status of servicemen" concerned certain entitlements enjoyed by servicemen.

The applicants claimed that suspending the effects of the aforementioned laws prevented the Federal Assembly from carrying out supervision of the disbursement of budget funds and therefore directly affected the rights and freedoms of all citizens in one case and cut the level of social protection for servicemen in other cases.

The Constitutional Court noted above all that the law on finance is a legislative act of a special type which is adopted following a special procedure and sets out provisions concerning only the revenue and expenditure of the State for the year in question, and may not alter or repeal the provisions of other laws in force.

The arrangements governing the work of the Court of Auditors, including its duty to present the report on execution of the federal budget to the Federal Assembly, bear no relation to the matters regulated by the law on finance. This law may not set out provisions altering the powers and arrangements governing the work of the Court of Auditors established by other laws.

With regard to the suspension of the effects of several articles of the Law "On the status of servicemen" the constitutional judges noted that the federal legislator was empowered to make changes to the previously established rules. However, norms repealing or modifying compensation payments and entitlements must be set forth in the text of the federal law establishing those payments and entitlements and not in the federal law on finance.

Furthermore, the Court accepted that in exceptional circumstances, such as when budget resources were insufficient, the provisions of federal laws establishing material guarantees for servicemen could be suspended by the federal law on finance. But in such cases, the legislator should provide for machinery for other compensation.

The Court held that the challenged provisions of the laws on finance were unconstitutional.

### *Languages:*

Russian.



### *Identification: RUS-2004-3-005*

a) Russia / b) Constitutional Court / c) / d) 29.06.2004 / e) 13 / f) / g) *Rossiyskaya Gazeta* (Official Gazette), 07.07.2004 / h).

### *Keywords of the systematic thesaurus:*

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

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

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

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

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

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

5.3.13.23.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – Right not to incriminate oneself.

5.3.13.23.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to remain silent – Right not to testify against spouse/close family.

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

### *Keywords of the alphabetical index:*

Accused, rights / Parliament, member, custody, procedure / Criminal code, status / Criminal procedure, guarantees.

### *Headnotes:*

If an accused person declines to participate in his or her own defence, the prosecution authorities, from a starting point of presumption of innocence, are under

obligation to establish and prove not only the person's guilt but also their innocence.

Obliging an accused person to request the summoning of a witness to corroborate an alibi during the preliminary investigation constitutes a violation of the constitutional right to not have to prove one's innocence.

In order to place a member of parliament in custody, a judicial decision and the consent of the corresponding chamber are required.

The Code of Criminal Procedure takes priority over other ordinary laws only in the sphere of regulation of criminal procedure.

### Summary:

The examination of the constitutionality of certain provisions of the Code of Criminal Procedure was requested by a group of deputies in the State Duma.

Firstly, they challenged the provisions whereby the functions of accusation, defence and resolution of criminal proceedings are separated and may not be assigned to the same body. The deputies claimed that this released public prosecution and preliminary investigation bodies from the obligation to seek exempting and attenuating circumstances on the pretext that this was a function of the defence. This freed them from the constitutional obligation to respect and protect human rights as the principle of in-depth, full and objective investigation of the case had been excluded.

Secondly, they challenged the provisions which rule out an accused person's request to summon a witness to establish their alibi if such a request was not made during the preliminary investigation and also rule out questioning at the request of the defence of individuals enjoying immunity from testimony (such as the parents of the accused). The applicants claimed that this was a radical and arbitrary restriction on the possibility for an accused person to defend his or her case.

Thirdly, it was pointed out that provisions allowing the placing in custody of a deputy of the State Duma or a member of the Federation Council without the consent of the corresponding chamber of parliament were contrary to the Constitution.

Fourthly, they challenged the provisions establishing priority of the Code of Criminal Procedure over other federal laws and prohibiting courts, prosecutors and investigators from applying federal law contrary to the Code.

For the first group of provisions, the Constitutional Court did not hold that they were unconstitutional. According to the Court's interpretation of the challenged provisions, organs of criminal prosecution are under obligation to proceed on the presumption of innocence and guarantee suspects' and accused persons' right to defence. A charge may be deemed founded only if all the circumstances of the case contradicting that charge are objectively examined and refuted by a prosecuting party. In all cases, including cases where the accused refuses to participate in their defence, the organs of prosecution are under obligation to establish and prove not only their guilt but also their innocence.

The Court held that the second group of provisions was not in line with the Constitution. The Court noted that a request from the defending party to summon a witness to establish an alibi must be granted regardless of whether the request was submitted during the preliminary investigation phase or another phase of the procedure. In its current wording, this provision violates the right of the accused to his or her defence. By compelling the accused to summon a witness to corroborate an alibi in the preliminary investigation phase, which is ultimately tantamount to refusing them the constitutionally guaranteed right not to have to prove their innocence, this provision raises a *de facto* procedural obstacle to the enjoyment of that constitutional right.

At the same time, in the view of the Court, the right of individuals enjoying immunity from testimony not to give evidence against their close family members may not constitute an obstacle to disclosing information in their possession on a case in progress. In the light of this interpretation of constitutional law, the challenged provision is not contrary to the Constitution.

In relation to the third group of challenged provisions, the Court concluded that when taking a decision to place a deputy of the State Duma or a member of the Federation Council in custody, it is necessary to have a judgment and the consent of the corresponding chamber of parliament. Custody is inevitably linked to restrictions on freedom of movement, prohibition on contact with certain individuals, receiving and sending correspondence, negotiation via any means of communication etc. Consequently, in restricting a parliamentarian's freedom, all the procedures laid down by the law must be respected. In the light of this interpretation, the challenged provisions are not contrary to the Constitution.

Concerning the fourth group of disputed provisions, the Court established that these did not imply priority of the Code of Criminal Procedure over federal

constitutional laws and international treaties. In the event of conflicting legislation, there are norms that have to be applied as having greater legal force, and these are precisely constitutional laws or international treaties. At the same time, the Code of Criminal Procedure, being an ordinary federal law, does not take precedence over other federal laws. But in the sphere of regulation of criminal procedure, the Code of Criminal Procedure does enjoy priority over other federal laws, as it constitutes a systematised body of legal norms governing the whole of criminal procedure, in all its various parts, phases, stages and institutions. The precedence enjoyed by the Code of Criminal Procedure over other laws is obviously not unconditional and is limited to the framework of the purpose of regulation. Consequently, in the light of this interpretation, the disputed provisions are not contrary to the Constitution.

#### *Languages:*

Russian.



#### *Identification:* RUS-2004-3-006

a) Russia / b) Constitutional Court / c) / d) 29.11.2004 / e) 16 / f) / g) *Rossiyskaya Gazeta* (Official Gazette), 07.12.2004 / h) CODICES (Russian).

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

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

3.6.3 **General Principles** – Structure of the State – Federal State.

3.18 **General Principles** – General interest.

4.9.9.7 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Method of voting.

4.9.9.8 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Counting of votes.

4.9.9.10 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Minimum participation rate required.

5.3.41.3 **Fundamental Rights** – Civil and political rights – Electoral rights – Freedom of voting.

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

Election, regional, vote “against all candidates”.

#### *Headnotes:*

A vote “against all candidates” achieving a higher score than a given candidate obtaining the majority means that the latter candidate has failed to secure the necessary voter support to guarantee that the people are truly represented. In this case, the elections are deemed to be void.

#### *Summary:*

Examination of the case was prompted by complaints from citizens of the violation of their constitutional rights by a provision in a regional law on the elections of deputies at regional and local levels.

In accordance with this provision, a candidate obtaining over half the total number of votes cast for all the candidates is deemed to be elected; if no one candidate obtains over half the total number of votes cast for the candidates, a second round of voting is run for the two candidates who obtained the highest number of votes.

According to the applicants, counting the number of votes cast for all the candidates and not the number of votes cast in total is discriminatory, in that it disregards the opinion of the electors who voted “against all candidates”. This equates the latter category of electors with those who did not take part in the vote.

The Constitutional Court, having referred to its case-law [RUS-2002-2-001], pointed out that truly free and democratic elections run on the basis of universal, equal and direct suffrage in a secret ballot predetermine, *inter alia*, the right of voters to express their views on the candidates, by voting “for” or “against”. In other words, every voter is entitled to express their will, through any legally permitted form of voting, to rule out any possibility of altering the essence of the expression of voters' will; the will of the electorate may be expressed by a vote not only for or against certain candidates but also in the form of a vote against all the candidates.

With this in mind, the federal legislator made provision in the federal law of 2002 “On the principal guarantees of citizens' electoral rights” for a “vote against all candidates” category on the ballot slip.

But the interests of certain citizens, particularly those who vote “against all candidates” does not always coincide with the public interest of constituting public authorities. As previously noted by the Court, the negative attitude expressed by most of the electorate with regard to all candidates, confirmed by a higher score for the vote “against all candidates” than a given candidate obtaining the majority means that the latter candidate has failed to secure the necessary voter support to guarantee that the people are truly represented. In this case, the elections are deemed to be void.

In this respect the challenged provision of regional law meets the requirements of federal legislation regarding the recognition of elections. The regional legislator was justified in establishing the rules for determining the results of elections and the number of votes required for local authority officials to be elected, with or without account being taken of the votes cast against all candidates.

In the light of this interpretation, the challenged provision is not contrary to the Constitution and does not violate the electoral rights of citizens.

#### *Languages:*

Russian.



## Slovakia Constitutional Court

### Statistical data

1 September 2004 – 31 December 2004

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 1
- Decisions on the merits by the panels of the Court: 180
- Number of other decisions by the plenum: 3
- Number of other decisions by the panels: 284

### Important decisions

*Identification:* SVK-2004-3-006

**a)** Slovakia / **b)** Constitutional Court / **c)** First Panel / **d)** 08.09.2004 / **e)** I. ÚS 87/04 / **f)** / **g)** *Zbierka názvov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Detention, judicial review / Court, inactivity / Constitutional Court, compensation, award.

*Headnotes:*

The role of the different levels of ordinary courts during proceedings includes taking decisions expeditiously and independently on issues of release from detention and on complaints against remand in custody in such a way that no violation occurs in



relation to rights guaranteed by the Constitution and by the Convention for the Protection of Human Rights and Fundamental Freedoms.

### Summary:

The applicant claimed a violation of his fundamental right set out in Article 17.2 of the Constitution and Article 5.4 ECHR. That right was allegedly violated in ordinary court proceedings (District and Regional Court) on his application requesting a release on bail and on his complaint against being taken into custody.

The applicant was remanded in custody as a result of a decision of the District Court. An appeal was immediately lodged, and a complaint was filed seeking his release from custody. Subsequently the applicant amended his application in such a way that in the event of refusal of his application for release, he sought release on bail. The hearings on the appeal regarding the remand in custody were held in the Regional Court, whereas the proceedings on the complaint requesting release from detention or replacing it with remand on bail were held in the District Court. As of the day of filing of the applicant's complaint with the Constitutional Court, these matters had not been heard.

On the basis of the indictment filed by the prosecutor, the District Court found the applicant guilty and imposed a suspended sentence. The applicant was subsequently released from custody.

The application for release from detention was based principally on different reasons than the complaint against custody. For that reason, it was the District Court's responsibility to hear and determine the latter complaint. The District Court's responsibility to determine the complaint as soon as possible did not diminish when the applicant was released from custody, and the release did not justify the transmission of the case-file to the Regional Court. Failure to respond to such matters led to delays, which the Constitutional Court assessed as amounting to an especially serious violation of the District Court's responsibilities following from Article 5.4 ECHR and Article 17.2 of the Constitution. After the Regional Court had returned the case-file to the District Court, the applicant's complaint had become unfounded as he had already been released. In the instant case, the inactivity of the District Court turned from unreasonable delays into absolute negation of the applicant's fundamental right (*denegatio iustitiae*).

The Constitutional Court accepted the applicant's interpretation of the violation of his right by the Regional Court, and deemed that the time to make a decision on this complaint against remand in custody was unreasonably long. The Constitutional Court considered especially inadequate the elapse of the term of a further 6 months for the delivery of the Regional Court's decision to the applicant. The Constitutional Court deemed that the length of time needed for the Regional Court in deciding the complaint had been unreasonably long even in proceedings involving two court instances; therefore, it found a serious violation of rights following from Article 5.4 ECHR and Article 17.2 of the Constitution.

The Constitutional Court granted the applicant adequate financial satisfaction, as the infringement of the right had not been possible to redress (setting aside the decision, or reinstating the original conditions).

### Languages:

Slovak.



# Slovenia

## Constitutional Court

### Statistical data

1 September 2004 – 31 December 2004

The Constitutional Court held 30 sessions (13 plenary and 17 in chambers) during this period. There were 382 unresolved cases in the field of the protection of constitutionality and legality (denoted U- in the Constitutional Court Register) and 815 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 2004). The Constitutional Court accepted 133 new U- and 268 Up- new cases in the period covered by this report.

In the same period, the Constitutional Court decided:

- 124 cases (U-) in the field of the protection of constitutionality and legality, in which the Plenary Court made:
  - 22 decisions and
  - 102 rulings;
- 39 cases (U-) cases joined to the above-mentioned cases for common treatment and adjudication.

Accordingly the total number of U- cases resolved was 163.

In the same period, the Constitutional Court resolved 352 (Up-) cases in the field of the protection of human rights and fundamental freedoms (12 decisions issued by the Plenary Court, 290 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 delivered to the participants in the proceedings.

However, decisions and rulings are published and made available to interested persons:

- 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 August 1995 on the Internet, full text in Slovenian as well as in English <http://www.us-rs.si>;
- 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-2004-3-003

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 07.10.2004 / **e)** Up-472/02 / **f)** / **g)** *Uradni list RS* (Official Gazette), 114/04 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

*Keywords of the systematic thesaurus:*

- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Rules of evidence.
- 5.3.32 **Fundamental Rights** – Civil and political rights – Right to private life.
- 5.3.36.2 **Fundamental Rights** – Civil and political rights – Inviolability of communications – Telephonic communications.

*Keywords of the alphabetical index:*

Communication, telephone, evidence / Telephone, conversation, confidentiality / Voice, right to use, protection.

*Headnotes:*

An interference with the right to privacy would be admissible under certain conditions; there needs to

exist especially substantiated circumstances in order to take evidence obtained by violating the right to privacy. The taking of such evidence should have a special purpose for the exercise of a constitutionally-protected right. In such a case, the court must consider the principle of proportionality and carefully evaluate which right must be given priority.

### *Summary:*

The Court emphasised that the Constitution protects privacy, and referred to the freedom of communication in Article 35, which sets out the general rule that every person has the right to privacy and that privacy is to be inviolable, and especially to Article 37.1 of the Constitution, which guarantees the privacy of correspondence and other means of communication. Moreover, the Court pointed out that those two articles also include the right concerning one's voice. That right is not limited with regard to the contents of a conversation. For the protection of that right, it is not necessary for the contents of a conversation to be of an intimate nature or an exchange of confidential information (e.g. business secrets), or for the interlocutors to have especially agreed that the conversation would be secret. It is often impossible to envisage how a conversation will develop. Thus, a conversation which is at first a business conversation may turn into a private conversation, just as a private conversation may turn into a business conversation. The possibility of changing the topic of conversation during a relaxed conversation is inherent in the right of every interlocutor to decide on what he or she wishes to say in a conversation. This possibility of deciding oneself permits a person to prepare for the possible legal consequences of a conversation. Where an interlocutor knows that a third person is listening to the conversation or that the conversation is being recorded, and that the third person may be examined as a witness or the recording of the conversation will be used in subsequent judicial proceedings, the interlocutor can then refrain from any conversation which may entail legal consequences. Similarly, the interlocutor could obtain evidence himself or herself, or say something which could subsequently be used to his or her benefit in judicial proceedings. A person is deprived of all these possibilities if that person is not permitted to decide himself or herself on whether to permit the contents of a conversation to be listened to or recorded by someone else.

The Constitutional Court emphasised that the Supreme Court had held that the case did not concern an interference with the complainant's right to privacy, as the complainant as a participant in the telephone conversation should have allegedly expected that his interlocutor would allow a third party

to listen to the telephone conversation. The Supreme Court had added that the mere fact that there were various methods of listening to a conversation (several telephone cables, several telephone receivers and an internal network of telephones or a loudspeaker telephone) could not exclude such an interference. In the Constitutional Court's opinion, the Supreme Court did not establish that the complainant had been aware of the fact that a third person had been listening to the telephone conversation. Furthermore, the general finding that the listening to or recording of a telephone conversation was in certain circles normal or even a standard practice could not amount to a substitute for an interlocutor's consent to allow a third person to listen to the conversation. The Supreme Court, however, had not established any facts which would point to the complainant's tacitly consenting to the listening to or recording of the conversation in question. A recording or an audio recording of a telephone conversation cannot be equated with notes on a conversation. They differ in quality. Notes on a conversation are abstracts of what has been said, and are written in accordance with the subjective evaluation of the writer on what is important enough to be written down. A recording is, however, the authentic preservation of the words or the voice separated by a recording from a person who has spoken. As already mentioned, an audio recording gives power over a third person or his or her personal interests, as it makes it possible for the words or conversation to be played back. The Constitutional Court held that where an audio recording is made without the knowledge of the person affected, the exclusive right of a person relating to his or her own words or voice is thereby violated.

Moreover, the Constitutional Court explained that the above did not mean that such an interference with the right to privacy could not be admissible under specific conditions. However, to admit evidence obtained by a violation of the right to privacy, especially substantiated circumstances must exist in the legal proceedings. The admission of such evidence should be of special importance for the exercise of a right protected by the Constitution. In such a case, the court must consider the principle of proportionality, and carefully evaluate which right should be given priority (Articles 15.3 and 2 of the Constitution). As the impugned Supreme Court judgment had been based on the assumption that the admission of evidence by examining the witness who had listened to the telephone conversation and that listening to the recorded conversation did not interfere with the right to privacy, the Constitutional Court did not find any circumstances which would justify the interference in the instant case.

The Court held that the complainant's right to privacy laid down by Article 35 and the right to the privacy of correspondence and other means of communication set out in Article 37.1 of the Constitution had been violated by the impugned judgment. Consequently, it set aside that judgment and remanded the case to the District Court.

#### *Supplementary information:*

Legal norms referred to:

- Articles 14.2, 22, 35 and 37 of the Constitution (URS);
- Article 59.1 of the Constitutional Court Act (ZUstS).

#### *Languages:*

Slovenian, English (translation by the Court).



## South Africa Constitutional Court

### Important decisions

*Identification:* RSA-2004-3-011

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 15.10.2004 / **e)** CCT 49/2003, CCT 50/2003, CCT 69/2003 / **f)** Bhe and Others v. Magistrate, Khayelitsha and Others (Commission for Gender Equality as *amicus curiae*), Shibi v. Sithole and Others, South African Human Rights Commission and Another v. President of the Republic of South Africa and Another / **g)** 2005 (1) *South African Law Reports* 563 (CC) / **h)** 2005 (1) *Butterworths Constitutional Law Reports* 1 (CC); CODICES (English).

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

1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.  
 3.18 **General Principles** – General interest.  
 5.2.2.1 **Fundamental Rights** – Equality – Criteria of distinction – Gender.  
 5.2.2.2 **Fundamental Rights** – Equality – Criteria of distinction – Race.  
 5.2.2.7 **Fundamental Rights** – Equality – Criteria of distinction – Age.  
 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.  
 5.3.33.2 **Fundamental Rights** – Civil and political rights – Right to family life – Succession.  
 5.3.44 **Fundamental Rights** – Civil and political rights – Rights of the child.

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

Customary law, respect / Culture, right / Succession, rules / Succession, male primogeniture, principle.

#### *Headnotes:*

Legislation and regulations providing for a separate system of succession for African people, based on customary law (Section 23 of the Black Administration Act), and the customary law rule of male primogeniture are unconstitutional and unjustifiable in an open and democratic society.



Respect for customary law must not lead to a parallel discriminatory system of law. The evolving nature of customary law must allow it to keep pace with changing values and social realities. An interim system of succession based on the Intestate Succession Act must be established to prevent a legal vacuum.

### Summary:

In the first of these three cases, two minor African girls were deprived of their rights to inherit from their deceased father as a result of legislation imposing customary law on intestate succession amongst Africans: Section 23 of the Black Administration Act of 1927. In the second case an African woman was prohibited from inheriting from her brother. Two cousins were his closest male relatives. In the third case, a state institution and a non-governmental organisation sought to have the legislation struck down in the public interest and were granted direct access to the Court on the grounds that their submissions added fresh insight to a matter affecting women and children.

Langa DCJ, majority judgment, looked at the Black Administration Act of 1927 and its regulations. He described it as a parallel system that excluded Africans from the Intestate Succession Act of 1987. Customary law is protected under Sections 30, 31, 39.2 and 39.3 of the Constitution.

The rights to human dignity, equality and the rights of children were violated by Section 23 of the Black Administration Act, as it was discriminatory. The Act was branded as a relic of South Africa's racist past. The violation of rights could not be justified in an open and democratic society (Section 36 of the Constitution).

Customary law has not kept pace with changing society, having been frozen in statute books. Because it is flexible it can evolve, as is visible in practice. The rule of primogeniture, in excluding women from inheriting, as well as all female children and male extra-marital children, discriminates against them on grounds of gender and birth status. This discrimination is unfair and unjustifiable.

A difficult aspect of the case was finding the appropriate remedy. The first option was to strike down the impugned provisions (i.e. Section 23 of the Black Administration Act together with regulations made under that Act and Section 1.4.b of the Intestate Succession Act). However, this would cause a gap where intestate succession for Africans is concerned. Suspending the validity of the provisions would hinder the ability of those affected to benefit

from important rights. Developing the customary law in the spirit of the Bill of Rights and the notion of the 'living' customary law – as opposed to the official customary law – was a difficult option. There was insufficient evidence before the Court on the true nature of the 'living' customary law and change in this manner would be slow. The legislature experienced delays in correcting impugned legislation. The best solution was an order that would apply until the legislature remedied the defects in the existing law. The South African Law Commission's proposals on the changes to the Intestate Succession Act were considered, as well as the effect any order would have on polygynous unions. The Court expressed no opinion on the validity of the unions but noted that the order must protect everyone affected by the legislation.

The Court held that it would be just and equitable not to apply its order to estates in which transfer of ownership had been completed where the heir was not aware of the challenge on the constitutional validity of the provisions. It would be just and equitable to make the order retrospective to the date at which the interim Constitution came into force, 27 April 1994, in order to offer relief to the applicant in the Shibi case whose brother died before the current Constitution came into force. In order to allow for continued flexibility, agreements on succession not impairing children's interests should continue to be available, subject to the Intestate Succession Act and to the courts preventing prejudice to any party.

This judgment would affect legislation such as the Administration of Estates Act of 1965. It was held that the Master of the Court (an officer of the High Court who keeps all records relating to people's estates – deceased or insolvent –), in light of his role in both the above mentioned Act and the Intestate Succession Act, should be empowered to attend to the affected estates. Estates currently being wound up should continue under the procedures established by the Black Administration Act and its regulations.

In a partial dissent, Ngcobo J agreed that Sections 23 of the Act, 1.4.b of Intestate Succession Act, and regulation violate rights to equality and dignity. He held that the principle of male primogeniture (the principle) is part of indigenous law. Sections 211.3 read with 39.2 require the courts to developed it to remove deviation such that it is in line with the Bill of Rights. This principle preserves the family unit and ensures that upon death of family head, a successor or *indlalifa* takes over the responsibilities. In indigenous law inheritance refers to inheriting property of the deceased, whereas succession refers to the process of succeeding to the status of the deceased. The principle discriminates against women

and not against children. Rather than striking down the principle, both Act and principle must apply subject to the Constitution and requirements of fairness, justice and equity.

#### Cross-references:

- *Satchwell v. President of the Republic of South Africa and Another*, 2003 (4) SA 266 (CC), *Bulletin* 2002/2 [RSA-2002-2-014];
- *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*, 1999 (1) SA 6 (CC), *Bulletin* 1998/3 [RSA-1998-3-009];
- *Fraser v. Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC), *Bulletin* 1997/1 [RSA-1997-1-001];
- *Government of the RSA and Others v. Grootboom and Others*, 2001 (1) SA 46 (CC), *Bulletin* 2000/3 [RSA-2000-3-015];
- *Harksen v. Lane NO and Others*, 1998 (1) SA 300 (CC), *Bulletin* 1997/3 [RSA-1997-3-011], *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others*, 2000 (2) SA 1 (CC), *Bulletin* 2000/1 [RSA-2000-1-001];
- *Carmichele v. Minister of Safety and Security*, 2001 (4) SA 938 (CC), *Bulletin* 2001/2 [RSA-2001-2-010].

#### Languages:

English.



#### Identification: RSA-2004-3-012

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 26.11.2004 / **e)** CCT 56/03 / **f)** The Rail Commuters Action Group and Others v. Transnet Ltd t/a Metrorail and Others / **g)** / **h)** CODICES (English).

#### Keywords of the systematic thesaurus:

- 1.3 **Constitutional Justice** – Jurisdiction.
- 3.20 **General Principles** – Reasonableness.
- 4.6.10.1 **Institutions** – Executive bodies – Liability – Legal liability.
- 4.6.10.1.2 **Institutions** – Executive bodies – Liability – Legal liability – Civil liability.

4.16 **Institutions** – International relations.

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

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

5.3.12 **Fundamental Rights** – Civil and political rights – Security of the person.

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

#### Keywords of the alphabetical index:

Public service, access, right / Service, provider, responsibility / Transport, public, passenger, security / Accountability, principle.

#### Headnotes:

The organs of state have a positive obligation (legal duty) under Sections 8.1 and 7.2 of the Constitution read with Sections 15.1 and 23.1 of the Legal Succession to the South Africa Transport Services Act (the SATS Act) to ensure that reasonable measures are provided for the safety and security of rail commuters.

Responsibility for ensuring the safety and security of passengers travelling on commuter trains in light of the constitutional right to safety and security of persons.

Principle of accountability does not always result in the existence of delictual remedies enforceable against the State.

The Court has jurisdiction to hear appeals on issues relating to the factual dispute if they are connected with constitutional issue.

#### Summary:

The applicants, (Rail Commuters Action Group and other individuals, who had either suffered assaults or injuries while travelling on trains or their relatives injured or killed on trains), sought to hold the service providers (Metrorail, Commuter Corporation and other organs of state) legally liable for the safety and security of rail commuters. The applicants alleged that service providers must take reasonable measures in ensuring the safety and security of the rail commuters. The High Court awarded mandatory relief requiring the first to third respondents to take steps to improve safety and security on trains, prohibitory relief restraining them from running the rail commuter service without complying with their own operational guidelines, and a structural interdict requiring the respondents to report to the court on measures to be taken to improve safety and security

on trains. This decision was overturned on appeal by the Supreme Court of Appeal and the applicants challenged this in the Constitutional Court.

In a unanimous judgment, O'Regan J found that, although there were disputes of fact that could not be resolved on the papers, there were sufficient common cause facts for some of the legal issues to be resolved. The Court has the jurisdiction to determine facts on appeal where they are connected with a decision on a constitutional matter. The court held that there was a serious problem of crime on trains in the Western Cape, even if there was a dispute as to whether crime was "rife" or not, or in excess of other crime rates. It is also common cause that service providers were not meeting their own targets in relation to crime rates. These facts needed to be considered in their historical and social context, in particular the effect that apartheid spatial planning has had on the customer base of rail commuter services. Service providers predominantly supply poor communities with essential public transport.

The Court went on to say that the determination of the scope of public power, and any duties attached to it requires an analysis not only of the relevant law conferring the power, but also of the social, political and economic context within which the power is to be exercised and a consideration of the relevant provisions of the Constitution. The principle of accountability is relevant in determining legal duty but will not always establish a legal duty whether in private or public law. The court held that in determining whether a legal duty exists whether in private or public law, careful analysis of the relevant constitutional provisions is required. The Court held that the respondents had a positive duty under the provisions of the SATS Act read with the Constitution to take reasonable steps to provide for the safety and security of rail commuters. What constitutes reasonable steps will depend on a range of factors.

The Court held that private law relief was not always appropriate for enforcing constitutional rights. However, in the current case, it was not necessary to decide whether delictual claims would lie against the first and second respondents. The appropriate relief in the circumstances was to issue a declaratory order to the effect that service providers had an obligation to ensure that reasonable measures were taken to provide for the safety and security of rail commuters.

#### Cross-references:

- *Government of the Republic of South Africa and Others v. Grootboom and Others*, 2001 (1) *South African Law Reports* 46 (CC), 2001 (11) *Butterworths Constitutional Law Reports* 1169 (CC) [RSA-2000-3-015];
- *Plascon-Evans Paint Ltd v. Van Riebeeck Paints (Pty) Ltd*, 1984 (3) *South African Law Reports* 623 (A);
- *Carmichele v. Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*, 2001 (4) *South African Law Reports* A 938 (CC), 2001 (10) *Butterworths Constitutional Law Reports* 995 (CC), *Bulletin* 2001/2 [RSA-2001-2-010];
- *Minister of Safety and Security v. Van Duivenboden*, 2002 (6) SA 431 (SCA);
- *Van Eeden v. Minister of Safety and Security*, 2003 (1) *South African Law Reports* 389 (SCA).

#### Languages:

English.



#### Identification: RSA-2004-3-013

a) South Africa / b) Constitutional Court / c) / d) 02.12.2004 / e) CCT 15/04 / f) Director of Public Prosecutions, Cape of Good Hope v. Robinson / g) / h) CODICES (English).

#### Keywords of the systematic thesaurus:

- 1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
- 3.4 **General Principles** – Separation of powers.
- 3.10 **General Principles** – Certainty of the law.
- 4.7.1 **Institutions** – Judicial bodies – Jurisdiction.
- 5.3.13.1.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Constitutional proceedings.

#### Keywords of the alphabetical index:

Extradition, competence / Extradition, evidence, by receiving state / Extradition, proceedings.

**Headnotes:**

In extradition proceedings, the State as an aggrieved litigant within the meaning of Rule 19.2 of the Rules of the Constitutional Court has the right to appeal a decision of the High Court under Section 167.6 of the Constitution.

Under Section 10.1 of the Extradition Act 67 of 1962, a magistrate in an extradition proceeding does not have the power to consider whether the constitutional rights of an individual would be infringed upon extradition; rather, the decision is for the Minister of Justice who in deciding whether to extradite an individual should consider whether an individual's constitutional rights would be violated.

**Summary:**

Mr Trevor Claud Robinson, a South African citizen who was living in Canada, was convicted of sexually assaulting a fourteen years old girl by a Canadian Court in 1996. After his conviction Mr Robinson immediately fled to South Africa and, in his absence, was sentenced to three years imprisonment. The Canadian government requested his extradition and he was subsequently arrested in South Africa and appeared before the Wynberg Magistrates' Court. The Magistrate found that he was liable to be surrendered under the Extradition Act 67 of 1962.

Mr Robinson appealed the Magistrate's decision to the Cape High Court, raising three issues. First, he argued that his right to a fair trial, as guaranteed in Section 35.3 of the Constitution, would be violated if he were extradited to serve a sentence that was imposed in his absence. Second, Mr Robinson contended that the documents that the state relied upon at the extradition enquiry were not properly authenticated. Third, he asserted that it had not been shown that he was convicted of an extraditable offence.

The High Court found that because the Canadian Court sentenced Mr Robinson in his absence, his right to a fair trial as guaranteed in Section 35.3 of the Constitution was violated. The High Court also held that when deciding whether a person is liable to be surrendered, the magistrate is required to consider the constitutional rights of the individual. On this point, the High Court emphasized the distinction between judicial and administrative decisions, holding it would not be proper to entrust decisions regarding surrender to the executive when an individual's constitutional rights may be at issue. Thus, the High Court held that Mr Robinson should have been discharged under Section 10.3 of the Extradition Act.

On appeal to the Constitutional Court, Yacoob J, writing for a unanimous court, held that extradition proceedings are distinguishable from criminal proceedings and that the State as an aggrieved litigant within the meaning of Rule 19.2 of the Rules of the Constitutional Court has the right to appeal the decision of the High Court under Section 167.6 of the Constitution. Further, Yacoob J held that it was in the interests of justice for the Court to hear the appeal, so that there would be certainty as to the scope of a magistrate's powers in an extradition proceeding.

The Court further held, on the basis of the wording of Section 10.1 of the Extradition Act, that a magistrate in an extradition proceeding does not have the power to consider whether the constitutional rights of an individual would be infringed upon extradition. Rather, it is a decision for the Minister of Justice whether to extradite an individual, after taking into account whether the individual's constitutional rights would be violated. Any such decision of the Minister will be subject to judicial scrutiny. The Court accordingly, upheld the State's appeal on this judgement.

The Court also held that the extradition documents required from Canada were properly authenticated under the relevant terms of the extradition agreement between South Africa and Canada, and reinstated the order of the extradition magistrate that Mr Robinson was liable to be surrendered to Canada.

**Cross-references:**

- *Harksen v. President of the Republic of South Africa and Others*, 2000 (2) SA 825 (CC), 2000 (5) BCLR 478 (CC), *Bulletin* 2000/1 [RSA-2000-1-004];
- *Geuking v. President of the Republic of South Africa and Others*, 2003 (3) SA 34 (CC), 2004 (9) BCLR 895 (CC), *Bulletin* 2002/3 [RSA-2002-3-020];
- *Mohamed and Another v. President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)*, 2001 (3) SA 893 (CC), 2001 (7) BCLR 685 (CC), *Bulletin* 2001/2 [RSA-2001-2-007];
- *Kaunda and Others v. President of the RSA and Others*, (2) 2004 (10) BCLR 1009 (CC); *Rail Commuters Action Group and Others v. Transnet Ltd t/a Metrorail and Others*, CCT 56/30.

**Languages:**

English.





## Sweden

### Supreme Administrative Court

#### Important decisions

*Identification:* SWE-2004-3-001

a) Sweden / b) Supreme Administrative Court / c) Grand Chamber / d) 26.10.2004 / e) 5819-01 / f) / g) *Regeringsrättens Årsbok* / h) CODICES (Swedish).

*Keywords of the systematic thesaurus:*

2.1.3.2.2 **Sources of Constitutional Law** – Categories – Case-law – International case-law – Court of Justice of the European Communities.  
3.18 **General Principles** – General interest.  
3.26.1 **General Principles** – Principles of Community law – Fundamental principles of the Common Market.

*Keywords of the alphabetical index:*

European Community, law / Free movement of services, restriction, conditions / Gambling, promotion.

*Headnotes:*

Community law allows substantial restrictions in the area of gambling; the member States have a large extent of freedom in choosing how to achieve their aims with regard to protection of gamblers, crime prevention and public order. Consequently, banning the promotion of gambling organised abroad is not contrary to community law.

*Summary:*

A Swedish limited company (W) had appealed against an injunction lodged by the country's National Gaming Board, tasked *inter alia* with surveillance of gaming establishments and racecourses (the *Lotteriinspektionen*). Under that injunction, W was bound to desist from its involvement in the operations of an English gaming establishment. W claimed that a provision in the Swedish law on gambling (the *Lotterilagen* /1994:1000/) banning the promotion of gambling activities organised abroad was not compatible with community law and, consequently, not applicable.

The *Regeringsrätten* held that the provision in question and the Swedish regulations on gambling – in short – were not compatible with the provisions of the EC Treaty regarding the free provision of services and freedom of establishment. It ensued that the pertinent issue was to establish whether the restrictions on those freedoms were acceptable for special reasons.

The *Regeringsrätten* noted – with reference to a series of judgments of the Court of Justice – that, in the field of gambling in particular, substantial restrictions had been accepted. The Member States had been given wide latitude to choose means for ensuring protection of gamblers, crime prevention and public order. Thus, measures as radical as setting up a monopoly or banning gambling activities are in principle acceptable.

The *Regeringsrätten* noted that the main aims of the Swedish regulations on gambling, which make the organisation of all manner of gaming subject to compulsory licensing, are aims deemed acceptable by the Court of Justice, i.e. protection of the individual and society and also allocation of the surplus to the State and in the public interest. The examination by the *Regeringsrätten* was mainly intended to establish whether effective application of the regulations in question achieved those aims or whether the legislator had merely sought to boost state revenue.

Although application of the regulations on certain points – particularly regarding aggressive marketing by gaming establishments and shortcomings in the surveillance of those establishments – raised questions of compatibility with the conditions laid down by the Court of Justice, the *Regeringsrätten* found that the Swedish system satisfied these conditions on the whole. For that reason, the *Regeringsrätten* found no grounds for refusing application of the provision in question with reference to community law. The *Regeringsrätten* rejected the appeal.

*Languages:*

Swedish.





# Switzerland

## Federal Court

### Important decisions

*Identification:* SUI-2004-3-007

**a)** Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 05.07.2004 / **e)** 1P.22/2004 / **f)** X. v. Public Attorney and Cantonal Court of Zug canton / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 130 I 269 / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

- 3.9 **General Principles** – Rule of law.
- 3.10 **General Principles** – Certainty of the law.
- 4.7.3 **Institutions** – Judicial bodies – Decisions.
- 5.3.13.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope.
- 5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Trial/decision within reasonable time.

*Keywords of the alphabetical index:*

Promptness, principle / Sentence, application, procedures / Sentence, execution / Sentence, suspension / Non-custodial treatment.

*Headnotes:*

Article 6.1 ECHR; Article 29.1 of the Federal Constitution. Order of execution, 12 years after sentencing, of a prison sentence suspended in favour of non-custodial treatment; principle of promptness.

The principle of promptness is more broadly applicable under the Federal Constitution than under the European Convention on Human Rights. It is not limited to challenges under civil law or criminal charges but extends to all procedures before the judicial and administrative authorities (point 2.3).

The criteria laid down for promptness for criminal prosecution are not applied indiscriminately to the execution of sentences. Scope of the principle of promptness in the area of execution of sentences (point 3).

No violation of the principle of promptness in the given case (point 4).

*Summary:*

By judgment of 13 September 1991, the Criminal Court of Zug Canton sentenced X. for various offences to 18 months' non-suspended imprisonment. However, the Court suspended execution of the sentence in favour of non-custodial treatment and placed the sentenced person under supervision on release.

Having noted in March 2001 that the non-custodial treatment had been unsuccessful, the Cantonal Office for the enforcement of sentences and measures called for execution of the sentence. The Criminal Court took a decision accordingly. On appeal by X., the Cantonal Court of Zug Canton upheld the suspension of the execution of the sentence and ordered new non-custodial treatment on 25 June 2002.

In January 2003, the Cantonal Office terminated non-custodial treatment, as this proved impossible to execute. Upon application by the Cantonal Office, the Cantonal Court, by judgment of 18 November 2003, ordered execution of the 18-month prison sentence. There was provision for treatment in parallel to sentence execution.

Through a public law appeal, X. applied to the Federal Court for the annulment of that judgment. He claimed that there had been a violation of Article 6.1 ECHR and Article 29.1 of the Federal Constitution, owing to the time elapsed between the passing of the sentence and its execution, which he considered to be excessive. The Federal Court rejected the appeal.

Article 6.1 ECHR states that everyone is entitled to have their case dealt with within a reasonable time. This provision is applicable to the lawfulness of any criminal charge and therefore covers the entire criminal procedure until final judgment. However, the execution of sentences does not form part of the notion of criminal charge and does not fall within the scope of Article 6.1 ECHR. Decisions to suspend the sentence, place an individual on conditional release or set aside suspension of imprisonment following further offences are not covered by this provision of the convention. But the appellant may rely on Article 29.1 of the Federal Constitution, which entitles everyone to have their case judged within a reasonable time. This constitutional norm is broader in scope than that of Article 6.1 ECHR and applies to any procedure before the judicial and administrative authorities. It is therefore in relation to Article 29.1 of the Federal Constitution that such complaints are to be examined.

However, application of the principle of promptness to execution of sentences does not mean that the criteria to be taken into account are identical to those for criminal prosecution. Criminal judgments must be executed effectively and swiftly, but the principles of the rule of law and legal certainty require judgments to be executed, even if some time has elapsed since sentencing. The difference in relation to criminal prosecution is that the person sentenced is aware of the definitive judgment and is therefore not in any uncertainty. When execution of the sentence is suspended in favour of non-custodial treatment, under the Swiss Criminal Code it may still be ordered, in theory, at any time. Execution would be shocking if, as a result of administrative failings, non-custodial treatment was not ordered for many years, whereas the sentence, if not suspended, would have been time-barred.

In the case at point, the appellant does not criticise the length of the different phases of the judicial procedure but does point out that the lapse of time between the offences (committed between 1984 and 1986 and in 1989 and 1990), the judgment of 13 September 1991 and the order to execute the sentence of 18 November 2003, was too long. Above all he questions the actions of representatives of the authorities, who he claims did not give their support for therapy and managed supervision badly, with the result that ordering execution of the sentence was contrary to the constitutional principle of promptness.

In its first decision of 25 June 2002, the Cantonal Court took the actions of representatives of the authorities into account. It pointed out that, to date, neither the non-custodial treatment nor the supervision had operated effectively, in which case it was disproportionate to order execution of the sentence. It therefore suspended execution and gave the appellant, in ordering new non-custodial treatment, one last chance while pointing out that the success of the therapy depended above all on him and the efforts he made. Therefore, the Cantonal Court took account of the administrative failings and drew practical conclusions.

In its second decision of 18 November 2003, the higher Court noted that the (new) non-custodial treatment had failed as a result of the appellant's behaviour. Therefore, it was the appellant himself who was responsible for the halting of non-custodial treatment and no reproaches could be made to the authorities. The appellant's behaviour was therefore the cause of execution of the sentence being ordered. In these circumstances, the disputed decision does not violate the principle of promptness inferred from Article 29.1 of the Federal Constitution.

### Languages:

German.



### Identification: SUI-2004-3-008

**a)** Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 13.07.2004 / **e)** 2A.118/2003 / **f)** X. SA. v. Cantonal Office of labour inspection and relations and the Administrative Court of Geneva Canton / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 130 II 425 / **h)** CODICES (German).

### Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 5.3.13.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope.
- 5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to a hearing.
- 5.3.13.9 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Public hearings.
- 5.3.32 **Fundamental Rights** – Civil and political rights – Right to private life.
- 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

### Keywords of the alphabetical index:

Labour law / Personality, right to protection / Worker, protection / Worker, surveillance / Vehicle, GPS satellite tracking system.

### Headnotes:

Article 6.1 ECHR; Article 6 of the law on labour in industry, trades and commerce; Article 26 of the order (no. 3) on labour law. GPS satellite tracking system installed in company cars; right to a public hearing in an administrative law dispute in the area of worker protection.

Regardless of how it is registered under public law, prohibition on an employer to use a surveillance system within the company concerns “civil rights and

obligations” within the meaning of Article 6.1 ECHR (points 2.2 and 2.3).

Lawfulness and scope of Article 26 of the order (no. 3) (points 3 and 4). Proportionality of the surveillance measure: appropriateness of the tracking system complained of in relation to the intended aim (monitoring of workers' time management and prevention of abuses) and necessity of the system for the employer (point 5); weighing up of the different interests involved (proportionality in the strict sense; point 6).

### Summary:

Company X. SA sells fire extinguishers and provides after-sales and maintenance service for them. It employs fifteen or so “sales technicians” who are responsible for the selling of extinguishers and after-sales service throughout Switzerland. This work entails frequent and regular visits to customers, who are allocated to the sales technician team by geographical sector. To carry out their task, the employees are provided with company cars, which they use for three to four hours a day. Although they keep these cars at home on a permanent basis, they are not allowed to use them for private purposes without prior permission.

In 2002, the Company installed a GPS satellite tracking system on its vehicles at a cost of 40,000 Swiss francs. It said that the system was intended to rationalise work management and optimise travelling time, provided a means of monitoring the activity of the sales technicians (working hours and to an extent quality of work) and served as an anti-theft measure.

One of the employees complained to the Cantonal Office of labour inspection and relations of Geneva canton, on the grounds that he felt under constant surveillance by the employer, which amounted to harassment. The Cantonal Office ordered the Company to remove the tracking system from its vehicles, considering that the system jeopardised the workers' psychological health by allowing surveillance that was systematic, lasting, targeted and inhibiting. Given that it was intended to monitor work-yield, it did not respect the principle of proportionality and other, less intrusive methods could be used. On appeal by the Company, the Administrative Court of Geneva Canton confirmed the Cantonal Office's decision.

The Company lodged an appeal under administrative law; it claimed that the Cantonal Court had violated Article 6.1 ECHR by rejecting its request for a public hearing, that the Administrative Court had infringed its right to be heard by not granting its request to hold a hearing of certain witnesses and that the facts had

consequently been inaccurately ascertained. The Federal Court allowed the appeal under administrative law, annulled the Administrative Court's judgment and sent the case back to the Administrative Court for further investigation and a new decision.

Article 6.1 ECHR guarantees, *inter alia*, the right to a public hearing before courts when civil rights and obligations are concerned. The provision implies a real and serious challenge to the existence of a right, recognised in domestic law, its scope or the procedures for its exercise. The provision in the convention applies in particular when rights of a private nature are involved, such as the guarantee of ownership and economic freedom.

The disputed decision was taken on the basis of labour law and order no. 3, which are intended to protect the physical and mental health of workers; its effect is to prohibit the Company from equipping its vehicles with a tracking system. The decision of prohibition has a direct impact on the very content of the work contract between the Company and its employees, in that it sets out certain obligations of the employer in the area of worker protection, and therefore concerns civil rights and obligations. As the tracking system enables the Company to substantially increase its efficiency, the decision of prohibition constitutes a restriction, at least on its economic freedom if not the exercise of its right of ownership. The Company may therefore rely on Article 6.1 ECHR and request the holding of a public hearing before the Cantonal Court.

The labour legislation and order no. 3 pertaining to it are intended to protect the physical and mental health of workers and their integrity and personality in general. It is generally agreed that surveillance systems usually trigger negative reactions in the individuals monitored and damage the overall atmosphere in the company, with adverse effects on the well-being, psychological health and working capacity of the workers. This means that only objectively justified surveillance measures meeting a primary interest of the employer are admissible. Labour legislation – complementing the provisions of the Code of obligations – implies that the principle of proportionality must be respected. It does not aim to impose a blanket ban on the use of surveillance or monitoring systems in companies. The only systems prohibited are those intended to monitor the behaviour of workers at their workstation, whereas those justified by legitimate grounds, such as imperatives of security or factors linked to the organisation or planning of work or the actual nature of working relations are not prohibited. And the surveillance system chosen still has to be regarded, all circumstances considered, as a means proportionate to the aim.

Analysis of the aims pursued from different technical viewpoints shows that it is not possible to claim that the tracking system is unnecessary and inappropriate for monitoring the time management of employees and preventing abuses. Nevertheless, the proportionality of the disputed measure, in the strict sense of the term, remains to be examined. That examination implies that additional measures of investigation are required to elucidate these questions, particularly to determine the true technical characteristics and precise scope of surveillance provided by the tracking system. The case has therefore been referred back to the Cantonal Court for further investigation; the Court will rule on the admissibility of the tracking system after reconsidering all the interests involved.

*Languages:*

German



## Turkey Constitutional Court

### Important decisions

*Identification:* TUR-2004-3-010

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 28.01.2004 / **e)** E.2003/86, K.2004/6 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 25635, 06.11.2004 / **h)** CODICES (Turkish).

*Keywords of the systematic thesaurus:*

- 3.15 **General Principles** – Publication of laws.
- 3.19 **General Principles** – Margin of appreciation.
- 4.5.2.1 **Institutions** – Legislative bodies – Powers – Competences with respect to international agreements.
- 4.8.7 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects.
- 4.10.2 **Institutions** – Public finances – Budget.

*Keywords of the alphabetical index:*

Municipality, income rate, determination / International agreement, parliamentary approval.

*Headnotes:*

The rate of allocation of revenues determined by law may be increased or decreased when the need to change arises. As determining the optimum rate is impossible, and changing situations may need different rates, it is within the discretionary power of the parliament to determine the rates and the period to be applied provided that they are not immoderate and unjust.

International agreements on defence and security do not need the approval of the parliament. Agreements of an economic and commercial nature may not be exempted from promulgation in the Official Gazette.

*Summary:*

A group of deputies brought an action before the Constitutional Court alleging that some provisions of



Articles 6, 7 and 10 of Law no. 4969 were contrary to the Constitution.

I. Articles 6 and 7 of Law no. 4969

Article 6 amended Law no. 2389 governing the allocation of the general budget tax revenues to local administrative bodies. According to Article 6, the current rate of allocation of the general budget revenues to local administrations (6%) shall be applied as 5% until the end of 2003.

The Constitutional Court noted that, in order to remove the negative effects of the reduced allocation rate to the local administrative bodies, "additional property tax" (a kind of municipality tax) was introduced and some other precautions were taken by Laws 4837, 4958 and 4811.

Article 7 amended the Law on Metropolitan Municipalities and provided that the allocation of the general budget tax revenues to the metropolitan municipalities shall be applied as 3.5% (currently 4.1%) until the end of the year 2003. Under the last sentence of the last paragraph of Article 127 of the Constitution, local administrative bodies shall be allocated financial resources in proportion to their functions.

The Court considered that the determination of the rate of allocation of revenues to local administrations from the general budget tax revenues is within the discretionary power of the parliament. The determination of the allocation rate of tax revenues to local administrative bodies is therefore not contrary to the Constitution.

II. Article 10 of Law no. 4969

A. Paragraph (A)

According to this provision, the Committee of Ministers may give individuals and institutions competence on behalf of the Turkish Republic to negotiate and sign agreements on donations and aid aimed at defence and security, with the exception of those competencies which belong to the President and the Prime Minister, and such agreements shall come into force through a decree of the Committee of Ministers. The deputies alleged that the mentioned provision is not in conformity with the Constitution since it may not be regarded as one of the exceptions enumerated in Article 90.2 and 90.3 of the Constitution.

Under Article 90.3 of the Constitution, agreements in connection with the implementation of an international treaty, and economic, commercial, technical or administrative agreements which are concluded on

the basis of an authorisation given by law shall not require approval by the Turkish Grand National Assembly. Since there is no need to enact approving law on international agreements aimed at defence and security, the provision that "the agreements on donations and aid aimed at defence and security shall come into force through decrees of the Committee of Ministers" is not contrary to the Constitution.

B. Paragraph (C) of Article 10 of Law no. 4969

This paragraph stipulated that agreements signed under Law no. 4749 are exempted from the provisions of Law no. 1322 on the Promulgation, Publication and Validity of Laws and Government Decrees (dated 23.05.1928) and shall not be promulgated in the Official Gazette. It is alleged that this provision is contrary to Articles 90 and 104.b of the Constitution.

Under Article 90.3 of the Constitution, "Agreements in connection with the implementation of an international treaty, and economic, commercial, technical or administrative agreements which are concluded on the basis of an authorisation given by law shall not require approval by the Turkish Grand National Assembly. However, agreements concluded under the provision of this paragraph and affecting the economic or commercial relations and private rights of individuals shall not come into effect unless promulgated."

In general, the agreements enumerated in Law no. 4749 are concerned with the procedures of public funds and debts having an economic and commercial character. Without taking into consideration the fact that at least some of the agreements listed in Law no. 4749 are among the ones to be promulgated in the Official Gazette, it is unconstitutional to exempt all agreements signed under that law from promulgation in the Official Gazette. The objected provision was therefore annulled.

*Languages:*

Turkish.



**Identification:** TUR-2004-3-011

a) Turkey / b) Constitutional Court / c) / d) 13.05.2004 / e) E.2000/43, K.2004/60 / f) / g) *Resmi Gazete* (Official Gazette), 25633, 04.11.2004 / h) CODICES (Turkish).

**Keywords of the systematic thesaurus:**

- 3.9 **General Principles** – Rule of law.  
 3.19 **General Principles** – Margin of appreciation.  
 4.5.2 **Institutions** – Legislative bodies – Powers.  
 5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.  
 5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.

**Keywords of the alphabetical index:**

Sanction, administrative, appeal / Driving licence, suspension as a reprimand.

**Headnotes:**

The administration may apply sanctions other than imprisonment such as fines, disciplinary actions or seizing of driving licences for a certain period of time. The legislature has the discretionary power to give the administration the power to impose certain sanctions which were before within the competence of the judiciary provided that those sanctions are not related to imprisonment. Taking away a driving licence for a certain period of time under certain circumstances is not contrary to the rule in Article 38 of the Constitution that the administration may not impose any sanction resulting in restriction of personal liberty.

**Summary:**

*Veziirköprü* Criminal Court of First Instance applied to the Constitutional Court alleging that Article 112.1 and additional Article 13 of Law no. 4450 (the law amending the Traffic Law no. 2918) were contrary to the Constitution.

According to the objected provisions if any person drives motorized vehicles when he/she is drunk, his/her driving licence shall be taken away temporarily by the administration for a certain period of time. The trial court alleged that the administration may not impose any sanction resulting in restriction of personal liberty (Article 38 of the Constitution).

Under Article 7 of the Constitution legislative power is vested in the Turkish Grand National Assembly on

behalf of the Turkish Nation. The legislative power has the discretionary power to remove some competences from the judiciary and transfer them to the administration when new developments arise.

The administration is required to impose sanctions for some actions according to the severity of those actions on the social order. As is accepted by the doctrine, the sanctions directly used by the administration according to administrative law principles are called “administrative sanctions” provided that the competence to impose those sanctions are given by the law. Taking away a driving licence under some circumstances for a certain period of time by the administration is an administrative sanction.

The legislature gave this power, which was a judicial competence before the new regulation, to the administration, namely to the traffic police, thereby using its discretionary power. Recourse to judicial review against those sanctions is without doubt available under general rules as a requirement of the rule of law.

In the reasoning of Article 38.10 of the Constitution, it is stated that imprisonment as a heavy limitation of individual freedom shall be imposed only by the courts. In other words the administration may not impose imprisonment as an administrative sanction, for example as a disciplinary sanction. But other sanctions may be used by the administration.

Therefore, it is not unconstitutional for the administration to impose sanctions other than imprisonment such as fines, disciplinary penalties or temporary deprivation of certain rights provided that they are within constitutional principles and generally accepted legal principles.

As a result, the Constitutional Court did not find the objected provisions unconstitutional and unanimously rejected the demand.

**Languages:**

Turkish.



**Identification:** TUR-2004-3-012

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 16.06.2004 / **e)** E.2003/12, K.2004/69 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 25622, 23.10.2004 / **h)** CODICES (Turkish).

**Keywords of the systematic thesaurus:**

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

**Keywords of the alphabetical index:**

Sentence, criminal, suspension / Judge, discretion.

**Headnotes:**

Which actions shall be deemed a crime or offence and which penalties shall be given to those crimes is to be determined by the legislature. The same rule is applied as far as the possibility of the suspension of the sentences given is concerned. Heaviness of the crimes or the offences is not determinant in the application of suspension of sentences. Having a sentence suspended does not constitute a right for the convicted person. Since individuals who have committed different acts do not have the same legal status, the application of different rules to those individuals does not infringe the equality principle.

**Summary:**

Two of the Criminal Courts of First Instance brought an action in the Constitutional Court alleging that a provision of Article 2.3 of Law no. 1072 (the law on playing machines such as roulette, table football and other similar ones) was contrary to the Constitution.

In Article 2 of Law no. 1072, some sanctions have been laid down for those who act contrary to the provisions of this law. The objected provision states that the sentences given under the provisions of Law no. 1072 shall not be suspended. The trial courts which brought the action before the Constitutional Court pointed out that the sentences given under Law no. 1072 may not be suspended while other penalties which are much heavier may be suspended under general and current regulations. According to them this rule infringes the equality principle in Article 10 of the Constitution.

In its judgment, the Constitutional Court stated that it is for the legislature to determine which actions shall be deemed a crime or offence and which penalties shall be given to those actions. According to Article 6 of the law on the Execution of Penalties (no. 647) sentences other than fines may be suspended under certain circumstances. Suspension is therefore not a right for the convicted person and it is within the power of appreciation of the judge.

When the legislature stipulates different sentences for different acts, the legal benefit is taken into account. Since those who commit different acts do not have completely the same legal status, they may not be given the same sentences. Therefore, the impossibility of suspending some sentences derives from the fact that persons who committed different acts do not have the same legal status. As a result the Constitutional Court concluded that the objected provision is not contrary to Article 10 of the Constitution (equality before the law).

Therefore, the demand was rejected.

**Languages:**

Turkish.

**Identification:** TUR-2004-3-013

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 24.06.2004 / **e)** E.2004/18, K.2004/89 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 25649, 23.11.2004 / **h)** CODICES (Turkish).

**Keywords of the systematic thesaurus:**

3.5 **General Principles** – Social State.  
 3.9 **General Principles** – Rule of law.  
 3.10 **General Principles** – Certainty of the law.  
 5.3.38.3 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Social law.  
 5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.

**Keywords of the alphabetical index:**

Pension, fund / Pension, pensionable service, period, determination.

*Headnotes:*

A regulation on the time-limit for the retirement period which has retroactive effect is contrary to the principle of the rule of law and to the Constitution. The legislature in a state governed by the rule of law is under an obligation to ensure the laws conform not only to the Constitution, but also to the universal principles of law. The Law on the retirement period may not be applied to persons who have paid a pension premium before the new law has been promulgated.

*Summary:*

Balıkesir Labour Court brought an action in the Constitutional Court alleging that a provision of Article 57.b of Law no. 4956 was contrary to the Constitution.

The action before the trial court concerned the pension of the inheritor of a retired person. The time limit for retirement under some special circumstances had been fixed in Article 23 of Law no. 2926 as 3 years. But, the new provision of Article 57.b of Law no. 4956 fixed the retirement limit under the same circumstances as 5 years. The insurance premium has been paid for 3 years, 5 months and 25 days in the case before the trial court. The issue before the Constitutional Court related to the constitutionality of the new regulation.

Article 2 of the Constitution provides for the rule of law and it requires that the State must create a just legal order in all areas and that its acts and actions must be open to judicial review. Under Article 5 of the Constitution, the fundamental aims and duties of the state are: to ensure the welfare, peace and happiness of the individual and society; to strive for the removal of political, social and economic obstacles which restrict the fundamental rights and freedoms of the individual in a manner incompatible with the principles of justice and of a social state governed by the rule of law; and to provide the conditions required for the development of the individual's material and spiritual existence. On the other hand, Article 60 of the Constitution stipulates that "everyone has the right to social security. The state shall take the necessary measures and establish the organisation for the provision of social security."

As a requirement of legal security, rules are generally applied to events and situations after their promulgation, but in exceptional cases if the public interest and public order require, they may have retroactive effect. It is a prerequisite of the social rule of law that solutions be provided while taking into account that

social security law develops to promote the rights and guarantees of employees and it is the State's duty to ensure those rights and guarantees.

The retroactive regulation harmed the legal certainty of individuals and was thus contrary to Articles 2, 5 and 60 of the Constitution.

It was unanimously annulled.

*Languages:*

Turkish.

*Identification:* TUR-2004-3-014

a) Turkey / b) Constitutional Court / c) / d) 30.06.2004 / e) E.2001/481, K.2004/91 / f) / g) *Resmi Gazete* (Official Gazette), 2562, 22.10.2004 / h) CODICES (Turkish).

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Hearing, court, obligation / Criminal proceedings.

*Headnotes:*

Any criminal charge against individuals requires that a hearing be held and that the accused be present at that hearing. These are the natural consequences of the right to a fair trial and the right to defence. Even if a criminal order requires punishment other than imprisonment such as fines, suspension of a profession or trade, it is the requirement of the Constitution that a public hearing be held.



*Summary:*

Menemen Criminal Court of First Instance brought an action in the Constitutional Court alleging that provisions of Articles 302, 386 and Article 390.3 of Criminal Procedures Law no. 1412 were contrary to the Constitution.

The Constitutional Court reviewed only Article 390.3 among the alleged provisions since Articles 302 and 386 were not applicable to the case before the trial court.

Article 390.3 of Law no. 1412 stipulates that if the accused is sentenced to a fine or a heavy fine or suspension of a profession or trade or some or all of those sanctions are applied, the judge of the Criminal First Instance shall examine the case upon objection made by the accused according to Articles 301, 302 and 303 of Law no. 1412. In this situation, when the objection petition is given, the execution of the criminal order is stopped.

Article 390 of Law no. 1412 refers to Articles 301, 302 and 303. Under those articles, if the court is to decide on a sentence other than short imprisonment, it may issue a criminal order without holding a hearing. The trial court alleged that it is contrary to Article 36 of the Constitution (freedom to claim rights) to examine the case without holding a hearing. Thus, the right to be informed about the accusation, the right to have the decision after a public hearing and the right to defence are not guaranteed.

Under Article 390 of Law no. 1412 (entitled as "objection to the criminal order"), if an objection is raised against a criminal order which entails short imprisonment, then the hearing is held according to the general rules. However, if the criminal order entails a light or heavy fine or suspension of a profession or trade, then the case file is sent to the Criminal Court of First Instance and the judge at that court shall examine the case without holding a hearing according to Articles 301, 302 and 303 of Law no. 1412. If the objection is acceptable, the criminal order shall be removed. Otherwise, the objection shall be rejected. The decision is final in both situations.

Article 36 of the Constitution stipulates that everyone has the right of access to a court either as a plaintiff or defendant and the right to a fair trial before the courts through lawful means and procedures.

On the other hand, in Article 6.1 ECHR, it is indicated that everyone is entitled to a fair and public hearing and the minimum rights to be ensured for the

accused during the criminal procedures are counted in Article 6.3 ECHR.

Because of the changing social conditions in contemporary states, criminal instruments such as criminal order or even sanctions applied by the administration are widely used as a crime and punishment policy. In the case of objection to the criminal order, holding a hearing and being present at that hearing are the natural results of the right to a fair trial and the right to defence.

It is understood that the legislature did not regard the sanctions and the punishments other than imprisonment as heavy as punishments requiring deprivation of liberty. If the fines are not paid, they will be transformed into imprisonment. Therefore, the accused must be ensured an open hearing and his or her defence must be taken, if he or she objects to the criminal order.

For those reasons, the objected provision was annulled unanimously.

*Languages:*

Turkish.



# Ukraine

## Constitutional Court

### Important decisions

*Identification:* UKR-2004-3-016

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 12.10.2004 / **e)** 2-v/2004 / **f)** Petition by the parliament (*Verkhovna Rada*) for an opinion concerning the conformity of the draft law “On introducing amendments to the Constitution of Ukraine” (Draft Law no. 4180) with Articles 157 and 158 of the Constitution / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 42/2004 / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

1.1.2 **Constitutional Justice** – Constitutional jurisdiction – Composition, recruitment and structure.

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

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

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

4.5.4.2 **Institutions** – Legislative bodies – Organisation – President/Speaker.

4.5.7 **Institutions** – Legislative bodies – Relations with the executive bodies.

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

4.6.4.1 **Institutions** – Executive bodies – Composition – Appointment of members.

*Keywords of the alphabetical index:*

Constitution, amendment, draft.

*Headnotes:*

The Constitutional Court held the draft law “On introducing amendments to the Constitution of Ukraine”, preliminarily adopted by the parliament (*Verkhovna Rada*) on the 23 June 2004, to be in conformity with Articles 157 and 158 of the Constitution.

*Summary:*

In accordance with Resolution of the parliament (*Verkhovna Rada*) no. 1844-IV “On the preliminary

adoption of the draft law introducing amendments to the Constitution (file no. 4180)” of 23 June 2004 the parliament applied to the Constitutional Court with a petition seeking an opinion concerning conformity of the draft law “On introducing amendments to the Constitution of Ukraine” (hereinafter “the draft law”) with the requirements of Articles 157 and 158 of the Constitution.

The draft law proposed introducing numerous amendments to the Constitution:

The provisions of Articles 85.1.34, 89.2, 89.3, 89.4 and 89.5 of the draft law (taking account of the Constitutional Court’s reservations laid out in its Opinion no. 3-v/2003) are identical to those of Articles 85.1.34, 89.3, 89.4, 89.5 and 89.6 of the Constitution currently in force. The draft law seeks to restore the provisions of the current Constitution which were absent in draft law no. 4180 before it was drafted and preliminarily adopted by parliament.

The Constitutional Court recalled that during the drafting of draft law no. 4180 the reservations of the Constitutional Court laid down in the mentioned Opinion which prescribed that “even though no human or civil right cancellation or limitation results from the fact that the Congress of Judges may no longer take part in the appointment of Constitutional Court judges, the judiciary is in effect debarred from the formation of the sole body of constitutional jurisdiction, which will not favour strengthening the fundamentals of the constitutional jurisprudence in Ukraine” (paragraph 13, Clause 3 of the reasoning).

Taking into account the proposals of the Constitutional Court in its Opinion no. 3-v/2003, the draft law, as revised and preliminarily adopted by the parliament contains changes and amendments which, in the opinion of the Constitutional Court, do not imply abolishment or restriction of human and citizen’s rights.

This in particular refers to the following provisions:

- Article 77.1, stating that elections to the parliament shall be held in the last week of the last month of the fifth year of the parliament’s term;
- Article 83.8 on the submission of proposals to the President by a deputy faction coalition concerning the candidature of the Prime Minister and those of the Cabinet of Ministers;
- Article 83.10 according to which a parliament deputy faction comprising the majority of People’s Deputies of the constitutional composition of the parliament shall have the

rights of a deputy faction coalition at the parliament prescribed by the Constitution;

- Article 88.2.2 on the authority of the Chairman of the parliament concerning the organisation of activity of the parliament and coordination of the activity of its bodies;
- Article 113.3 stating that the Cabinet of Ministers is guided in its activity by the Constitution, laws, presidential decrees and parliament resolutions, adopted in accordance with the Constitution and the laws;
- The second sentence of Article 115.3 on the formation by the parliament of a new Cabinet of Ministers within the terms and in accordance with the procedure defined by the Constitution;
- Article 115.4 providing that the Cabinet of Ministers who resigned before the newly elected parliament or whose resignation was accepted by the parliament shall continue to carry out duties until a newly-formed Cabinet of Ministers commences its activity;
- Article 116.10 on the exercising by the Cabinet of Ministers of other powers prescribed by the Constitution and the laws;
- Article 141.1 on the establishment of a five-year term in office for the deputies of bodies of local self-government; and
- The amendments to Clauses 13 and 33 of Article 85.1 of the Constitution by adding the words “and of the Law” and “and by the Law” respectively.

“Final and Transitional Provisions” of the draft law (hereinafter “the Provisions”) define the time period for the Law “On introducing amendments to the Constitution” to take effect and the procedure for the state bodies to assume powers in accordance with the amendments introduced to the Constitution.

According to Clause 1 of the Provisions (and in relation to Clause 4), the law takes effect from the day the President, elected during the 2004 elections, takes office. It is also proposed that Articles 76.5, 77.1, 78.2, 81.2.6, 81.6, 90.2.1 and 120.2 are made consistent with Clauses 2, 3 and 6 of the Provisions and shall take effect on the date of the assumption of powers by the parliament elected in 2006.

Clauses 5 and 9 of the Provisions define the period during which the Cabinet of Ministers and members

of the Board of the National Bank who are appointed by the President after the law takes effect and in accordance with the introduced amendments to the Constitution shall exercise their functions under the Constitution. This is caused by the re-distribution of powers between the President and the Cabinet of Ministers.

Clause 7 of the Provisions establishes the term of office for the Constitutional Court judges appointed by the Congress of Judges and the procedure for the parliament and the President to appoint the new judges of the Constitutional Court under Articles 85.1.26 and 106.1.22 of the Constitution as amended by the Draft Law (paragraph 1). Moreover, it is established that the parliament may, in cases prescribed in Article 126.5 of the Constitution, terminate the powers of the Constitutional Court judges appointed by the Congress of Judges.

These powers of the parliament and the President are foreseen by the proposed amendments of the draft law in accordance with Articles 85.1.26 and 106.1.22 of the Constitution. At the same time, the Constitutional Court notes certain inconsistencies between paragraph 2 Clause 7 of the Provisions and Articles 126.5 and 149 of the Constitution currently in effect.

Clause 8 of the Provisions provides that amendments to Article 126.5.2 of the Constitution regarding judges of the Constitutional Court and Supreme Court who reach the age of 70 shall concern judges appointed after this law takes effect.

#### *Supplementary information:*

Judges M.D. Savenko, V.I. Ivashchenko and V.M. Shapoval submitted their dissenting opinions.

#### *Cross-references:*

- The Opinion of the Constitutional Court no. 3-v/2003 of 10.12.2003 on the conformity of the draft law “On introducing amendments to the Constitution of Ukraine” with Articles 157 and 158 of the Constitution submitted by the Chairman of the parliament (the case on introducing amendments to Articles 76, 78, 80, 81, 82 and others of the Constitution), [UKR-2003-3-021].

#### *Languages:*

Ukrainian.



### *Identification:* UKR-2004-3-017

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 02.11.2004 / **e)** 15-rp/2004 / **f)** Conformity with the Constitution of Article 69 of the Criminal Code (concerning more lenient punishments handed down by court) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 45/2004 / **h)** CODICES (Ukrainian).

### *Keywords of the systematic thesaurus:*

3.9 **General Principles** – Rule of law.  
 3.16 **General Principles** – Proportionality.  
 4.7.1 **Institutions** – Judicial bodies – Jurisdiction.  
 4.7.2 **Institutions** – Judicial bodies – Procedure.  
 5.2 **Fundamental Rights** – Equality.  
 5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.  
 5.3.16 **Fundamental Rights** – Civil and political rights – Principle of the application of the more lenient law.

### *Keywords of the alphabetical index:*

Justice, fundamental / Justice, implementation / Punishment, criminal offence, proportionality / Offence, criminal, minor / Offence, exemption from punishment, grounds / Punishment, mitigation.

### *Headnotes:*

By not providing for the possibility of mitigating punishment for minor offences, even though it does refer to special circumstances that mitigate the penalty and considerably lower the degree of an offence for felonies and serious and medium crimes, Article 69 of the Criminal Code is inconsistent with the fundamental principle of justice of the state ruled by law as persons committing less serious crimes are disadvantaged compared to those committing more serious offences.

Punishment must correspond to the degree of social hazard of a crime, its circumstances and personal circumstances of the offender, that is, it should be just. The law cannot put persons committing lesser crimes in a more disadvantageous position than those committing more serious crimes. If courts are not able to apply a more lenient punishment then they are not able to implement the principle of justice by way of sentence mitigation.

### *Summary:*

According to Article 8.2 of the Constitution, Ukraine recognises and applies the principle of the rule of law. All the elements of this principle are consistent with the justice ideology and the idea of law largely reflected in the Constitution.

Justice is crucial in determining the role of law as a regulator of social relations and a general human measure of law. The notion of justice implies that the offence and punishment should correspond.

An immediate application of the constitutional principles of respect for humanity, justice and legitimacy is provided in the Criminal Code regulations. They allow for an offender who committed a minor offence for the first time to be exempt from criminal responsibility in case of true repentance (Article 45); reconciliation between the offender and the victim and indemnification by the offender of the loss or damage incurred (Article 46); admission to bail (Article 47) or change of circumstances (Article 48). A person may be exempt from punishment if by the time of trial no ground exists for considering him socially hazardous (part 4 of Article 74).

Exemption from punishment based on Articles 47 and 48 of the Code and in accordance with part 4 of Article 74 thereof applies to minor or medium offences. This illustrates the application of the legal equality principle in differentiating criminal responsibility.

Article 65 of the Code establishes general principles for sentencing. Based on these, the Court will sentence:

1. according to the available penalties as defined by the Special Part of the Code provisions;
2. in accordance with the provisions of the General Part of the Code; and
3. taking into consideration the gravity of offence, the personal circumstances of the offender and mitigating and aggravating factors (Article 65.1); Article 69 of the Code defines the grounds for mitigating the punishment under relevant articles of the Special Part thereof (Article 65.3).

General sentencing principles apply to all offences regardless of their gravity.

Applying to a minor crime other regulations that provide legal grounds and establish procedures of exemption from criminal responsibility and punishment (Articles 44, 45, 46, 47, 48 and 74 of the Code)



may not be an obstacle for the court to customise punishment, for example by using more lenient punishments than those established by law.

However, Article 69 does not provide for this kind of punishment customisation for minor offences, even though it does allow special circumstances that mitigate the penalty and considerably lower the degree of an offence for felonies and serious and medium crimes. Therefore, the provisions of the article are inconsistent with the fundamental principle of justice in a state ruled by law since persons committing less serious crimes are disadvantaged compared to those committing more serious offences.

Article 69 of the Code violates the fundamental principle of justice of the rule of law because it makes it impossible to provide either an equal application of punishment which is lower than that provided by the relevant articles of the Special Part or the application of an alternative, more lenient punishment not specified in the article, to minor crimes where the degree of social hazard is much less serious than that of felonies, serious crimes and medium offences.

The restriction of the defendant's constitutional rights must be governed by the proportionality principle. The provisions of Article 69 are incommensurate with the said purposes.

Article 65 of the Code implements the principle established by Article 61.2 of the Constitution that all legal responsibility is case-dependent. The General Part of the Code describes in detail the punishment system, exemption from criminal responsibility, exemption from and service of a sentence and the use of a more lenient sentence. Punishment must correspond to the degree of the social hazard of a crime, its circumstances and personal circumstances of the offender, that is, it should be just. This is reflected in Article 65.1.3 of the Code under which the sentence must take into account the gravity of offence as well as the circumstances of the offender and mitigating and aggravating factors.

Constitutional provisions concerning the person, his or her rights and freedoms as well as Articles 65.2, 66, 223.2, 324.1.5 and 334.1 of the Ukrainian Code of Criminal Procedure that stipulate the aggravating or mitigating factors to be identified and taken into account, reflect the humanistic context of the Constitution and the criminal and procedural legislation and also an increased sentencing consistency for all crimes regardless of their gravity.

When deciding a sentence under Articles 65.2 and 69.1 and the relevant provisions of the Special Part of

the Code, the courts cannot implement the provisions of Article 61.2 of the Constitution and the Criminal Code articles. Article 61.9 therefore restricts the application of the constitutional principles of legal equality and customised sentencing. Without being able to deliver more lenient sentences for minor crimes, the justice and punishment consistency principles are violated.

Articles 367.1.5 and 398.1.3 of the Code of Criminal Procedure stipulate the possibility of setting aside or changing a judgement or a court ruling if it is inconsistent with the gravity of the offence and circumstances of the offender for cases heard in courts of appeal or cassation. A punishment is considered inconsistent with the gravity of offence or circumstances of the offender if such punishment, although it may not exceed the limits under a relevant Code article, is by its type or severity (either too lenient or excessively severe) clearly unjust (Article 372). Article 373.1.1 of the Code of Criminal Procedure stipulates that the court of appeal may change the judgment to a more lenient one if the severity of punishment is found to be inconsistent with the gravity of offence or circumstances of the offender.

Substantial violation of the criminal procedure legislation includes all cases of infringement of the Code of Criminal Procedure which have or may have prevented the court from a comprehensive consideration of the case and delivering a verdict or ruling that is legal, evidence-based and just (Article 370.1).

The lack of legal opportunity for a customised or more lenient punishment therefore results in the court being unable to take account of the gravity of offence, the magnitude of damage incurred, the type of guilt or motive, the property status of the defendant and other critical circumstances when deciding on minor offences which violates the principle of a just, case-dependent and commensurate punishment.

Judges V.D. Vozniuk and V.I. Ivashchenko submitted their dissenting opinions.

#### *Cross-references:*

Legal provisions referred to by the Constitutional Court:

- Articles 3, 8, 21, 28, 55, 61 and 129 of the Constitution;
- Articles 6, 14, 22, 28, 45 through 48, 50, 65, 66, 69 and 74 of the Criminal Code;
- Articles 223, 324, 334, 367, 370, 372, and 398 of the Code of Criminal Procedure;

- Article 10 of the Universal Declaration of Human Rights;
- Article 14 of the International Covenant on Civil and Political Rights;
- Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms;
- Clauses 2.1, 2.2 and 2.3 of the UN General Assembly Resolution 45/110 of 14.12.1990 “The Standard Minimum Rules for Non-Custodial Measures” (the Tokyo Rules);
- Decision of the Constitutional Court no. 3-rp/2003 as of 30.01.2003 on the conformity with the Constitution of the provisions of part 3 of Article 120, part 6 of Article 234 and part 3 of Article 236 of the Code of Criminal Procedure (concerning examination by court of specific rulings by the investigator and prosecutor), [UKR-2003-1-003].

### Languages:

Ukrainian.



### Identification: UKR-2004-3-018

a) Ukraine / b) Constitutional Court / c) / d) 11.11.2004 / e) 16-rp/2004 / f) Official interpretation of Clause 1 of Article 9 and Clause 10 of Article 1 of the Law “On consumer cooperatives” and part 4 of Article 37 of the Law “On cooperatives” (consumer cooperative organisations property rights protection case) / g) *Ophitsynyi Visnyk Ukrayiny* (Official Gazette), 48/2004 / h) CODICES (Ukrainian).

### 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.  
 2.3.8 **Sources of Constitutional Law** – Techniques of review – Systematic interpretation.  
 5.1.1.5 **Fundamental Rights** – General questions – Entitlement to rights – Legal persons.  
 5.3.39 **Fundamental Rights** – Civil and political rights – Right to property.

### Keywords of the alphabetical index:

Co-operative, consumer / Co-operative, property, legal guarantees.

### Headnotes:

Property owned by a consumer co-operative is any property obtained in line with the activity of a consumer cooperative organisation under legislation in effect at the property purchase date.

The inviolability of consumer cooperative property implies that any violation of its rights to own, use and dispose of property is prohibited under the constitutional appeal case of the Ukrainian Central Cooperative Society Union on the official interpretation of Articles 9.1 and 10.1 of the Law “On consumer cooperatives” and Article 37.4 of the Law “On cooperatives” (the case on the protection of property rights of consumer cooperative organisations) and the prohibition of other acts that abuse property owner’s legal interests. Any forced removal of property rights is prohibited unless in accordance with the Constitution and applicable law.

The inviolability of consumer cooperative’s property is safeguarded by the state. In particular, the state determines legal means of protection against illegal acts by either individuals or legal entities, ensures stable property legal relations and facilitates equal development and all property protection opportunities. Property rights of a consumer cooperative, whenever these were acquired, provided they were acquired legally, are protected by law and are subject to state protection to the same extent as the rights of other legal property owners.

The settlement of disputes arising between consumer cooperative organisations and other entities, institutions and organisations or individuals over specific property, including market consumer cooperative property groupings is within the competence of the courts of general jurisdiction.

### Summary:

The Ukrainian Central Consumer Cooperative Societies Union (hereinafter “UCCCSU”) seized the Constitutional Court for an official interpretation of Articles 9.1 and 10.1 of the Law “On consumer cooperatives” and Article 37.4 of the Law “On cooperatives”.

When considering the appeal to clarify the issues of consumer cooperative property, its scope, the right to own, use and dispose of property, as well as ensuring equal inviolability and protection with other forms of

property, the Constitutional Court proceeded from a number of assumptions. The Law "On cooperatives" defines legal, organisational, economic and social prerequisites for joining in a cooperative organisation (either a cooperative or a cooperative association) as well as legal aspects of cooperative activity in Ukraine. Depending on the objectives and scope of cooperative activity, the Law defines consumer cooperatives as consumer cooperative organisations (Article 6.2).

The activity of a consumer cooperative is governed by the Law "On consumer cooperatives" which deals with the legal, economic and social prerequisites of consumer cooperatives. The Law establishes the legal status of consumer cooperative organisations and provides that they are independent and self-sufficient institutions.

Article 1 of the Law "On consumer cooperatives" provides that a consumer cooperative is a voluntary association of citizens established for the purpose of jointly carrying out economic activities in order to improve their economic and social status (carrying out sales, stocking, production or other activities not prohibited by law currently in force, facilitation of social and cultural development in the rural and crafts sector and participation in the international cooperative movement).

According to Article 111.1 of the Economic Code, consumer cooperation is a system of self-governing organisations of citizens (consumer associations, their unions and associations) and of entities and institutions comprising such organisations. Consumer cooperation is a separate form of cooperative movement.

Property owned by a consumer cooperative comprises property owned by consumer associations, unions, their affiliated entities and organisations and their jointly owned property (Article 9.1 of the Law "On consumer cooperatives").

According to Article 9.2 and 9.3 of the Law "On consumer cooperatives", the property of a consumer association includes contributions of its members and profits from sales of goods, products, services and securities or from other legitimate activity. Production means, products manufactured and other property required to achieve association objectives comprise the property of a consumer cooperative.

Article 9.4 of the Law "On consumer cooperatives" establishes that property of a consumer association is comprised of the property contributed by its members and of profits generated from economic activity of

member businesses and organisations, sales of securities or other transactions.

The holders of consumer cooperative property rights include its member, employees of cooperative enterprises and organisations and legal entities whose shares in the cooperative are defined in the articles of association. (Article 9.6 "On consumer cooperatives").

Property rights, that is, the right to own, use and dispose of cooperative property, are vested in its bodies in accordance with the association documents (articles of association) of a consumer association or its union (association), according to Article 9.1 of the Law "On consumer cooperatives" and Article 111.5 of the Economic Code.

The Constitution provides guarantees for the protection of property rights. According to Article 13.4 of the Constitution, the state ensures protections of the rights of all holders of property and economic activity rights and their equality before the law.

Illegally depriving an owner of property rights is directly prohibited by the Constitution (Article 41.4). At the same time, disposing of one's property may not infringe the rights, freedoms or dignity of other persons or the interests of society or harm the environment or the natural qualities of land (Article 41.7 of the Constitution).

The cooperative property inviolability principle established by the provisions of Article 37.4 of the Law "On cooperatives" and Article 10.1 of the Law "On consumer cooperatives", under which cooperative property is under state and legal protection in the same manner as other types of property means that property may not be taken away other than in accordance with the terms and procedure defined by law.

The Ukrainian SSR 1978 Constitution by its political and economic nature and social focus classified production means by property rights holder in state property (possessed by the nation as a whole), as that owned by collective farms and other cooperative organisations or their associations, and that of trade unions and other non-profit organisations (Articles 10, 11, 12.1, 14 and 15). Therefore, cooperative organisations were recognised as property right holders for various property including production means and were entitled to possess property independently from the state.

A close look at the legislation in effect in 1987 (the Ukrainian SSR Civil Code and the Council of Ministers Resolution no. 285 "On the procedure for the transfer of entities, associations, organisations,

institutions, buildings and facilities" of 28 April 1980, adopted for the application of the USSR Council of Ministers Resolution of the same name) suggests that the state and its authorities had the right to transfer state property to non-governmental (cooperative or non-profit) organisations free or for a payment. The transfer of property to consumer cooperative organisations was subject to legal regulations in effect at the time.

Several resolutions were adopted by the central office of the Ukrainian SSR Ministry of Trade which entailed the transfer of collective farm markets to consumer cooperatives. This in turn resulted in the collective farm market and horticultural trade administration being dissolved and allotment limits reduced. Collective farm administration was eliminated from the trade management regulations of respective local councils' executive committees (Clause 2 of the Ukrainian SSR Council of Ministers Resolution no. 119 of 3 May 1988).

Thus, transfer free of charge of collective farm markets did not infringe the legislation then in effect. As a result, the markets in their entirety became exploitable property of consumer cooperative organisations which, under the provisions of the Law "On property", acquired property rights for the property transferred to them by virtue of title documents.

#### *Supplementary information:*

Judge V.I. Ivashchenko submitted a dissenting opinion.

#### *Languages:*

Ukrainian.



#### *Identification:* UKR-2004-3-019

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 18.11.2004 / **e)** 17-rp/2004 / **f)** Constitutionality of the Decree of the parliament (*Verkhovna Rada*) "On the *Verkhovna Rada* temporary ad-hoc commission on monitoring presidential election legislation implementation" (the case on the *Verkhovna Rada* temporary ad-hoc commission) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 48/2004 / **h)** CODICES (Ukrainian).

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

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

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

4.5.4.4 **Institutions** – Legislative bodies – Organisation – Committees.

4.5.7 **Institutions** – Legislative bodies – Relations with the executive bodies.

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

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

Parliament, *ad-hoc* commission, composition / Election, legislation, implementation monitoring.

#### *Headnotes:*

Separation of powers between the legislature, executive and judiciary means the powers and functions are independently executed by each of the powers. This does not imply that these may not cooperate, for example, by providing information or contributing to the preparation or discussion of questions. Such cooperation, however, must be in line with requirements laid out in Articles 6 and 19 of the Constitution according to which governmental bodies must act in compliance with, within the limits of powers of and in a manner established by the Constitution and legislation.

Where a case is not determined by the Constitution or legislation, the involvement of governmental bodies in temporary *ad-hoc* commissions is subject to their explicit consent.

The contested parliamentary Decree does not allow an interpretation that the governmental bodies authorised the involvement of their representatives in the Commission. Since it provides for mandatory involvement of the representatives of various governmental bodies, the parliamentary Decree infringed the Constitution.

#### *Summary:*

According to Article 89.3 of the Constitution, the parliament (*Verkhovna Rada*) may establish and operate, within the limits of its powers, special temporary commissions for the preparation and preliminary consideration of questions. Procedures for their organisation and operation are defined by applicable legal provisions which allow the establishment within the parliamentary framework of commissions involved in the preparation and



examination of issues that according to the Constitution fall within the powers of the parliament.

According to Clause 2 of the Parliamentary Decree “On the Parliamentary *ad-hoc* commission for monitoring implementation of legislation on the presidential election” no. 1982-IV of 7 September 2004 (hereinafter the “Decree”) the Commission’s task is to monitor the implementation of legislation on the presidential election. The purpose of the monitoring is to look at practices implementing legislation that regulates legal relations during the electoral process, election results evaluation and parliamentary proposals on the improving electoral legislation, highlighting and eliminating legislative faults and straightening out inconsistencies in the electoral legislative framework. While carrying out the monitoring, the Commission may not interfere with the electoral process or activity of central or local government bodies involved in implementing electoral legislation. The Decree gives rise to no such interference.

The task of putting motions to the government and local government bodies involved in implementing electoral legislation that is vested in the Commission may not be considered as interference with either the electoral process or the government bodies involved. The Commission proposals are recommendatory rather than binding. However, the Commission may not put forward motions on questions being heard in relation to claims concerning election participants.

The establishment of the Commission and its work can be viewed as a development phase in the process of advancing electoral legislation, including the Law “On presidential elections in Ukraine”. This work creates grounds for parliamentary discussion of the question, therefore facilitating the proper implementation of the constitutional rights of citizens.

According to Article 92.1.20 of the Constitution, legislation alone regulates the way elections are organised and held. Creating the legal framework to support democratic, general, equal, free and secret ballot election is Parliament’s constitutional duty. Legislation furthermore defines the procedure according to which the election is to be held (Article 103.6 of the Constitution). The parliament therefore did not go beyond its powers by establishing a commission vested with the functions of preliminary preparation and discussion of questions in order to improve regulations on presidential elections.

However, the provisions of Clause 1 of the Decree relating to the involvement of representatives of the Ministry of Internal Affairs, the Ministry of Justice, the General Prosecutor’s Office, the Supreme Court, the Security Service, the State TV and Radio Broadcast

Commission and the Central Election Commission in the *ad-hoc* commission’s activity without the consent of these authorities shall be considered contradictory to the Constitution.

The provisions of Clause 1 of the Decree which were recognised unconstitutional shall cease to be in force from the day of the adoption of this decision by the Constitutional Court.

#### *Languages:*

Ukrainian.



#### *Identification: UKR-2004-3-020*

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 01.12.2004 / **e)** 18-rp/2004 / **f)** Official interpretation of specific provisions of part 1 of the Code of Civil Procedure (the case on legally protected interest) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

#### *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.

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

Interest, legally protected, definition, scope / Shareholder, interest, protection.

#### *Headnotes:*

The term “a legally protected interest”, which, in the way it is used in Article 4.1 of the Code of Civil Procedure and other laws is logically and semantically linked to the term “law”, as a pursuit of certain tangible and/or intangible benefits in order to satisfy either individual or collective needs, provided these are not in conflict with the Constitution and legislation, social interests, justice, fair practices, reasonableness and other general legal principles. A legally protected interest is a simple legitimate permission arising out of the general content of law and not directly specified as a right. Such permission can be an independent object of judicial and other means of legal protection.

In the context of this constitutional petition Article 4.1 of the Code of Civil Procedure should be interpreted so that a shareholder may defend his or her legally protected rights and interests by referring them to a court of law if they are infringed, challenged or not recognised either by the joint stock enterprise of which he is a member, its specific bodies or other shareholders.

A joint stock enterprise cannot be viewed as equal to a simple combination of the individual protectable interests of its members. Where its legally protected interests are infringed, they must be defended in accordance with the procedure defined by law.

### *Summary:*

Members of Parliament applied to the Constitutional Court asking for an official interpretation of the term “a legally protected interest” as used in Article 4.1 of the Code of Civil Procedure in the context of the following provision: “Any interested person whose rights or legally protected interests have been infringed or challenged, may, by following the procedure defined by law, refer these to a court of law”. An explanation of the following was also requested: “Does this refer to the notion of interests of an individual, i.e. a joint stock enterprise shareholder resort to legal action in order to protect rights of a joint stock enterprise of which he is a member, given that an infringement of the rights of an enterprise entails the infringement of its shareholders’ rights established according to legislation currently in force and/or the articles of association of the enterprise?”

In addressing the issue of the official interpretation of “a legally protected interest” as used in Article 4.1 of the Code of Civil Procedure, the Constitutional Court put forward the following.

Etymologically, the meaning of the word “interest” includes:

- a. caring for or being concerned with someone or something; interest or enthusiasm;
- b. significance, importance;
- c. something one is concerned with or focused on the most;
- d. pursuits, needs;
- e. something that is beneficial to someone, answers his needs; a benefit, utility or profit.

Sociologically, an interest is understood as an objectively existing and subjectively realised social need, an appeal, stimulus, or drive for action. Psychologically, an interest is a perception of an object as something that appeals or is of value

to an individual. In law, the term “interest”, given its etymological, sociological and psychological meanings, is used in either a broad or a narrow sense as an independent object of legal relations which can be either advanced or blocked by regulatory means.

The Constitution provides an example of the broader meaning of “interest”. Articles 18, 32, 34, 35, 36, 39, 41, 44, 79, 89, 104, 121, 127 and 140 stress national interests, the interests of national security, economic welfare, territorial integrity, civil order, physical and moral health, political, economic, social and cultural interests, interests of the nation, citizens as a whole and each citizen in particular, interests of the state and common interests of rural, settlement or urban communities. While establishing that such interests exist, the Constitution stresses the need for them to be secured (Article 18 of the Constitution), satisfied (Article 36 of the Constitution) and protected (Articles 44 and 127 of the Constitution). No interpretation of interests in a broad sense is given.

Given the meaning of Article 8.1 of the Constitution, a legally protected interest is protected by law and by justice, since interest in its narrow sense arises from and is an integral part of the general sense of such law. The types and content of legally protected interests which are logically and semantically linked to the notion of “law” are not defined in legal provisions and therefore are in effect subject to protection by law.

Wherever an interest is not legally protectable, the legislator explicitly so provides. For example, the Civil Code contains the notions of an interest that may conflict with the general principles of civil law (Article 15), the interests of others (Article 64) or a not illegal interest (Article 980), thus stressing that interests may arise out of relations that are not covered by the law and therefore not legally protectable, but also that there may exist a conflict of interests.

An interest can be protected by law. Alternatively, an interest may not be protected by law if it aims to infringe upon the rights and freedoms of other individuals or legal entities, restricts the interests of the society, state or nation protected by the Constitution and legislation or conflicts with the latter or universally accepted principles of law.

In order to answer the questions raised in the constitutional motion by the members of Parliament, it is important to clearly distinguish between the notion of “interest” (in a narrow sense) and that of “right”. The logical and semantic connection between the two is evident: both are covered by law and guaranteed and protected by the state.

Thus, the notion of a “legally protected interest” found in Article 4.1 of the Code of Civil Procedure and other legal acts is by its logical and semantic relation to the notion of “law” (interest in a narrow sense) a legal phenomenon that:

- a. extends beyond the limits of right;
- b. is a separate object of judicial and other protection;
- c. aims to satisfy perceived individual and collective needs;
- d. may not be in conflict with the Constitution and legislation, public interests or universally accepted principles of law;
- e. means a pursuit (not the legal possibility), within a regulatory framework, of a certain tangible and/or intangible benefit; and
- f. is considered a simple legitimate permission, that is, one that is not legally prohibited. A legally protected interest safeguards a sphere of legal relations that the legislator considers inappropriate or impossible to go into in detail to make it a right.

The systemic analysis thus performed by the Constitutional Court suggests that the notion of a “legally protected interest” whenever it is used in legislation in connection with the notion of “law” has the same meaning.

The results of the Constitutional Court investigation show that a legitimate interest of a joint stock company cannot be simply looked upon as the cumulative legal interests of its shareholders. Individual interests of the latter are generally contradictory and often conflicting since they are aimed at acquiring and using or creating the ways and means to satisfy needs that may differ by both scope and content as well as the motivations behind them. The interests of those who own a single share and a controlling stake, as well as the changing interests of a minor shareholder and the strategic interests of a business as a whole, are all naturally different.

Neither the Constitution nor applicable legislation prevent an individual shareholder from defending his immediate legal interests in courts of general jurisdiction or economic courts under Articles 8 and 55 of the Constitution, Article 1 of the Code of Economic Procedure, Article 4 of the Code of Civil Procedure and Article 6 of the Law on the judicial system amongst others. However, according to legal provisions (Articles 10, 41, 43, 45, 46 and 48 of the Law on businesses, Article 5 of the Law on securities, Articles 9 and 23 of the Law on audit, etc.) such a lawsuit is normally filed if the shareholder’s rights and interests are infringed upon by the company itself of which he is a member.

Neither does legislation (Articles 110, 122 and 113 of the Code of Civil Procedure and Article 28 of the Code of Economic Procedure, amongst others) exclude the possibility for a shareholder to resort to legal action to defend legally protected interests of the company of which he is a member, provided, however, that he either holds a duly made power of attorney certificate or such powers are granted to him by the articles of association.

In most cases, legitimate interests of a joint stock company (Article 41 of the Law on businesses) are formulated by its management and are defended in court by the Board or its specially authorised bodies rather than by an individual shareholder whose interests may contradict both that of the rest of members and of the company as a whole (see in particular Articles 1, 23, 41, 46 and 48 of the Law on businesses, Articles 1, 21 and 28 of the Code of Economic Procedure and Article 110 of the Code of Civil Procedure). Shareholders’ individual interests are the responsibility of bodies, such as the supervisory boards (Article 46 of the Law “On businesses”), along with the Securities and Stock Market State Commission (relevant articles of the Laws on securities and the stock market and on the national depository system and the electronic stock exchange). Additional means of protecting the interests of shareholders that own more than 10% of the stock are provided in particular by Articles 41, 43, 45, and 49 of the Law on businesses.

#### *Languages:*

Ukrainian.



#### *Identification: UKR-2004-3-021*

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 01.12.2004 / **e)** 19-rp/2004 / **f)** Official interpretation of the provisions of Article 126.1 and 126.2 of the Constitution and Article 13.2 of the Law on the status of judges (the case on the independence of judges as part of their status) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

4.7.4.1.6 **Institutions** – Judicial bodies – Organisation – Members – Status.

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

*Keywords of the alphabetical index:*

Judge, independence, guarantees / Judge, immunity, scope.

*Headnotes:*

Judicial independence is an integral part of the judicial status. It is safeguarded by the special practices that define the way judges are elected or appointed and dismissed; prohibition of any kind of influence imposed upon them; protection of their professional interests; special procedure of bringing them to disciplinary liability; ensuring the state protection of their personal safety and that of their families; ensuring the availability of financing and necessary operational conditions and legal and social protection required for judges and courts to function properly; prohibition on becoming members of political parties and trade unions, on taking part in any political activity, on becoming deputies or being simultaneously involved in other activity of certain kinds; bringing to legal liability those who are guilty of disrespect for judges and court; and judicial self-governance.

Judicial immunity is an element of judicial status. It does not constitute a special benefit but rather has a public and legal purpose of ensuring that justice is rendered by courts that are impartial, unbiased and independent.

According to Article 126.1 of the Constitution the scope of judicial immunity is not limited to the guarantee established by part 3 of this article under which no judge may be detained or jailed before a verdict of guilty is delivered unless this is sanctioned by the parliament (*Verkhovna Rada*). Additional guarantees of judicial independence and immunity other than those established by the Constitution can also be provided by legal regulations. They are found in Article 13 of the Law on the status of judges. They may not be decreased when adopting new or amending existing acts.

The provisions of Article 126.2 of the Constitution are to be understood as safeguarding the independence of judges in relation to rendering justice and prohibiting any acts towards them on the part of

public authorities, institutions and organisations, local governments and their officials, individuals or businesses aimed at preventing a judge from carrying out his or her professional duties or making a judge biased in order to produce an unjust decision.

*Summary:*

Judicial independence is an integral part of judicial status. It means their ability to function autonomously without being dependent on any circumstances or governed by any will other than the will of law.

Judicial independence as guaranteed by the Constitution is safeguarded by the special practices that define the way they are elected or appointed and dismissed (Articles 85.1.27, 126.4-5, 127.3-4, 128 and 131.1.1 of the Constitution); prohibition of any kind of influence imposed upon them (Article 126.2 of the Constitution); protection of their professional interests (127.6 of the Constitution); the way they are bound by the sole governance of law in serving their duties (Article 129.1 of the Constitution); special procedure of bringing them to disciplinary liability (Article 131.1.3 of the Constitution); ensuring the availability of financing and necessary operational conditions and legal and social protection required for judges and courts to function properly (Article 130.1 of the Constitution); prohibition from becoming members of political parties and trade unions, taking part in any political activity, becoming members of Parliament, simultaneously holding other paid posts or doing any paid work other than research, teaching or creative work (Article 127.2 of the Constitution); prosecuting those who act disrespectfully towards judges and courts (Article 129.5 of the Constitution); ensuring state protection of their personal safety and that of their families (Article 126.7 of the Constitution); and judicial self-governance (Article 130.2 of the Constitution).

Article 126.1 of the Constitution establishes the possibility of providing additional guarantees of judicial independence by means of relevant legal regulations. They are for example established by Articles 3, 11, 12, 13, 14, 15, 31, 42, 44 and 45 of the Law on the status of judges; Articles 14, 15, 16, 17, 118, 119, 120, 121, 122 and 123 of the Law on the judicial system in Ukraine” and Articles 376, 377, 378 and 379 of the Criminal Code.

The constitutional guarantees of judicial independence need to be secured by certain tangible safeguards. The Constitutional Court therefore views as unacceptable any regression in relation to the level of such safeguards.



In its Decision no. 7-zp of 23 December 1997 the Constitutional Court points out that “the purpose of establishing additional immunity guarantees for selected categories of public servants is to create an appropriate environment that would enable them to carry out the duties placed on them by the state while protecting them from illegal interference”.

The fact that such guarantees are granted to judges by the Constitution lies in their role as justice providers.

According to Article 126.3 of the Constitution, judicial immunity means that a judge may not be detained or jailed before a verdict of guilty is delivered unless this is sanctioned by the parliament (*Verkhovna Rada*). At the same time, according to the provisions of part one of this article, judicial immunity as a guarantee that judicial service is delivered in an independent way may extend beyond the scope defined by Article 126.3.

Additional immunity guarantees may be provided by legislation. Article 13 of the Law on the status of judges establishes that immunity of a judge applies to his or her home and office, transport and communication means, correspondence, property and documents (Article 13.1); no entrance or search of or seizure from his or her home or office or personal or business vehicle, no telephone tapping, no personal search of a judge or seizure of his or her correspondence, belongings and documents is allowed save where authorised by court on due grounds or with the consent of the judge should a decision to resort to special protection measures be made by the head of the relevant court (Article 13.4) and other guarantees of judicial immunity adopted by the Law on the status of judges.

In particular, the scope of immunity guarantees was specified by Article 13.2 of the Law on the status of judges as amended on 15 December 1992 establishing that “no judge may be criminally prosecuted or detained without the parliament’s authorisation. No judge may be subject to administrative sanctions imposed by court other than with the authorisation of the body that elected the judge for the position.”

These provisions were eliminated in 1999 and Article 13.2 of the Law on the status of judges was changed to read as follows: “no judge may be detained or jailed before a verdict of guilty is delivered unless this is sanctioned by the parliament”, which in the view of the Supreme Court resulted in a more restricted immunity and a lower level of independence guarantees.

In the view of the Constitutional Court, decreased level of judicial independence guarantees may indirectly result in restricted possibilities of implementing the right of access to court.

Article 126.2 of the Constitution establishes an important judicial independence guarantee that prohibits any attempt to influence the judge. This means the prohibition of any acts towards the judge aimed at preventing the judge from carrying out his or her professional duties or making him or her biased in order to produce an unjust decision. The prohibition of any influence applies to the judge’s full term in office.

#### *Cross-references:*

Legal provisions referred to by the Constitutional Court:

- Articles 85.1.27, 126.1, 126.2, 126.4, 126.5, 127.3, 127.4, 127.6, 128, 129.1, 129.5, 130.1 and 131.1 of the Constitution;
- Articles 3, 11, 12, 13, 14, 15, 31, 42, 44 and 45 of the Law on the status of judges;
- Articles 14, 15, 16, 17, 118, 119, 120, 121, 122 and 123 of the Law on the judicial system in Ukraine;
- Articles 376, 377 and 379 of the Criminal Code;
- Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950);
- The UN General Assembly Resolution 40/32 of 29.11.1985 and 40/146 of 13.12.1985 “Basic Principles on the Independence of the Judiciary”;
- The UN Economic and Social Council resolution 1989/60 of 24.05.1989 on the Procedures for the Effective Implementation of the “Basic Principles on the Independence of the Judiciary”;
- The European Charter of 10.07.1998 on the status of judges;
- Recommendation no. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges;
- The Constitutional Court Decision no. 7-zp of 23.12.1997 with respect to the constitutional petition of the President concerning the conformity with the Constitution of the Law on the Chamber of Accounts of the parliament (the Chamber of Accounts case), [UKR-1998-1-001];
- The Constitutional Court Decision no. 7-rp/99 of 19.05.1997 with respect to the constitutional petition of the Supreme Court and the Security Service requesting an official interpretation of Article 86 of the Constitution and Articles 12 and 19 of the Law on the status of members of parliament (the case on deputies’ inquiries) [UKR-1999-2-001];

- The Constitutional Court Decision no. 6-rp/99 of 24.06.1999 concerning the constitutional petition of the Supreme Court on the constitutionality of the provisions of Articles 19 and 42 of the Law On Ukraine's 2004 State budget (the financing of courts case), [UKR-1999-2-004].

*Languages:*

Ukrainian.



*Identification:* UKR-2004-3-022

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 01.12.2004 / **e)** 20-rp/2004 / **f)** Constitutionality of the provisions of Article 78.2, 78.3 and 78.4 of the Law "On Ukraine's 2004 State budget" (the case on suspension or restriction of benefits, compensation and guarantees) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

*Keywords of the systematic thesaurus:*

3.5 **General Principles** – Social State.  
 3.11 **General Principles** – Vested and/or acquired rights.  
 4.10.2 **Institutions** – Public finances – Budget.  
 5.1.1.4.4 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Military personnel.  
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.  
 5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to a sufficient standard of living.

*Keywords of the alphabetical index:*

Budget, state / Military, personnel, benefits, right / Judiciary, independence, duty of the State.

*Headnotes:*

The reason for providing a system of organisational, legal and economic measures (through benefits, compensation and guarantees) for military servicemen and law enforcement personnel in order to ensure their social protection and that of their families lies in the specific characteristics of their professional responsibilities rather than in disablement, loss of

employment or lack of sufficient means to support their living (Article 46 of the Constitution). These responsibilities entail hazards to their life and health and certain restrictions on constitutional rights and freedoms, including the right to earn to ensure a higher standard of living for them and their families. Such measures are therefore to be implemented regardless of the amount of income they make or the availability of budgetary funding. Subjecting the right to benefits to a certain amount of monetary income results in an impaired applicability of the legal benefits for military servicemen and law enforcement personnel and is therefore a breach of their state-guaranteed right to social protection.

Under the Constitution, the state is obliged to provide the funding and maintain the environment necessary to ensure the proper functioning of the judiciary (Article 130.1 of the Constitution) Reduced State Budget allocations are not sufficient to ensure proper and comprehensive judicial proceedings and the normal functioning of the judicial system. Thus, the norms on providing judges with material means and welfare and social protection as established by Articles 44 and 45 of the Law "On the status of judges" may not be abolished if adequate compensation has not been secured. Availability of benefits under the Law may not be dependent on the amount of income judges make or availability of budget funding.

*Summary:*

The case was heard in response to a constitutional petition by 54 Members of Parliament concerning the constitutionality of Articles 44, 47, 78 and 80 of the Law "On Ukraine's 2004 State Budget" and the petition by the Supreme Court concerning the constitutionality of Articles 78.2, 78.3 and 78.4 of the Law "On Ukraine's 2004 State Budget" (hereinafter the "Law").

Article 44 of the Law establishes the amounts of annual one-time aid in 2004 according to the Law "On the status of war veterans and the guarantees of their social protection" for category 1 disabled war veterans, category 2 disabled war veterans, category 3 disabled war veterans, combatants, meritorious service, survivor benefits and benefits to spouses of deceased combatants and veterans who were found disabled while alive.

Pursuant to Article 78.2 of the Law, allocations for free or discounted welfare and community services provided by law to certain groups of workers are to be secured from and within the limits of budgetary allocations to support the corresponding state-financed organisations. Such allocations include:

supplies of uniforms, equipment and service clothes; free medical services; health spa facilities; discounted residential rent, fuel, phone and communal services (water, gas and electric supplies, and heating); free travel and luggage transportation; and free alarm system installation and use.

Article 78.3 of the Law provides that benefits, compensation and guarantees to which some categories of state-financed institutions workers are legally entitled are available to them only if their income is less than the amount of the living wage established for persons who are fit for work. These include discounted rent, fuel, telephone and communal rates (water, gas and electric supplies and heating) and free use of any urban passenger transport (except taxi), rural public automotive services and commuter trains, water and bus services.

In accordance with Article 78.4 of the Law the cumulative income calculated by adding the monetary equivalent of the benefits provided and the individual's own income must not exceed the amount of living wage established for individuals who are fit for work.

When deciding the matter in respect to the above petitions, the Constitutional Court underlined that benefits, compensation and guarantees provide an essential financial source of income to a considerable number of Ukrainian citizens in addition to the regular sources available to them and that these are an essential part of the constitutional right of access to adequate standards of living (Article 48 of the Constitution) which in any case may not be less than the living wages established by law (Article 46.3 of the Constitution). Under Article 22 of the Constitution the scope or meaning of this right cannot be restricted by either adopting new or amending existing legal acts. The abolition of such right is subject to state of emergency provisions being enacted in such a way as to conform to Articles 85.1.31 and 92.1.19 of the Constitution, respectively.

Based on the fact that under the Constitution, defending the Motherland and Ukraine's territorial integrity is every citizen's duty (Article 65.1 of the Constitution), the Constitutional Court concludes that the state social protection guarantees under Article 17.5 of the Constitution must apply to individuals who under the Law "On the status of war veterans and the guarantees of their social protection" fall into the category of war veterans.

The legal view held by the Constitutional Court with respect to the restriction of benefits, compensation and guarantees provided to military servicemen and

law enforcement personnel is that the reason for providing a system of organisational, legal and economic measures in order to ensure their social protection and that of their families lies in the specific characteristics of their professional responsibilities rather than disablement, loss of employment or lack of sufficient means to support their living (Article 46 of the Constitution). Such measures are implemented regardless of the amount of income they make or the availability of budgetary funding.

However, the benefits mentioned in part one of the Law are under Article 78.3 and 78.4 only provided if the monetary income of military serviceman or law enforcement is less than the level of living wages established for individuals who are fit for work (Article 78.3). As has been noted in the Constitutional Court Resolution no. 7-rp/2004 of 17 March 2004 (social protection of military servicemen and law enforcement personnel case), this in effect means impaired applicability of the legal benefits for military servicemen and law enforcement personnel and is therefore a breach of their state-guaranteed right to social protection.

Under the Constitution, the state is obliged to provide the funding and maintain the environment necessary to ensure the proper functioning of the judiciary (Article 130.1 of the Constitution) as integral elements of the constitutional guarantees of their independence and immunity (Article 126.1 of the Constitution). According to the legal position of the Constitutional Court, reduced State Budget allocations are not sufficient to ensure proper and comprehensive judicial proceedings and the normal functioning of the judicial system. As a result, the popular confidence in the state power may be undermined with the possible risk that the constitutionally guaranteed right of individuals and citizen to a court defence may not be implemented as appropriate.

Constitutional proceedings with regard to examining Articles 47, 78.1 and 80 of the Law from the point of view of their consistency with the Constitution are to be terminated on the grounds of Article 45.2 of the Law "On the Constitutional Court of Ukraine" – inconsistency of a constitutional motion with the requirements of the Constitution and the Law "On the Constitutional Court of Ukraine".

Judge V.I. Ivashchenko submitted a dissenting opinion.

#### *Cross-references:*

- The Constitutional Court Decision no. 8-rp/99 of 06.07.1999 with respect to the constitutional petition by the Ministry of Internal Affairs and the Ministry of Finance for an official interpretation of

the provisions of part 6, Article 22 of the Law “On the militia” and part 7, Article 22 of the Law “On fire safety” (the right to benefits case) [UKR-1999-2-005];

- The Constitutional Court Decision no. 5-rp/2002 of 23.12.1997 with respect to a constitutional petition by 55 Members of Parliament concerning the constitutionality of Articles 58 and 60 of the Law “On Ukraine’s 2001 State Budget” [UKR-2002-1-005] and the petition by the Supreme Court constitutionality of the provisions of Clauses 2, 3, 4 5, 8 and 9.1 of Article 58 of the Law “On Ukraine’s 2001 State Budget” and sentence 1 Clause 1 of the Law “On some measures for the reduction of budget expenses” (the benefits, compensation and guarantees case);
- The Constitutional Court Decision no. 7-rp/2004 of 17.03.2004 with respect to the constitutional petition of 45 Members of Parliament concerning the conformity with the Constitution of the provisions of part 3 of Article 59 of the Law “On Ukraine’s 2003 State budget” (the social protection of servicemen and law enforcement personnel case).

#### *Languages:*

Ukrainian.



#### *Identification:* UKR-2004-3-023

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 15.12.2004 / **e)** 21-rp/2004 / **f)** Constitutionality of provisions of Article 73.1 of the Commercial Shipping constitutionality (the case on a seaport as a public enterprise) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

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

3.25 **General Principles** – Market economy.

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

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

Port, status / Competition, protection / Port, use by private enterprises.

#### *Headnotes:*

While defining a seaport as a public enterprise, the Commercial Shipping Code allows (Article 73.1, 73.3 and 73.4) for business activities to be performed within the port’s territory by enterprises and organisations of any form of ownership for servicing vessels, passengers and cargo, under the procedure established by the Cabinet of Ministers. It also prohibits a seaport from interfering in such activities or impeding them, except for cases provided for by the legislation and the statutory instruments of such enterprises and organisations. These provisions mean that the state does not restrict the constitutional right of an entity to do business on the territory of such a public transport enterprise as a seaport.

#### *Summary:*

The Members of Parliament appealed to the Constitutional Court for recognition that Article 73.1 of the Commercial Shipping Code defining a seaport as a public enterprise only was not in conformity with the requirements of Article 42.1 and 42.3 of the Constitution.

When considering the issue raised in the constitutional petition, the Constitutional Court made the following points.

When defining a seaport as a public enterprise, the Code at the same time (Article 73.1, 73.3 and 73.4) did not rule out the possibility of business activities to be performed within the port’s territory by enterprises and organisations of any form of ownership for servicing vessels, passengers and cargo, under the procedure established by the Cabinet of Ministers. The Code also prohibited a port from interfering in such activities or impeding them, except for cases provided for by legislation and the statutory instruments of such enterprises and organisations. These provisions mean that the state did not restrict the constitutional right of an entity to do business on the territory of such public transport enterprise as a seaport.

Therefore, defining of a seaport as a public enterprise does not conflict with Article 42.1 of the Constitution.

The same applies to the conformity of the disputed provision of the Code with Article 42.3 of the Constitution, which deals with the state’s responsibilities for protecting competition in entrepreneurial activity and preventing any abuse of a monopolistic position in the market, unlawful restriction of competition and unfair competition.



An examination of Articles 73.3, 73.4 and 76 of the Code shows that the state not only refrains from imposing any restrictions on, but also supports legal principles of entrepreneurial activity. As to the status of a seaport as a public transport enterprise (even if treated as a type of monopoly) it is clear that the legislator may determine such status in accordance with Article 42.3 of the Constitution, which states that, “types and limits of monopolies shall be determined by law”. So the status is regulated not only by the Law On Natural Monopolies, which is referred to in the constitutional motion, but also by other laws.

Defining the status of a seaport as a public transport enterprise also complies with provisions of Article 92.1.7 and 92.1.8 of the Constitution, establishing that the legal regime of property, legal principles and guarantees of entrepreneurship, rules of competition and norms of antimonopoly regulation shall be determined by law only.

#### *Languages:*

Ukrainian.



#### *Identification:* UKR-2004-3-024

**a)** Ukraine / **b)** Constitutional Court / **c)** / **d)** 24.12.2004 / **e)** 22-rp/2004 / **f)** Constitutionality of the Law on Specific Application of the Law on Election of the President at the Repeat Ballot on 26 December 2004 (the case on specific application of the Law on Election of the President) / **g)** *Ophitsyyni Visnyk Ukrayiny* (Official Gazette) / **h)** CODICES (Ukrainian).

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

4.9.9.6 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Casting of votes.

5.1.1.4.2 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Incapacitated.

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

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

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

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

Election, voting outside of the polling station / Disabled person, right to vote.

#### *Headnotes:*

The provisions of Article 6.1 of the Law on Specific Application of the Law on Election of the President at the Repeat Ballot on 26 December 2004, which prevent all voters who cannot move on their own, except for disabled individuals of the first disability group, from casting their votes outside voting premises, is contrary to the Constitution.

The established possibility for voting outside polling stations should secure the constitutional right to elect officers of public authorities and bodies of local self-government to citizens who cannot get to a polling station on polling day. Such a category of voters comprises not only disabled individuals of the first disability group, but also disabled individuals of other groups and citizens, who cannot move on their own for health, age and other reasons.

#### *Summary:*

Forty-six Members of Parliament appealed to the Constitutional Court regarding the constitutionality of the Law on Specific Application of the Law on Election of the President during the Repeat Ballot on 26 December 2004 of 8 December 2004, Law no. 2221-IV (hereinafter referred to as the Law).

In considering the issue raised in the constitutional petition, the Constitutional Court proceeded from the following.

The sole body of legislative power in Ukraine is the parliament – the *Verkhovna Rada* (Article 75 of the Constitution). The parliament has the power to adopt laws (Article 85.3 of the Constitution). According to Article 92.1.20 of the Constitution, only the laws shall determine the organisation and the procedure of elections.

On 18 March 2004, the parliament passed the Law On Election of the President in its new wording. On 8 December 2004, it passed the law on clarification of separate provisions of the Law On Election of the President in the part of organisation and holding of the presidential election during the repeat ballot on 26 December 2004 in order to secure constitutional suffrage rights by citizens, adherence to principles of universal, equal, free and fair election, transparency and openness of the electoral process as the fundamental principles of the election legislation

established by the Constitution and international legal acts, the binding nature of which has been recognised by the parliament.

Thus, when adopting the Law, the parliament acted within the legal scope provided for by the Constitution and did not infringe the principle of distribution of powers as being asserted by the Members of Parliament who submitted the petition.

The Constitutional Court, after having examined provisions of the Law as to their constitutionality, has established that the provisions of Article 6.1 saying that only disabled individuals of the first disability group who cannot move on their own may vote outside the premises for voting, fail to comply with the Constitution. A hand-written application requesting that a voter be provided with a possibility to vote outside the premises for voting shall be filed with a polling station commission together with a copy of a disabled individual's pension certificate certified in accordance with the established procedure or a certificate of an expert medical commission no later than on 12 a.m. of the day before the polling day.

The established possibility for voting outside the premises for voting should secure the constitutional right to elect officers of public authorities and bodies of local self-government by citizens who cannot get to a polling station on polling day. Such category of voters comprises not only disabled individuals of the first disability group, but also disabled individuals of other groups and citizens, who cannot move on their own for health, age and other reasons.

The Law has failed to cover other voters, who get to the ordinary polling stations where they have been put on electoral registers for health and other reasons, and voters who have been put on electoral registers at special polling stations, created at in-patient hospitals, who cannot get to premises for voting because they are confined to bed. Thus, other voters having the same reasons as disabled individuals of the first disability group for not reaching at polling stations on their own are prevented from casting their votes outside the voting premises. This means that different categories of voters have been discriminated against in execution of their suffrage rights. Singling out disabled individuals of the first disability group from the whole category of citizens who cannot move on their own, and providing them with a privilege in voting outside polling stations, infringe the principle of equality before the law, established by Article 24.1 of the Constitution.

According to Article 3.2 of the Constitution, affirming and ensuring human rights and freedoms are the

main duties of the State. However, ensuring rights and freedoms, among others, requires legal mechanisms and procedures which give real opportunities for citizens to realise rights and freedoms.

Article 6.1 of the Law also established a procedure, according to which a voter has to confirm his/her disability with a copy of his/her pension certificate or a certificate of an expert medical commission issued to him/her, this being duly certified under the established procedure by a notary or an official of an executive body of the local council in a settlement where a notary is absent. The said copy may be also certified by the body which has issued the certificate. These documents shall be filed with a polling station commission together with an application no later than on 12 a.m. of the day before polling day. Such requirements failed to ensure the exercise of the voting rights of citizens; to the contrary, they made it complicated.

The provisions of the Law recognised as unconstitutional shall lose their effect from the day of the adoption of the decision by the Constitutional Court.

Judges V.M. Shapoval and V.Ye. Skomorokha submitted dissenting opinions.

#### *Languages:*

Ukrainian.



# United States of America

## Supreme Court

### Important decisions

*Identification:* USA-2004-3-005

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 12.01.2005 / **e)** 04-104, 04-105 / **f)** United States v. Booker / **g)** 125 *Supreme Court Reporter* 738 (2005) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

1.5.1.3.2 **Constitutional Justice** – Decisions – Deliberation – Procedure – Vote.

1.5.5 **Constitutional Justice** – Decisions – Individual opinions of members.

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

3.20 **General Principles** – Reasonableness.

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

5.3.13.10 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Trial by jury.

*Keywords of the alphabetical index:*

Sentence, determination / Sentence, increased / Judge, sentencing discretion / Judicial restraint / Court, law, interference, minimum.

*Headnotes:*

Under the constitutional requirements of a fair criminal trial, if an increase in a guilty person's punishment depends upon the finding of a fact, that fact must be admitted by the defendant or found by a jury under a standard of beyond a reasonable doubt.

Juries, not judges, must decide the facts that are the basis for a criminal sentence.

A court must refrain from invalidating more of a legislative act than is necessary and must retain those portions of the act that are constitutionally valid.

*Summary:*

In two separate criminal proceedings, following jury determinations of the defendants' guilt, federal court judges imposed sentences that increased the length of imprisonment beyond the maximum terms available to juries under the applicable statutes. The judges took these actions under the mandatory requirements of the Federal Sentencing Guidelines (the "FSG"). The FSG are found in legislation initially enacted by the U.S. Congress in 1984. Among other things, the FSG required a judge who found certain types of additional facts, such as the quantity of drugs in a narcotics case, to increase the length of the offender's prison sentence beyond the so-called "statutory maximum". The "statutory maximum" is the longest prison sentence for the crime in question when only the facts found by the jury are the basis for the sentence. Therefore, in the case of defendant Freddie Booker, the jury found Mr Booker guilty beyond a reasonable doubt of possessing at least 50 grams of crack cocaine – a finding that by itself would have resulted in a maximum sentence of 21 years and ten months in prison. In addition, however, the judge found, by a preponderance of the evidence, that the defendant also possessed an additional 566 grams of crack cocaine. The jury had not heard this evidence. Under the FSG, the judge's findings mandated a minimum sentence of 30 years in prison. In the case of Ducan Fanfan, the judge similarly found additional facts by a preponderance of the evidence that required a minimum 15-year prison sentence, instead of the maximum six-year sentence authorized by the jury verdict alone.

In the Booker case, the judge imposed the longer sentence and the defendant appealed to the Court of Appeals for the Seventh Circuit, which overturned the sentence. The judge in the Fanfan case concluded that he could not follow the FSG and imposed a sentence based solely upon the jury's guilty verdict. The United States Supreme Court accepted review of both cases and consolidated them into one decision.

In an unusual two-part decision produced by two different alignments of the Court's Justices, the Court ruled that:

1. the FSG violated defendants' rights to trial by jury under the Sixth Amendment to the U.S. Constitution; and
2. that the constitutional infirmity could be cured by severing the mandatory nature of the FSG from the rest of the applicable legislation.

In the first part of the decision, the Court concluded that the FSG violated the Sixth Amendment by giving judges the power to make factual findings on their own that increased sentences, without the jury's

having made such findings. This conclusion rested on the Court's determination that (except in cases of the defendant's own admission) juries, not judges, must decide the facts that form the basis of a criminal sentence; therefore, any fact, except for a prior conviction, that is necessary to support a sentence exceeding the standard maximum sentence must either be admitted by the defendant or proved to a jury beyond a reasonable doubt. In the decision's second part, the Court declared that judges must consult the FSG and "take them into account" in imposing sentences; however, the Sixth Amendment requires them to treat the FSG as advisory only. In addition, the Court ruled that appellate review of judges' sentencing determinations must be based on a "reasonableness" standard of review.

As to the Booker and Fanfan cases, the Court remanded both cases back to the courts of first instance for sentencing in accordance with the Court's decision.

#### *Supplementary information:*

The Sixth Amendment to the U.S. Constitution states in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed..."

The Court's decision in Booker, by making the FSG advisory instead of mandatory, restored to judges much of the sentencing discretion that the U.S. Congress had sought to withdraw when it enacted the FSG. The legislative goal in enacting the FSG had been to make sentences more uniform. In dissenting against the second part of the Court's decision, the four dissenting Justices stated that the Court, by transforming the FSG from mandatory commands to advisory guidelines, had violated the "tradition of judicial restraint" by exercising a legislative, rather than a judicial, power.

The Court's Booker decision means that much attention will be placed on the federal Courts of Appeals, which under the new "reasonableness" standard will be called upon to review the discretionary sentencing decisions of judges in the courts of first instance.

#### *Languages:*

English.



## Court of Justice of the European Communities and Court of First Instance

### Important decisions

*Identification:* ECJ-2004-3-012

**a)** European Union / **b)** Court of First Instance / **c)** First Chamber / **d)** 11.01.2002 / **e)** T-174/00 / **f)** Biret International SA v. Council of the European Union / **g)** *European Court Reports* II-00017 / **h)** CODICES (English, French).

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

- 1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
- 2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
- 3.10 **General Principles** – Certainty of the law.
- 3.26 **General Principles** – Principles of Community law.

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

International agreement, direct applicability / General Agreement on Tariffs and Trade of 1994 / European Union, non-contractual liability / Damage, compensation / Common Agricultural Policy / Public health, protection.

#### *Headnotes:*

1. Where, in the context of an action for damages, the improper conduct originates not from a national body but from a Community institution, any damage ensuing from the implementation of the Community legislation by the national authorities, which had no discretion, is attributable to the Community. Since the Community judicature has exclusive jurisdiction under Article 215 of the Treaty (now Article 288 EC) to hear actions seeking compensation for such damage, remedies available under national law cannot automatically guarantee effective protection of the rights of individuals who consider themselves to have been adversely affected by measures of the Community institutions (see paragraphs 33-34).



2. Directive 88/146 prohibiting the use in livestock farming of certain substances having a hormonal action did not frustrate the legitimate expectations of the traders affected by the prohibition of the use of the hormones. In view of the differing appraisals which had emerged, traders were not entitled to expect that a prohibition on administering the substances in question to animals could be based on scientific data alone.

The possibility that Directive 88/146 might not have been applied by Member States cannot be likened to conduct by the Council capable of having given rise to legitimate expectations on the part of traders. Moreover, failure to apply it would have been in manifest breach of the obligations on Member States under the Treaty and, more particularly, the obligations imposed on them by that directive. No-one may have a legitimate expectation that an unlawful situation will be maintained or, therefore, base such an expectation on the possible failure on the part of Member States to transpose and effectively implement a Council directive.

Lastly, traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained. *A fortiori*, therefore, such traders are not justified in placing legitimate expectations in a future, hypothetical amendment of legislation, particularly in an area such as the common agricultural policy where, as a result of its potential effects on public health, any legislative amendment depends on unpredictable developments in scientific knowledge and complex assessments to be made by the legislature (see paragraphs 50, 54-55).

3. In view of their nature and structure, the WTO Agreement and its annexes, in the same way as GATT 1947, do not in principle form part of the rules by which the Court of Justice and the Court of First Instance review the legality of acts adopted by Community institutions under Article 173.1 of the Treaty (now, after amendment, Article 230.1 EC); individuals cannot rely on them before the courts and any infringement of them will not give rise to non-contractual liability on the part of the Community. It is only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Community judicature to review the legality of the Community measure in question in the light of the WTO rules. Since Directives 81/602 and 88/146, which prohibit the use in livestock farming of certain substances having a hormonal action, were adopted several years before

the entry into force of the Agreement on the Application of Sanitary and Phytosanitary Measures, which is one of the WTO agreements, it is not logically possible for them either to give rise to a specific obligation entered into under that agreement or to refer expressly to some of its provisions (see paragraphs 61, 63-64).

#### *Summary:*

Believing that Community legislation was restricting their exports of beef and veal treated with certain hormones, in breach of the obligations the Community had entered into within the framework of the WTO, the United States and Canada each brought dispute settlement proceedings before the competent WTO bodies. These proceedings led to a finding by the dispute settlement body that the Community was indeed in breach of various provisions of the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement"). Having stated that it intended to comply with its WTO obligations, the Community asked for, and was granted, reasonable time to make the necessary adjustments. Although this period expired on 13 May 1999, the Commission, on the basis of the results of further analysis of the risks associated with the use of the substances in question, submitted to the Parliament and the Council on 3 July 2000 a proposal for a directive amending the existing regulations and seeking in particular to maintain the prohibition on the use of those substances. It was in this context that the company Biret International SA, in judicial liquidation, brought the present action.

The applicant company was incorporated in 1990. Its objects as set out in its articles of association were to trade in various agri-foodstuffs, including meat. It was placed in judicial liquidation in December 1995. Claiming that the prohibition on imports into the Community of beef and veal, in particular of American origin, was the cause of its difficulties, it asked the Court of First Instance to establish that the Community was liable in respect of its being placed in judicial liquidation and to order the Community to pay compensation. The Council, as defendant, disputed not only the admissibility of the action, but also its merits.

As regards, firstly, the admissibility of the action, the Council submitted, *inter alia*, that the applicant had failed to seek the remedies available to it in the national courts. It contended that the applicant should have contested the measures adopted by the French authorities to transpose the contested directives, pleading the unlawfulness of those directives and, if appropriate, seeking a preliminary ruling from the Court on the issue of their validity. The Court of First Instance found, however, that since the Community

judicature has exclusive jurisdiction to hear actions seeking compensation for damage attributable to the Community, remedies available under national law cannot automatically guarantee effective protection of the applicant's rights. Indeed, even if, in the context of proceedings for a preliminary ruling, the Court of Justice had considered that the rules applicable were such as to cause damage, the national court would not have had the power to adopt the measures needed to compensate for all the damage alleged by the applicant in this case. The Court of First Instance therefore rejected the argument that national remedies had not been exhausted.

As regards, secondly, the merits of the action, the applicant company contended that its legitimate expectations had been frustrated. It considered that it could legitimately expect that the prohibition on the hormones in question would only be temporary and that the scope of the derogations allowed would gradually be extended to include the categories of animals originating in the United States which it had planned to import into the Community. The Court of First Instance rejected this argument: it said that traders were not justified in placing legitimate expectations in a future, hypothetical amendment of legislation, particularly in an area such as the common agricultural policy where, as a result of its potential effects on public health, any legislative amendment depended on unpredictable developments in scientific knowledge and complex assessments to be made by the legislature. The plea alleging breach of the principle of the protection of legitimate expectations was therefore rejected, as was the plea alleging infringement of the SPS Agreement. The Court of First Instance explained that, in view of their nature and structure, the WTO agreements did not in principle form part of the rules by which the legality of acts adopted by Community institutions was reviewed. The purpose of these agreements was to govern relations between states or regional organisations for economic integration, and not to protect individuals. Since they did not create rights on which individuals could rely before the courts, any infringement of them would not give rise to non-contractual liability on the part of the Community. Admittedly, exceptions were allowed in both hypotheses, but the circumstances of the case did not correspond to either of them.

None of the pleas put forward by the applicant company having been allowed by the Court of First Instance, the action was finally dismissed.

#### *Supplementary information:*

- In this case, the Court of First Instance applied the case-law of the Court of Justice initiated in the judgments of 23 November 1999, *Portuguese*

*Republic v. Council of the European Union* (Case C-149/96, *European Court Reports* I-8395), and of 22 November 2001, *Kingdom of the Netherlands v. Council of the European Union* (Case C-301/97, *European Court Reports* I-8853).

- See also, in the same connection, the judgment of 11 January 2002, in *Etablissements Biret et Cie SA v. Council of the European Union* (Case T-210/00, *Reports* p.II-47).

#### *Languages:*

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



#### *Identification:* ECJ-2004-3-013

**a)** European Union / **b)** Court of First Instance / **c)** Fourth Chamber / **d)** 17.01.2002 / **e)** T-236/00 / **f)** Gabriele Stauner and others v. European Parliament and the European Commission / **g)** *European Court Reports* II-00135 / **h)** CODICES (English).

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

1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.

4.5.7.1 **Institutions** – Legislative bodies – Relations with the executive bodies – Questions to the government.

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

Action for annulment, admissibility / European Union, Parliament, member, relations with the European Commission / Budget, implementation, control.

#### *Headnotes:*

Measures that produce binding legal effects capable of affecting the interests of the applicant by significantly altering his legal position constitute acts or decisions against which an action for annulment under Article 230 EC may be brought. It is apparent from the provisions of the Framework Agreement of 5 July 2000 on relations between the Parliament and the Commission that the aim of the agreement is not to limit the right of Members of the Parliament individually to put questions to the Commission, but

merely to enable the Parliament to exercise wider powers of scrutiny over the Commission's activities by obtaining from that institution confidential information, the communication of which had not previously been regulated. The fact that the Framework Agreement provides that certain information may be supplied only to the parliamentary bodies referred to in point 1.4 of Annex 3 does not deprive Members of the Parliament, acting individually, of their right to put questions to the Commission and receive from that institution replies involving, where necessary, the forwarding of confidential information, as was the case before the adoption of the Framework Agreement. In that respect, the Commission's discretion in deciding whether to communicate confidential information in its reply to a question put by a Member of the Parliament acting individually, pursuant to Article 197.3 EC and in accordance with the relevant provisions of the Parliament's Rules of Procedure, is not governed, even indirectly, by the Framework Agreement. The Framework Agreement provides for an additional mechanism, distinct from that concerning the right of Members of the Parliament to put questions to the Commission under Article 197.3 EC, and permits, contrary to what would have been the case before the adoption of the Framework Agreement, the forwarding of confidential information to certain parliamentary bodies. In effect, where a request for confidential information comes from one of the bodies referred to in point 1.4 of Annex 3 to the Framework Agreement, the forwarding of that information by the Commission is henceforth governed by the provisions of the Framework Agreement. It follows that the Framework Agreement, which is limited to governing relations between the Commission and the Parliament, does not alter the legal position of Members of the Parliament, acting individually, as regards their right under Article 197.3 EC and does not impair that right, which is guaranteed by that provision (see paragraphs 57, 59-62).

### *Summary:*

In order to update the "code of conduct" in which the provisions regulating interinstitutional relations between the European Parliament and the Commission have been contained since 1990, a Framework Agreement was concluded between the two institutions. Point 17 of the Framework Agreement provides that the Commission shall forward all information necessary for supervising the implementation of the budget for the year in question which the chairperson of the parliamentary committee responsible for the discharge procedure under Article 276 EC requests from it for that purpose. According to point 29 of the Framework Agreement, the specific measures of application of the Frame-

work Agreement are dealt with in its annexes. Annex 3 concerns the forwarding of confidential information to the Parliament. Under point 1.4 of this annex, only the President of the European Parliament, the chairpersons of the parliamentary committees concerned, the Bureau and the Conference of Presidents may request confidential information from the Commission. Point 3.2 of the annex makes it possible to restrict access to confidential information by authorising its communication, for example, only to the chairperson and rapporteur of the relevant committee, or even only to the President of the European Parliament.

Fearing that the Commission might make use of these provisions to restrict requests for information submitted by Members in an individual capacity on the basis of Article 197.3 EC, Mrs Stauner and 21 other Members brought an action for annulment of the Framework Agreement. They also made two unsuccessful applications for suspension of the operation of the disputed provisions. In the present judgment, the Court of First Instance gave a decision in the main proceedings as well as ruling on the plea of inadmissibility raised by the defendant institutions.

The Parliament and the Commission submitted that the Framework Agreement produced legal effects only vis-à-vis the Contracting Parties to that agreement, and not vis-à-vis Members of the Parliament. Even assuming that the Framework Agreement did produce legal effects vis-à-vis the applicants, such effects were limited to those concerning the internal organisation of the Parliament's activities. The applicants, however, submitted that the disputed provisions did produce legal effects vis-à-vis themselves, by altering the conditions for the performance of their parliamentary duties, and could therefore be the subject of an action for annulment.

After recalling that an action for annulment could only be brought against acts of the Parliament that produced binding legal effects capable of affecting the interests of the applicant by significantly altering his legal position, the Court of First Instance found that the disputed act in no way infringed the right which Members held under Article 197.3 EC. The Framework Agreement did not deprive Members of the right to put questions in an individual capacity and, where appropriate, to request confidential information from the Commission. Since the disputed act did not alter the conditions for the performance by the applicants of their parliamentary duties, it therefore did not produce legal effects capable of affecting their interests. The action was therefore dismissed as inadmissible.

*Languages:*

Danish, Dutch, English, Greek.

*Identification:* ECJ-2004-3-014

**a)** European Union / **b)** Court of First Instance / **c)** Fourth Chamber / **d)** 07.02.2002 / **e)** T-211/00 / **f)** Aldo Kuijjer v. European Commission / **g)** *European Court Reports* II-00485 / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

3.16 **General Principles** – Proportionality.  
 3.18 **General Principles** – General interest.  
 5.3.24 **Fundamental Rights** – Civil and political rights – Right to information.

*Keywords of the alphabetical index:*

Document, access, refusal, motivation / Asylum, document, access / Immigration, document, access / International relations, damage, potential / Document, access, blanking out, burden, reasonable.

*Headnotes:*

1. When the Council decides whether the release of a document may undermine the public interest safeguarded by Article 4.1 of Decision 93/731 on public access to Council documents, it exercises a discretion which is among the political responsibilities conferred on it by provisions of the Treaties. In those circumstances, review by the Court of First Instance must be limited to verifying whether the procedural rules have been complied with, the decision at issue is properly reasoned and the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers (see paragraph 53).

2. The legal rule is that the public is to have access to the documents of the institutions and the power to refuse access is the exception. A decision denying access is valid only if it is based on one of the exceptions provided for in Article 4 of Decision 93/731 on public access to Council documents. These exceptions must be construed and applied

restrictively so as not to defeat the general principle enshrined in that decision. In that regard, the Council is obliged to consider in respect of each document requested whether, in the light of the information available to it, disclosure is in fact likely to undermine one of the public interests protected by the exceptions provided for in Article 4.1 of Decision 93/731. If those exceptions are to apply, the risk of the public interest being undermined must therefore be reasonably foreseeable and not purely hypothetical.

In such circumstances, the mere fact that certain documents contain information or negative statements about the political situation, or the protection of human rights, in a third country does not necessarily mean that access to them may be denied on the basis that there is a risk that the public interest may be undermined and is not, in itself and in the abstract, a sufficient basis for refusing a request for access. Rather, refusal of access to the documents in question must be founded on an analysis of factors specific to the contents or the context of each document, from which it can be concluded that, because of certain specific circumstances, disclosure of such a document would pose a danger to a particular public interest (see paragraphs 55-56, 60-61).

3. The exceptions provided for in Article 4.1 of Decision 93/731 on public access to Council documents must be interpreted in the light of the principle of the right to information and the principle of proportionality. Consequently, the Council must consider whether it is appropriate to grant partial access, confined to material which is not covered by the exceptions. In exceptional cases, a derogation from the obligation to grant partial access might be permissible where the administrative burden of blanking out the parts that may not be disclosed proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required (see paragraph 57).

*Summary:*

The applicant, a university lecturer and researcher, specialises in asylum and immigration matters. In a letter to the General Secretary of the Council, he requested access to certain documents related to the activities of the Centre for Information, Discussion and Exchange on Asylum (CIREA). The request related to certain documents drawn up by or with CIREA and reports of any joint missions for reports on missions carried out by Member States in third countries and sent to CIREA. The applicant also requested the list of the contact persons in the Member States involved with asylum cases.



Following the procedure provided for under Decision 93/731 on access by the public to Council documents, Mr Kuijer's request was, for the most part, rejected. The Council considered that the reports at issue contained detailed information on the general political situation and the protection of human rights in third countries, which could be construed as criticism of those countries and whose disclosure might therefore damage relations between the European Union and the countries concerned. As regards the "list of contact persons", it considered that it was for the Member States alone to decide whether this type of information could be made publicly available. The disclosure of such information, which had been provided for the specific purpose of establishing an internal network of contact persons to facilitate co-operation and co-ordination on asylum matters, would amount to a betrayal of the Member States' trust and might therefore undermine the public interest in the functioning of the exchange of information and co-ordination between Member States in this field.

Challenging the Council's decision, Mr Kuijer brought an action for annulment before the Court of First Instance of the European Communities. By judgment of 6 April 2000 (Case T-188/98, ECR II-1959), the Court of First Instance allowed his application after finding that the Council's decision did not satisfy the requirement to state reasons under Article 190 of the EC Treaty (now Article 253 EC) or the requirement to grant partial access to data not covered by the exception provided for in Article 4.1 of Decision 93/731. Following this judgment, the Council adopted a further decision in which it confirmed, with additional reasons, its refusal to disclose the reports in question on the basis of Article 4.1 of Decision 93/731. However, it decided to forward to the applicant the "list of contact persons" after removing all personal data from it. It was in this context that the applicant brought the present action.

Mr Kuijer adduced three grounds for annulment. The first was a violation of Decision 93/731, and in particular Article 4.1 thereof, and of the principle of proportionality. The second was a violation of the obligation to give reasons. The third was a violation of the basic principle of Community law that European citizens must be given the widest and most complete access possible to the documents of the Union.

After reiterating the cases in which public access to a document may be refused, the Court of First Instance found that neither the nature nor the content of the reports at issue was consonant with the reasons put forward by the Council in the contested decision to substantiate its refusal of the application for access. It

acknowledged that public interest grounds might justify preserving the confidentiality of certain passages of several of the reports at issue, where, for example, the people who had provided the information were cited. However, it criticised the Council for not having granted partial access to the documents in question. It noted in this connection that the granting of partial access, restricted to the passages not covered by the exception provided for in Article 4.1 of Decision 93/731, would have allowed the Council to protect the public interest which it had pleaded in support of its refusal to grant access to the entirety of each of the reports at issue, without undermining the principle of transparency and while observing the principle of proportionality. As regards the "list of contact persons", it found that the Council had erred in law in refusing the applicant's request regarding the information to which access was permitted in certain Member States. In refusing access to that information, which was already public, the contested decision was in breach of the principle of proportionality. In the light of all these considerations, the Court of First Instance allowed the first plea put forward by the applicant and annulled the Council's decision.

#### *Languages:*

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



#### *Identification:* ECJ-2004-3-015

**a)** European Union / **b)** Court of First Instance / **c)** Fifth Chamber / **d)** 26.02.2002 / **e)** T-17/00 / **f)** Willy Rothley and others v. European Parliament / **g)** *European Court Reports* II-00579 / **h)** CODICES (English, French).

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

1.2.2 **Constitutional Justice** – Types of claim – Claim by a private body or individual.  
 1.3.5.9 **Constitutional Justice** – Jurisdiction – The subject of review – Parliamentary rules.  
 1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.

*Keywords of the alphabetical index:*

Action for annulment, admissibility / European Union, Parliament, member / European Union, Parliament, decision, scope / Fraud, fight.

*Headnotes:*

1. An act of the European Parliament which on the one hand amends its internal Rules of Procedure by adding a Rule 9a concerning the internal investigations conducted by the European Anti-Fraud Office (OLAF) and on the other approves the Parliament's Decision concerning the terms and conditions of internal investigations, and which is one of the measures intended to protect the Communities' financial interests and to combat fraud and any other illegal activities which might be detrimental to those interests, goes in both its object and its effects beyond the internal organisation of the work of the Parliament. It may therefore be the subject of an action for annulment under Article 230.1 EC (see paragraphs 56-57).

2. An action brought by Members of the European Parliament against an act of that institution which applies without distinction to the Members of that institution in office at the time of its entry into force and to any other person subsequently coming to perform the same duties is inadmissible. Such an act applies without temporal limitation to objectively determined situations and has legal effects with respect to categories of persons envisaged generally and in the abstract. Such an act, although called a decision, therefore constitutes a measure of general application (see paragraphs 61-62, 78).

*Summary:*

After partially allowing the application for suspension of the operation of the Parliament's decision of 18 November 1999 on the amendments to the Rules of Procedure following the Interinstitutional Agreement of 25 May 1999 on the internal investigations conducted by the European Anti-Fraud Office (see Order of the President of the Court of First Instance of 2 May 2000, *Bulletin* 2003/2 [ECJ-2003-2-013], the Court of First Instance of the European Communities gave a ruling on the main action.

As requested by the European Parliament, the Court of First Instance examined the admissibility of the action brought by Mr Rothley and 70 other Members. For this purpose, it first considered whether the contested measure could be the subject of an action for annulment. It noted in this connection that the decision of 18 November 1999 produced legal effects going

beyond the internal organisation of the Parliament's work. From this point of view, therefore, it could form the subject of an action for annulment. The Court of First Instance then sought to establish whether the applicants had *locus standi* to bring proceedings and, more especially whether the contested measure constituted a "decision" of individual concern to them within the meaning of Article 230.4 EC. In that respect, the Court of First Instance found that the contested measure was applicable to objectively determined situations and produced its legal effects with respect to categories of persons envisaged in the abstract. Although entitled "decision", the contested measure therefore constituted a measure of general application. While, in some circumstances, a provision of a measure of general application could be of individual concern to certain persons, this did not apply to the instant case. Contrary to the applicants' submissions, none of the provisions of the contested measure supported the conclusion that there were any factors which might enable the applicants to be distinguished individually. Admittedly, the risk could not be excluded that, in conducting an investigation, the Anti-Fraud Office might perform an act prejudicial to the immunity enjoyed by every Member of the Parliament. However, if that were to occur, the individual concerned could avail himself of the judicial protection and the legal remedies provided for by the EC Treaty. But the existence of such a risk could not warrant altering the system of remedies and procedures established by the treaty and allow an action for annulment brought by persons who did not satisfy the conditions laid down in Article 230.4 EC to be declared admissible. Since the contested measure was not of individual concern to the applicants, the action was therefore finally dismissed as inadmissible.

*Languages:*

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.

*Identification:* ECJ-2004-3-016

**a)** European Union / **b)** Court of First Instance / **c)** Fourth Chamber enlarged / **d)** 28.02.2002 / **e)** T-227/99 and T-134/00 / **f)** Kvaerner Warnow Werft GmbH v. Commission of the European Communities / **g)** *European Court Reports* II-01205 / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

3.13 **General Principles** – Legality.

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

4.6.4 **Institutions** – Executive bodies – Composition.

*Keywords of the alphabetical index:*

European Union, Commission, decision, adoption procedure / European Union, Commission, member, independence.

*Headnotes:*

1. A Commission Decision to grant leave of absence to one of its Members has no legal basis either in the provisions of the EC Treaty or in the Commission's Rules of Procedure.

In a situation in which such a Decision is adopted in regard to a Member who is resigning, it cannot therefore affect his status as a Member of the Commission or deprive Article 215.4 EC of its legal force, which states that [s]ave in the case of compulsory retirement under Article 216, Members of the Commission shall remain in office until they have been replaced. The Decision cannot therefore be interpreted as a Decision to reduce the number of Members of the Commission, a Decision which only the Council, acting unanimously, may take under Article 213.1.2 EC. By its Decision the Commission merely gives the Member leave of absence, whilst awaiting the nomination by the Governments of the Member States, by common accord, of his replacement or the Council's decision not to fill the vacancy.

Therefore, the legality of a Commission decision, adopted in accordance with Article 219.2 and 219.3 EC and the provisions to which it refers, by a majority of the Members of the Commission present, is not called in question by a Commission decision to grant leave of absence to one of its Members (see paragraphs 57-58, 60).

2. A retiring Member of the Commission who is then elected to the European Parliament and whose parliamentary mandate does not commence until the date on which the European Parliament holds its inaugural session does not fail to comply with his duty of independence under Article 213.2.1 and 213.2.2 EC when, before that date, he takes part in a meeting of the College of Commissioners at which a decision is adopted.

Similarly, there is no evidence of a credible risk to the independence of that Member of the Commission before the new Parliament is constituted. The

intention of a Member, set out in his notice of resignation, to exercise his electoral mandate cannot in itself prove the loss of independence, no more than the mere statement that he belongs to a political party (see paragraphs 74-75).

*Summary:*

In 1992, Warnow Werft, an East German shipyard, was sold by the Treuhandanstalt, the public-law body entrusted with restructuring the undertakings of the former German Democratic Republic, to the Norwegian group Kvaerner. In 1993, 1994 and 1995, the Federal Republic of Germany granted it, pursuant to Directive 90/684, as amended by Directive 92/68, and with the Commission's authorisation, several sums by way of operating, investment and closure aid. In accordance with the provisions of the directive, reproduced in the contract clauses, the purchaser undertook, with regard to that yard, not to exceed a certain annual building capacity until 31 December 2005, unless that restriction under Community legislation was relaxed. The Commission took the view that the capacity restriction as stipulated had been exceeded both for 1997 and for 1998 and, in its Decisions 1999/675 and 2000/336, established the incompatibility of the aid granted and demanded that it be refunded as soon as possible. It was to secure the annulment of these decisions that Kvaerner Warnow Werft brought the present actions, joined for the purposes of the oral proceedings and the judgment. The contested decisions were indeed annulled by the Court of First Instance of the European Communities after it had noted, as requested by the applicant, that the Commission had committed a manifest error of appraisal in treating a capacity restriction as a limit on actual production.

This judgment was an opportunity for the Court of First Instance to reiterate certain rules governing the adoption of decisions within the Commission. Kvaerner Warnow Werft had pleaded the illegality of decision 1999/675, arguing that there had been irregularities in the composition of the Commission when the decision was adopted. According to the Court of First Instance, however, neither the absence of Commissioner Bangemann, who had been given leave of absence, nor the election of President Santer and Commissioner Bonino to the European Parliament affected the lawfulness of the contested decision. The pleas to this effect put forward by the applicant were therefore rejected.

*Languages:*

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



*Identification:* ECJ-2004-3-017

**a)** European Union / **b)** Court of First Instance / **c)** Third Chamber / **d)** 20.03.2002 / **e)** T-23/99 / **f)** LR AF 1998 A/S, formerly Løgstør Rør A/S v. Commission of the European Communities / **g)** *European Court Reports* II-01705 / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.  
 3.10 **General Principles** – Certainty of the law.  
 3.13 **General Principles** – Legality.  
 3.19 **General Principles** – Margin of appreciation.  
 5.2.1 **Fundamental Rights** – Equality – Scope of application.  
 5.3.13.6 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to a hearing.  
 5.3.13.8 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right of access to the file.  
 5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Rules of evidence.  
 5.3.38 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law.

*Keywords of the alphabetical index:*

Competition, administrative procedure / Fine, determination of the amount / Confidence, maintaining / Act, unlawful, committed in favour of a third party, non-reliance.

*Headnotes:*

1. Due regard is had to the requirements laid down in the case-law of the Court of First Instance, namely that an exchange of documents between the undertakings cannot in any event eliminate the Commission's own duty to ensure that during the investigation of an infringement of competition law the rights of defence of the undertakings concerned are respected when the Commission, while suggesting that the undertakings concerned facilitate access to the documents by exchanging documents among themselves, none the less itself ensures the right of access to the entire investigation file. The defence of one undertaking

cannot depend upon the goodwill of another undertaking which is supposed to be its competitor and against which the Commission has made similar allegations, since their economic and procedural interests often conflict (see paragraph 184).

2. It follows from a reading of Article 19.1 of Regulation no. 17, in conjunction with Articles 2 and 4 of Regulation no. 99/63, that the Commission must communicate the objections which it raises against the undertakings and associations concerned and may adopt in its decisions only those objections on which those undertakings and associations have had the opportunity to make known their views. However, there is no provision which prevents the Commission from sending to the parties after the statement of objections fresh documents which it considers support its argument, subject to giving the undertakings the necessary time to submit their views on the subject (see paragraphs 188, 190).

3. Where the Commission expressly states in its statement of objections that it will consider whether it is appropriate to impose fines on the undertakings and it indicates the main factual and legal criteria capable of giving rise to a fine, such as the gravity and the duration of the alleged infringement and whether that infringement was committed intentionally or negligently, it fulfils its obligation to respect the undertakings' right to be heard. In doing so, it provides them with the necessary means to defend themselves not only against the finding of an infringement but also against the imposition of fines. In those circumstances, the Commission is under no obligation to explain the way in which it will use each of those elements in determining the level of the fine. To give indications as regards the level of the fines envisaged, before the undertaking has been invited to submit its observations on the allegations against it, would be to anticipate the Commission's decision and would thus be inappropriate. Nor, consequently, is the Commission bound to inform the undertakings concerned, during the administrative procedure, that it intends to use a new method to calculate the amount of the fines. In particular, the Commission is not under an obligation to put the undertakings on notice by warning them of its intention to increase the general level of fines (see paragraphs 199, 206-208).

4. The principle that penal provisions may not have retroactive effect, enshrined in Article 7 ECHR as a fundamental right, is one which is common to all the legal orders of the Member States and takes its place among the general principles of law whose observance is ensured by the Community judicature. In that regard, although Article 15.4 of Regulation no. 17 provides that Commission decisions imposing fines for infringement of competition law are not of a



criminal nature, the Commission is none the less required to observe the general principles of Community law, and in particular the principle of non-retroactivity, in any administrative procedure capable of leading to fines under the Treaty rules on competition. Such observance requires that the fines imposed on an undertaking for infringing the competition rules correspond with those laid down at the time when the infringement was committed. However, having regard to the wide discretion which Regulation no. 17 leaves to the Commission, the fact that the latter introduces a new method of calculating fines, which may, in certain cases, lead to increased fines, but does not exceed the maximum level established by that regulation, cannot be regarded as an aggravation, with retroactive effect, of the fines as legally provided for by Article 15 of Regulation no. 17, which infringes the principles of legality and legal certainty (see paragraphs 219-221, 235).

5. In competition matters, the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed, since that framework is defined solely in Regulation no. 17 (see paragraph 234).

6. As regards the setting of the amount of fines for infringements of the competition rules, the Commission exercises its powers within the limits of the discretion conferred on it by Regulation no. 17. Traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretion will be maintained. It follows that undertakings involved in an administrative procedure which may lead to a fine cannot acquire a legitimate expectation that the Commission will not exceed the level of fines previously applied (see paragraphs 241, 243).

7. Article 184 of the Treaty (now Article 241 EC) expresses a general principle conferring upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a Decision of direct and individual concern to that party, the validity of previous acts of the institutions which, although they are not in the form of a regulation, form the legal basis of the Decision under challenge, if that party was not entitled under Article 173 of the Treaty (now, after amendment, Article 230 EC) to bring a direct action challenging those acts by which it was thus affected without having been in a position to ask that they be declared void. Since Article 184 of the Treaty is not intended to enable a party to contest the applicability of any measure of general application in support of any action whatsoever, the general measure claimed to be illegal must be applicable, directly or indirectly, to the issue with which the action is concerned and there must be a direct legal

connection between the contested individual Decision and the general measure in question.

In that regard, although the guidelines adopted by the Commission on the method of setting fines imposed pursuant to Article 15.2 of Regulation no. 17 and Article 65.5 of the ECSC Treaty do not constitute the legal basis of the decision imposing a fine on an economic operator, as that decision is based on Articles 3 and 15.2 of Regulation no. 17, they determine, generally and abstractly, the method which the Commission has bound itself to use in assessing the fine imposed by the decision and, consequently, ensure legal certainty on the part of the undertakings. Thus, provided that it is apparent that the Commission actually assessed the fine imposed on the economic operator in accordance with the general method which it laid down for itself in the guidelines, there is a direct legal connection between the individual Decision in issue and the general measure represented by the guidelines. Since the economic operator concerned was not in a position to ask that the guidelines be declared void, as a general measure, the guidelines may form the subject-matter of an objection of illegality (see paragraphs 272-276).

8. Even supposing that the Commission granted too high a reduction of the fine to another undertaking for an infringement of the competition rules, respect for the principle of equal treatment must be reconciled with the principle of legality, according to which a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party (see paragraph 367).

### *Summary:*

After being found guilty of participating in a series of agreements and concerted practices within the meaning of Article 85.1 of the EC Treaty (now Article 81.1 EC), the Danish company LR AF 1998 A/S, which specialises in the manufacture and sale of pre-insulated pipes used mainly in district heating systems, lodged the instant appeal. Pursuant to Article 173.4 of the EC Treaty (now Article 230.4 EC), the company sought annulment of decision 1999/60, in which the Commission had found that it had infringed EC competition regulations and had imposed a heavy fine on it. In support of its application, the company essentially put forward five pleas in law: factual errors in applying Article 85.1 of the Treaty, infringement of the rights of defence, violation of general principles and erroneous appreciation of the criteria for setting the fine, breach of the obligation to state reasons when setting the fine and excessive interest rate applied to the fine in the event of failure to pay immediately.

In the judgment, in which it dismissed each of the complaints lodged by the applicant and, consequently, the appeal in its entirety, the Court first drew attention to the importance of respecting the rights of defence in the context of the administrative procedure relating to infringement of EU competition regulations. With regard to both access to the file and the statement of objections, it drew attention to the limited extent of the Commission's powers. It also stressed the need to transpose the principle of non-retroactivity of criminal provisions to any administrative procedure capable of leading to fines under the Treaty rules on competition. Finally, with regard to the calculation of the fine imposed on the applicant, the Court clarified the legal framework within which the Commission exercised its prerogatives and the relevant procedural safeguards intended to protect the rights of the public.

#### *Languages:*

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



#### *Identification:* ECJ-2004-3-018

**a)** European Union / **b)** Court of First Instance / **c)** First Chamber / **d)** 24.03.2002 / **e)** T-218/01 / **f)** Laboratoire Monique Rémy SAS v. Commission of the European Communities / **g)** *European Court Reports* II-02139 / **h)** CODICES (English, French).

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

1.4.3 **Constitutional Justice** – Procedure – Time-limits for instituting proceedings.  
3.10 **General Principles** – Certainty of the law.

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

Time-bar / Error, excusable / *Force majeure* / Circumstance, unforeseeable / Code of Good Administrative Behaviour.

#### *Headnotes:*

1. The concepts of *force majeure* and unforeseeable circumstances contain, besides an objective element relating to abnormal circumstances unconnected

with the party in question, a subjective element involving the obligation, on his part, to guard against the consequences of the abnormal event by taking appropriate steps without making unreasonable sacrifices. In particular, the party in question must pay close attention to the course of the procedure and, in particular, demonstrate diligence in order to comply with the prescribed time-limits. Thus, the concepts of *force majeure* and unforeseeable circumstances do not apply to a situation in which, objectively, a diligent and prudent person would have been able to take the necessary steps before the expiry of the period prescribed for instituting proceedings (see paragraph 17).

2. The fact that the Commission does not refer, in a measure, to the possibility of starting judicial proceedings and/or of lodging a complaint with the European Ombudsman, in accordance with Article 230 EC or Article 195 EC, is a breach of the obligations which that institution has taken upon itself by its adoption of the Code of Good Administrative Behaviour for staff of the European Commission in their relations with the public which is set out in the Annex to the Rules of Procedure of the Commission (see paragraph 25).

3. The concept of excusable error, the direct source of which is a concern for observance of the principles of legal certainty and of the protection of legitimate expectations, can concern only exceptional circumstances in which, in particular, the conduct of the institution concerned was, either alone or to a decisive extent, such as to give rise to a pardonable confusion in the mind of a party acting in good faith and exercising all the diligence required of a normally prudent person. Although such may be the case where the commencement of an action out of time is caused by the provision, by the institution concerned, of wrong information creating pardonable confusion in the mind of such a person, or where the breach by the institution concerned of certain of its rules of procedure, such as, for example, a code of behaviour, has created such confusion, it cannot be the case, where the person concerned cannot harbour any doubt that the measure notified to him is in the nature of a decision. Indeed, in the latter case, the absence of information relating to the possibility of an appeal cannot in any way mislead that person (see paragraph 30).

#### *Summary:*

For over seven years, the Laboratoire Monique Rémy received financial assistance from the European Agricultural Guidance and Guarantee Fund (EAGGF), Guidance Section, to fund a project on the use of irises in the luxury perfume and food flavouring

industry. The laboratory, which challenged the lawfulness of the Commission's decision to withdraw this financial assistance, applied to the Court of First Instance of the European Communities for this decision to be annulled. In response, the Commission raised a plea of inadmissibility under Article 114 of the Court's Rules of Procedure in part on the ground that it was brought out of time and in part on the ground of infringement of Article 44 of the Rules of Procedure.

After drawing attention to the rules governing the time-limits within which proceedings for annulment must be instituted, as provided for in Article 230 EC, the Court held that the application lodged by the Laboratoire Monique Rémy was, in the instant case, out of time. On no account could the time taken by the post office to deliver a registered letter constitute unforeseeable circumstances or an instance of *force majeure*. Moreover, the existence of an undertaking by the French postal service to deliver a letter within a certain period could not, by itself, render any delay in its delivery unforeseeable. The Court also pointed out that failure to lodge the appeal within the time-limit was all the more inexcusable for the fact that Article 43.6 of the Rules of Procedure authorised applicants to send a copy of the signed original of the application by fax or e-mail, in order to meet the deadline, on condition that the original was lodged with the Court Registry within the next 10 days. Neither the applicant nor its counsel had made use of this possibility.

With regard to the argument that the Commission had infringed the Code of Good Administrative Behaviour, which it had undertaken to observe in its relations with the public, by failing to mention in the disputed decision the possibility of starting judicial proceedings or of lodging a complaint with the European Ombudsman, the Court pointed out that this breach was unrelated to the lodging of the application out of time. Even if this infringement had been committed, according to the Court, it could not have led to an excusable error on the part of the applicant, since the latter obviously knew that the measure notified to it was of the nature of a decision, the lawfulness of which it could therefore challenge. As only the existence of an excusable error allowed a derogation from the rules governing time-limits for initiating proceedings, the application was dismissed as manifestly inadmissible.

#### *Languages:*

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



#### *Identification:* ECJ-2004-3-019

**a)** European Union / **b)** Court of First Instance / **c)** Third Chamber / **d)** 10.04.2002 / **e)** T-209/00 / **f)** Frank Lamberts v. European Mediator / **g)** *European Court Reports* II-02203 / **h)** CODICES (English, French).

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

3.10 **General Principles** – Certainty of the law.  
3.19 **General Principles** – Margin of appreciation.  
4.12 **Institutions** – Ombudsman.

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

Action for damages / Liability, non contractual / Ombudsman, European, liability / Competition, staff members.

#### *Headnotes:*

1. Under Articles 235 EC and 288.2 EC, and Decision 88/591 establishing a Court of First Instance of the European Communities, as amended by Decision 1999/291, the Court of First Instance has jurisdiction in disputes relating to compensation for damage caused by Community institutions. The term institution used in Article 288.2 EC must not be understood as referring only to the Community institutions listed in Article 7 EC. The term also covers, with regard to the system of non-contractual liability established by the Treaty, all other Community bodies established by the Treaty and intended to contribute to achievement of the Community's objectives. Consequently, measures taken by those bodies in the exercise of the powers assigned to them by Community law are attributable to the Community, according to the general principles common to the Member States referred to in Article 288.2 EC. The Court of First Instance therefore has jurisdiction to entertain an action for compensation for damage allegedly sustained as a result of negligence on the part of the European Ombudsman in the performance of the duties assigned to him by the Treaty (see paragraphs 49, 51-52).

2. The Court of First Instance's jurisdiction to rule on actions alleging negligence on the part of the European Ombudsman is not affected by the case-law which states that an action for damages is

inadmissible where it is based on liability resulting from the Commission's failure to institute proceedings under Article 226 EC, since that institution is in any case under no obligation to institute such proceedings. The role which the Treaty and Decision 94/262 on the regulations and general conditions governing the performance of the Ombudsman's duties have assigned to the Ombudsman differs, at least in part, from that assigned to the Commission in the context of proceedings under Article 226 EC for failure to fulfil obligations. In the context of such proceedings the Commission exercises the powers conferred on it by Article 211 EC, first indent, in the general Community interest, in order to ensure the application of Community law. Moreover, in that context it is for the Commission to decide whether it is appropriate to bring such proceedings.

However, as regards the manner in which the Ombudsman deals with complaints, it is necessary to take into account the fact that the Treaty confers on all citizens both the subjective right to refer to the Ombudsman complaints concerning instances of maladministration on the part of Community institutions or bodies, apart from the Court of Justice and the Court of First Instance in the exercise of their judicial functions, and the right to be informed of the result of inquiries conducted in that regard by the Ombudsman under the conditions laid down by Decision 94/262 and the implementing provisions. Decision 94/262 also assigns to the Ombudsman not only the task of identifying and seeking to eliminate instances of maladministration on behalf of the public interest but also that of seeking, so far as is possible, a settlement that is in accordance with the specific interest of the citizen concerned. The Ombudsman has indeed very wide discretion as regards the merits of complaints and the way in which he deals with them, and in so doing he is under no obligation as to the result to be achieved. However, even if review by the Community judicature must consequently be limited, it is possible that in very exceptional circumstances a citizen may be able to demonstrate that the Ombudsman has made a manifest error in the performance of his duties likely to cause damage to the citizen concerned (see paragraphs 53-57).

3. The action for damages provided for under the Treaty was introduced as an autonomous form of action, with a particular purpose to fulfil within the system of legal remedies and subject to conditions of use dictated by its specific purpose. Although actions for annulment and for failure to act seek a declaration that a legally binding measure is unlawful or that such a measure has not been taken, an action for damages seeks compensation for damage resulting from a measure, whether legally binding or not, or from conduct, attributable to a Community institution or

body. Thus, the European Ombudsman's wrongful conduct in connection with the attempt to reach a non-judicial settlement of a case of maladministration may adversely affect citizens' rights (see paragraphs 58-59).

4. Article 288 EC makes clear that for the Community to incur liability the applicant must prove that the conduct of which the body concerned is accused was unlawful, that damage occurred and that there was a causal link between that conduct and the damage complained of (see paragraph 62).

5. In the institution of the European Ombudsman, the Treaty has given citizens of the Union, and more particularly officials and other servants of the Community, an alternative remedy to that of an action before the Community Court in order to protect their interests. That alternative non-judicial remedy meets specific criteria and does not necessarily have the same objective as judicial proceedings. Moreover, as is clear from Article 195.1 EC and Article 2.6 and 2.7 of Decision 94/262 on the regulations and general conditions governing the performance of the Ombudsman's duties, the two remedies cannot be pursued at the same time. Indeed, although complaints submitted to the Ombudsman do not affect time-limits for appeals to the Community Court, the Ombudsman must none the less terminate consideration of a complaint and declare it inadmissible if the citizen simultaneously brings an appeal before the Community Court based on the same facts. It is therefore for the citizen to decide which of the two available remedies is likely to serve his interests best. Where the complaint is brought by a servant of the Communities, the applicant is, in any event, deemed to be aware of the procedure for bringing an action before the Court of First Instance since that procedure is expressly laid down in the Staff Regulations (see paragraphs 65-67).

6. Under Article 2.5 of Decision 94/262 on the regulations and general conditions governing the performance of the Ombudsman's duties and Article 3.2 of the implementing provisions, the Ombudsman may advise the citizen concerned to apply to another authority and, where appropriate, to bring an action for annulment before the Court of First Instance. It may be in the interests of the proper performance of the task entrusted to him by the Treaty for the Ombudsman to routinely inform the citizen concerned of the measures to take in order to best serve his interests, including indicating to him the judicial remedies open to him and the fact that referring a complaint to the Ombudsman does not suspend the time-limit for pursuing such remedies. There is, however, no express provision requiring the Ombudsman to take such steps. The Ombudsman cannot, therefore, be accused of having failed to draw



the applicant's attention to the fact that his complaint had no suspensive effect and of not advising him to bring an action before the Community Court. The Ombudsman did not, therefore, in this context commit a breach of administrative duty which could give rise to non-contractual liability on the part of the Community (see paragraphs 68-69).

7. Neither Decision 94/262 on the regulations and general conditions governing the performance of the Ombudsman's duties nor the implementing provisions specify a time-limit within which the European Ombudsman must deal with complaints. It was only in his annual report for 1997 that the Ombudsman stated that the objective should be to carry out the necessary inquiries into a complaint and inform the citizen of the outcome within one year, unless there are special circumstances which require a longer investigation (antepenultimate paragraph of the foreword). In that statement the Ombudsman merely set himself an indicative, not a mandatory, time-limit for dealing with complaints. It must be stated, however, that in order to comply with the requirements of proper administration, in particular, the procedure before the Ombudsman must be completed within a reasonable time, to be determined according to the circumstances of the case. Accordingly, account should be taken of the fact that the Treaty and Decision 94/262 conferred on the Ombudsman not only the task of seeking, so far as possible, a settlement in accordance with the specific interest of the citizen concerned, but also that of identifying and seeking to eliminate instances of maladministration in the public interest. Where, following intervention by the Ombudsman in connection with the applicant's complaint, the Commission, in the interests of proper administration, has altered its administrative practice with regard to inviting candidates to attend the oral tests of a competition, the fact that almost 16 months elapsed between the applicant making his complaint and the Ombudsman taking his Decision cannot be regarded as a breach of the Ombudsman's duties (see paragraphs 74-77).

8. Although Decision 94/262 on the regulations and general conditions governing the performance of the Ombudsman's duties confers on the Ombudsman the task of seeking, so far as possible, a settlement in accordance with the specific interest of the citizen concerned, he enjoys very wide discretion in that regard. Consequently, the Ombudsman cannot incur non-contractual liability save where he has committed a flagrant and manifest breach of his obligations in that connection. Article 3.5 of Decision 94/262 and Article 6 of the implementing provisions state that the Ombudsman must cooperate with the institution concerned in order to achieve that objective and

cannot, in principle, merely forward the opinions of the institution to the citizen concerned. He must in particular decide whether a settlement acceptable to the citizen may be sought and adopt to that end an active role with regard to the institution concerned (see paragraphs 79-80).

9. A breach of Article 7 of the implementing provisions of Decision 94/262 on the regulations and general conditions governing the performance of the Ombudsman's duties, under which the Ombudsman may make a critical remark where the instance of maladministration has no general implications, cannot in any event cause damage to the applicant. Neither a critical remark nor a report which may contain a recommendation with regard to the institution concerned is designed to protect the individual interests of the citizen concerned against damage which may arise as a result of maladministration on the part of a Community institution or body (see paragraphs 86-87).

#### *Summary:*

The instant case arose in connection with the applicant's participation in an internal competition organised by the Commission of the European Communities with a view to the establishment as officials of members of the temporary staff. He had failed the oral test. Attributing his failure to the fact that, as he had been involved in an accident, he had been taking medication that reduced his ability to concentrate, he twice asked the chair of the selection board to reconsider his case. He pointed out that he had not requested a postponement of his oral test because there was a clause in the document inviting him to attend that test which stated that the organisation of the tests did not permit any change in the times communicated. He also pointed out that he had been unaware of the side-effects of the medication until he took the test. The Commission twice refused his request. Immediately after the initial refusal, Mr Lamberts lodged a complaint with the European Ombudsman. At the end of the procedure, which lasted almost 16 months, the Ombudsman sent Mr Lamberts his decision, in which he stated that, for the sake of sound administration, the Commission should as a general rule in future include a clause in the invitations to oral tests informing candidates that the date indicated may be changed in exceptional circumstances. Nevertheless he concluded that given that "this aspect of the case concerns procedures relating to specific events in the past, it is not appropriate to pursue a friendly settlement of the matter". After one more – unsuccessful – attempt to persuade the Commission and the Ombudsman to reconsider his case, Mr Lamberts brought an action for non-contractual liability against the Ombudsman

and the European Parliament. In response, they raised a plea of inadmissibility pursuant to Article 114 of the Rules of Procedure of the Court of First Instance of the European Communities.

By order of 22 February 2001 the Court of First Instance dismissed the application as inadmissible in so far as it had been brought against the Parliament. It noted that, under Article 195.3 EC, the Parliament had no legal means of influencing the action taken by the Ombudsman in relation to a complaint and that any mistakes made by the Ombudsman in the performance of the duties assigned to him by the treaty could under no circumstances be attributed to it. On the same date, given that it considered that the evidence in the file did not contain sufficient information for it to rule on the plea of inadmissibility raised by the Ombudsman without opening an oral procedure, the Court joined the plea of inadmissibility to the substance. It was therefore by this decision that the Court gave its final ruling on Mr Lamberts' application in so far as it had been brought against the Ombudsman, holding that the application was admissible but unfounded. Although it was indeed impossible to rule out the possibility that the Ombudsman may make a manifest error in the performance of his duties under the EC Treaty and consequently cause damage to the citizen concerned, this had not occurred in the instant case. As the applicant had not demonstrated that the Ombudsman had committed any breach of his administrative duties in dealing with his complaint, his application was dismissed.

*Languages:*

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



*Identification:* ECJ-2004-3-020

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 18.04.2002 / **e)** Opinion 1/00 / **f)** / **g)** *European Court Reports* I-03493 / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

1.3.5.1 **Constitutional Justice** – Jurisdiction – The subject of review – International treaties.

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

2.1.3.2.2 **Sources of Constitutional Law** – Categories – Case-law – International case-law – Court of Justice of the European Communities.

4.17.1 **Institutions** – European Union – Institutional structure.

4.17.2 **Institutions** – European Union – Distribution of powers between Community and member states.

*Keywords of the alphabetical index:*

International agreement / Aviation, Common Aviation Area / European Communities, autonomy, Community legal order / Interpretation, uniform.

*Headnotes:*

1. The effect of the policies reflected in the proposed agreement on the establishment of a European Common Aviation Area (the ECAA Agreement) is, first, to bring about the juxtaposition within a single geographical area (that of the ECAA) of rules of Community law and rules replicating them, which will not be applied or interpreted systematically by the same authorities or bodies. That might give rise to differences prejudicial to the operation of the ECAA Agreement. Another consequence of those policies is that the Commission is made responsible for applying a number of rules in that agreement outside the Community, thereby creating specific relations between the Community and the States Parties.

In that context, with a large number of the rules of the ECAA Agreement being essentially rules of Community law, it is incumbent on the Court to ascertain whether the agreement before it includes adequate measures, at least comparable to those laid down by the Agreement on the European Economic Area, to guarantee that neither the endeavour to ensure uniform interpretation of those rules nor the new institutional links established by the ECAA Agreement between the Community and the States Parties affect the autonomy of the Community legal order. It is particularly important that the mechanisms in the agreement should prevent the Community, in the event of a dispute with a State Party, from being bound by a particular interpretation of the rules of Community law referred to in the agreement. Thus, the agreement must make it possible to anticipate and prevent any such undermining of the objective

enshrined in Article 220 EC that Community law should be interpreted uniformly and of the Court's function of reviewing the legality of the acts of the Community institutions.

Preservation of the autonomy of the Community legal order requires therefore, first, that the essential character of the powers of the Community and its institutions as conceived in the Treaty remain unaltered. Second, it requires that the procedures for ensuring uniform interpretation of the rules of the ECAA Agreement and for resolving disputes will not have the effect of binding the Community and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of Community law referred to in that agreement (see paragraphs 10-13).

2. The proposed agreement on the establishment of a European Common Aviation Area (the ECAA Agreement) does not affect the essential character of the powers of the Community and its institutions to such an extent that it must be declared to be incompatible with the Treaty.

First, the ECAA Agreement will not affect the allocation of powers between the Community and the Member States. The Member States will not be parties to the ECAA Agreement. Thus, there is no risk of the Joint Committee set up by Article 25 of the proposed agreement or a court seised of a dispute concerning the interpretation of certain provisions of the agreement, applying or interpreting "Contracting Party" in such a way as to define the respective powers of the Member States and the Community. Furthermore, the fact that the Member States are not parties to the ECAA Agreement ensures that disputes between the Member States, or between those States and the Community institutions, concerning interpretation of the rules of Community law applicable to air transport will continue to be dealt with exclusively by the machinery provided for by the Treaty. The procedure for dispute resolution by the Joint Committee set up by Article 27 of the proposed agreement concerns only disputes between the States Parties or disputes between those States, or one of them, and the Community. Consequently, it does not conflict with Article 292 EC, under which Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein.

Second, although the proposed ECAA Agreement affects the powers of the Community institutions, it does not alter the essential character of those powers and, accordingly, does not undermine the autonomy of the Community legal order.

So far as the Commission is concerned, the provisions of the proposed agreement are directly inspired by the provisions of the Treaty defining its responsibilities in the field of competition with regard to the Member States. The fact that the basic rules of the ECAA Agreement to be implemented by the Commission together with the States Parties are identical to those of Community law, and the choice of the single-pillar structure, must also be regarded as guarantees that the essential character of the powers of the Community institutions will remain unchanged.

As regards the Court, the indispensable conditions for safeguarding the essential character of its powers are satisfied by the provisions of the proposed ECAA Agreement. First, Article 17.3 of the proposed agreement makes the Court responsible for ruling on [a]ll questions concerning the legality of decisions taken by Community institutions under this Agreement. Thus, the Court's exclusive task of reviewing the legality of acts of the Community institutions, whether the latter are acting under the Treaty or under another international instrument, conferred on it by, *inter alia*, Articles 230 EC and 234 EC, is not called in question. Second, in every case where the proposed agreement confers powers on the Court, the binding nature of the latter's decisions is safeguarded (see paragraphs 14-17, 21-25).

3. The mechanisms for ensuring uniform interpretation of the rules of the agreement on the establishment of a European Common Aviation Area (the ECAA Agreement) and for resolving disputes will not have the effect of binding the Community and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of Community law incorporated in the agreement.

First, the proposed agreement provides that the rules of the ECAA Agreement will, in accordance with the intention of the Contracting Parties, retain the general characteristics of Community law. Second, the procedures for preliminary references provided for in Article 23.2 of, and Protocol IV to, the proposed agreement, which give the States Parties the power to authorise their courts to make references to the Court, may be considered to be compatible with the Treaty. Those provisions are certainly not intended to enable courts of States Parties to bring matters before the Court as of right. However, the Court has already acknowledged, as regards the equivalent provisions of the Agreement on the European Economic Area (the EEA Agreement), that States may be allowed to decide whether or not to permit their courts and tribunals to make referrals to the Court. The Court has also found that courts or tribunals other than those of Member States could

refer questions to it for a preliminary ruling, provided that the answers given by it were binding on the referring courts. That is certainly the case in the proposed ECAA Agreement, since referrals made to the Court under Article 23.2 thereof, the procedures for which are laid down in the various options provided for in Protocol IV, will enable it, in accordance with the terms of the Protocol, to give binding rulings on the interpretation and validity of the rules of the ECAA Agreement.

Third, the mechanisms in Article 23.1 of the proposed agreement relating to the interpretation of provisions of the ECAA Agreement which are identical in substance to provisions of Community law ensure that the case-law of the Court will be adequately taken into account by the Contracting Parties. Although recognition of the binding authority of the decisions of the Commission and the case-law of the Court is restricted by that provision to decisions and rulings given prior to the date of signature of the ECAA Agreement, that fact does not, of itself, give rise to incompatibility with the Treaty, since adequate procedures are put in place to ensure that the Court's later case-law will not be affected, thus guaranteeing uniform interpretation of the rules of Community law.

Fourth, no objection can be taken to Article 23.3 of the proposed agreement. It governs cases in which a court of a Contracting Party, giving judgment at last instance, is not able to make a reference to the Court, and provides for any judgment of such a court to be sent to the Joint Committee, which then acts so as to preserve the homogeneous interpretation of the ECAA Agreement.

Lastly, the mechanism for resolving disputes established by Article 27 of the proposed agreement, a procedure to which Article 23.3 refers, is based on the procedures provided for by the EEA Agreement, which the Court found to be compatible with the Treaty, and is presented in the proposed agreement in a more restrictive form (see paragraphs 29-34, 36, 42, 44-45).

#### *Summary:*

The Court of Justice of the European Communities received a request for an opinion from the European Commission pursuant to Article 300.6 EC. In the request, the Commission questioned the Court about the compatibility with the EC Treaty of a draft agreement to establish a European Common Aviation Area (ECAA), to be negotiated between the Republic of Bulgaria, the Czech Republic, the Republic of Estonia, the European Community, the Republic of Hungary, the Republic of Iceland, the Republic of

Latvia, the Republic of Lithuania, the Kingdom of Norway, the Republic of Poland, Romania, the Slovak Republic and the Republic of Slovenia.

The draft ECAA Agreement makes access to the air transport markets of the Contracting Parties subject to a single set of rules based on the relevant legislation in force in the Community, guaranteeing free market access, freedom of establishment, equal conditions of competition and common safety and environmental rules. The proposed agreement is inspired by goals similar to those of the Agreement on the European Economic Area (EEA Agreement) in that it aims to extend the *acquis communautaire* to new countries, by introducing in a larger geographical area rules which are essentially those of Community law. However, the ECAA Agreement has a different institutional structure from that of the EEA Agreement. Whereas the latter is based on two "pillars": the Communities on the one hand and the EFTA (European Free Trade Association) on the other, the draft Agreement would base the ECAA on a single "pillar", so that the task of implementing the agreement and its annexes would be entrusted to one and the same body, namely the European Commission, whose powers in respect of competition and other air transport rules would be as broad with regard to the States Parties to the Agreement as with regard to the member States of the Community. In this context, the Court would be given sole jurisdiction to review the legality of decisions taken on the basis of the ECAA Agreement, particularly by the Commission. Provision is also made for optional procedures for requests for preliminary rulings by the Court where difficulties arise in interpreting the provisions of the Agreement.

Having outlined the characteristics of the draft ECAA Agreement, the Court found that since a large number of the rules it contained were essentially rules of Community law, it had to ensure that it included measures capable of guaranteeing that neither the attempt to ensure uniform interpretation of those rules nor the new institutional links established between the Community and the States Parties affected the autonomy of the Community legal order. In this connection, it was particularly important that the mechanisms in the agreement should prevent the Community, in the event of a dispute with a State Party, from being bound by a particular interpretation of the rules of Community law referred to in the agreement. It was also important to ensure that the powers of the Community and its institutions as provided for in the Treaty would remain unaltered. Having examined each of these aspects, the Court was able to conclude that the draft ECAA Agreement, which contained broadly comparable safeguards to those of the EEA Agreement, would not undermine the autonomy of the Community legal order.



Accordingly, the system of legal supervision which it proposed to establish was declared compatible with the EC Treaty.

#### *Languages:*

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



#### *Identification:* ECJ-2004-3-021

**a)** European Union / **b)** Court of First Instance / **c)** First Chamber enlarged / **d)** 03.05.2002 / **e)** T-177/01 / **f)** Jégo-Quéré & Cie SA v. Commission of the European Communities / **g)** *European Court Reports* II-02365 / **h)** CODICES (English, French).

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

1.3.5.2.2 **Constitutional Justice** – Jurisdiction – The subject of review – Community law – Secondary legislation.

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

1.4.9.2 **Constitutional Justice** – Procedure – Parties – Interest.

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

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

European Community, measures of general application, judicial review / Act, of direct and individual concern to the applicant.

#### *Headnotes:*

1. The procedures provided for in Article 234 EC on the one hand and Articles 235 EC and 288.2 EC on the other can no longer be regarded, in the light of Articles 6 and 13 ECHR and of Article 47 of the Charter of Fundamental Rights, as guaranteeing a public right to an effective remedy enabling citizens to contest the legality of Community measures of general application which directly affect their legal situation. Firstly, as regards proceedings before a national court giving rise to a reference to the Court of Justice for a preliminary ruling under Article 234 EC,

there are, in some cases, no acts of implementation capable of forming the basis of an action before national courts. The fact that an individual affected by a Community measure may be able to bring its validity before the national courts by violating the rules it lays down and then asserting their illegality in subsequent judicial proceedings brought against him or her does not constitute an adequate means of judicial protection. Individuals cannot be required to breach the law in order to gain access to justice. Secondly, the procedural route of an action for damages based on the non-contractual liability of the Community, as provided for in Articles 235 EC and 288.2 EC, does not provide satisfactory protection for the interests of the individual affected in all cases. Such an action cannot result in the removal from the Community legal order of a measure which is nevertheless necessarily held to be illegal. Given that it presupposes that damage has been directly occasioned by the application of the measure in issue, such an action is subject to different criteria of admissibility and substance from those governing actions for annulment, and does not therefore place the Community judicature in a position whereby it can carry out the comprehensive judicial review which it is its task to perform. In particular, where a measure of general application is challenged in the context of such an action, the review carried out by the Community judicature does not cover all the factors which may affect the legality of that measure, being limited instead to the censuring of sufficiently serious infringements of rules of law intended to confer rights on individuals.

However, such a circumstance cannot be a legitimate reason for changing the system of remedies and procedures established by the Treaty, which is designed to give the Community judicature the power to review the legality of the institutions' acts. In no case can such a circumstance allow an action for annulment brought by a natural or legal person which does not satisfy the conditions laid down by Article 230.4 EC to be declared admissible (cf. paragraphs 45-48).

2. There is no compelling reason to read into the notion of individual concern, within the meaning of Article 230.4 EC, a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee. In those circumstances, and having regard to the fact that the EC Treaty established a complete system of legal remedies and procedures designed to permit the Community judicature to review the legality of measures adopted by the institutions, the strict interpretation, applied until now, of the notion of a person individually concerned according to Article 230.4 EC must be reconsidered. In the light of the foregoing,

and in order to ensure effective judicial protection for individuals, a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question genuinely and immediately affects his legal position by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard (see paragraphs 49-51).

### Summary:

Does the need to ensure effective judicial protection for individuals in the European Union imply that the conventional interpretation of the notion of a person individually concerned within the meaning of Article 230.4 EC must be reconsidered? This is, essentially, the question that the Court of First Instance was required to determine in the instant case.

In order to enable the stock of hake threatened by overfishing in several Community fishing grounds to recover, the Commission introduced Regulation no. 1162/2001, which included various measures designed to reduce catches of juvenile hake. Although it fishes mainly for whiting, Jégo-Quéré considered itself to be penalised by these measures, so it lodged an application under Article 230.4 EC for the annulment of the provisions of Regulation no. 1162/2001 by which it was adversely affected. The Commission questioned whether the appeal was admissible and raised an objection of inadmissibility under Article 114.1 of the Court of First Instance's Rules of Procedure. It was on this question of Jégo-Quéré's *locus standi* that the Court was required to rule in the instant case.

The Commission's main argument in support of its objection of inadmissibility was that Jégo-Quéré was not individually concerned, within the meaning of Article 230.4 EC, by the impugned provisions, as they affected all operators fishing in the areas concerned in the same way. However, according to Jégo-Quéré, Regulation no. 1162/2001 was not of general application but was a bundle of individual decisions which could be contested separately. A finding that its action for annulment was inadmissible would leave it without any remedy, since no act had been adopted at national level against which legal proceedings were possible. Relying on Article 6 ECHR, it therefore asked the Court of First Instance to make a broad interpretation of Article 230 EC.

The Court rejected Jégo-Quéré's argument that the impugned provisions were not of general application but examined whether the company could nonethe-

less be considered directly and individually concerned by them. Following the most orthodox reasoning process, the Court came to the conclusion that while Jégo-Quéré was directly concerned by the impugned measures, it could not, in the light of long-established Community case-law, be considered to be individually concerned by them. However, instead of finding that the company's appeal was inadmissible, the Court took its reasoning an unprecedented step further and examined whether a finding of inadmissibility in respect of an application for annulment in a case such as this would deprive the applicant of its right to an effective judicial remedy. Apart from an action for annulment, the Court found, there were two other procedural routes by which a case could be brought before the Community judicature – which alone had jurisdiction for this purpose – to obtain a ruling that a Community measure was unlawful, namely proceedings before a national court giving rise to a reference to the Court of Justice for a preliminary ruling under Article 234 EC and an action based on the non-contractual liability of the Community, as provided for in Article 235 EC and Article 288.2 EC. Yet, none of these procedures guaranteed persons in a case like the present one the right to an effective remedy enabling them to contest the legality of Community measures of general application which directly affected their legal situation. Accordingly, referring to the Opinion of Advocate General Jacobs in the case of *Unión de Pequeños Agricultores v. Council* of 25 July 2002 (C-50/00 P, *European Court Reports* I-6677), the Court of First Instance set out to redefine the notion of a person individually concerned, as referred to in Article 230.4 EC. Departing from the long-established strict interpretation, it conceded that a natural or legal person was individually concerned by a Community measure of general application if the measure in question definitely and immediately affected his legal position by restricting his rights or by imposing obligations on him. The Court of First Instance found that this was true in the instant case, so it ruled that the objection of inadmissibility raised by the Commission had to be dismissed.

### Supplementary information:

On 25 July 2002, the Court of Justice gave its final judgment on appeal in the case of *Unión de Pequeños Agricultores*. In rejecting the Advocate General's ground-breaking proposals – precisely those upon which the Court of First Instance had relied in the instant case – the Court of Justice sought to uphold its established case-law, dooming to early failure the new precedent that the Court of First Instance had hoped to establish through its Jégo-Quéré judgment.

*Languages:*

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.

*Identification:* ECJ-2004-3-022

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 11.07.2002 / **e)** C-60/00 / **f)** Mary Carpenter v. Secretary of State for the Home Department / **g)** *European Court Reports* I-06279 / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

3.26.1 **General Principles** – Principles of Community law – Fundamental principles of the Common Market.

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

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

*Keywords of the alphabetical index:*

Service, freedom to provide / Deportation, spouse.

*Headnotes:*

1. A Member State may invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of the freedom to provide services only if that measure is compatible with the fundamental rights whose observance the Court ensures. In that regard, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8 ECHR, which is among the fundamental rights which are protected in Community law. Such an infringement will infringe the Convention if such a decision does not meet the requirements of paragraph 2 of that article, that is unless it is in accordance with the law, motivated by one or more of the legitimate aims under that paragraph and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see paragraphs 40-42).

2. Article 49 EC, read in the light of the fundamental right to respect for family life, is to be interpreted as precluding a refusal by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a third country, if such a decision, which constitutes an infringement of the right to respect for family life, is not proportionate to the objective pursued (see paragraphs 45-46, operative part).

*Summary:*

In September 1994, Mrs Carpenter, a national of the Philippines, was given leave to enter the United Kingdom as a visitor for six months. She overstayed that leave, failing to apply for any extension of her stay. In May 1996, she married Peter Carpenter, a United Kingdom national who runs a business established in the UK but conducting a significant proportion of its activities in other member States of the European Community. In July 1996, Mrs Carpenter applied for leave to remain in the UK as the spouse of a national of that state. As her application was refused by the Secretary of State and as she faced the threat of deportation, she appealed against the decision to an Immigration Adjudicator, arguing that the Secretary of State was not entitled to deport her because she enjoyed a right of residence in the United Kingdom under Community law. She maintained that her deportation would restrict her husband's right to provide services in other member States of the European Community, since Mr Carpenter's professional activities required him to travel a great deal, which he could do more easily when she was looking after his children from his first marriage. The Immigration Adjudicator acknowledged the important part Mrs Carpenter played in bringing up her stepchildren but dismissed her appeal, because Mr Carpenter could not be considered to be exercising any freedom of movement within the meaning of Community law while resident in the United Kingdom. On an appeal by Mrs Carpenter, the Immigration Appeal Tribunal considered that the legal issue raised before it required an interpretation of Community law. It decided therefore to stay proceedings and refer the case to the Court of Justice of the European Communities for a preliminary ruling.

The Court noted at the outset that Mr Carpenter was availing himself of the right freely to provide services guaranteed by Article 49 EC and pointed out that that right could be relied on by providers with regard to the states in which they were established if the services were provided for persons established in another Member State. The Community legislature had recognised the importance of ensuring the protection of

the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty. Separating Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercised his freedom to provide services. A Member State could invoke reasons of public interest to justify a national measure which was likely to obstruct the exercise of the freedom to provide services only if that measure was compatible with the fundamental rights whose observance the Court ensured. This was not so in the instant case, as the decision to deport Mrs Carpenter constituted an infringement of the right to respect for family life protected by Article 8.1 ECHR and by Community law. Unless it was justified in pursuance of Article 8.2 of the Convention, such an infringement could not be tolerated. In conclusion, the Court ruled that Article 49 EC was to be interpreted as precluding, in circumstances such as those in the main proceedings, a refusal, by the Member State of origin of a service provider, of the right to reside in its territory to that provider's spouse, regardless of his or her nationality.

*Languages:*

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.





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\* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

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<sup>1</sup> This chapter – as the Systematic Thesaurus in general – should be used restrictively, as the keywords in it should only be used if a relevant question is raised. This chapter is thus not used to establish statistical data; rather, the Bulletin reader or user of the CODICES database should only find decisions under this chapter when the subject of the keyword is an issue in the case.

<sup>2</sup> Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

<sup>3</sup> E.g. Rules of procedure.

<sup>4</sup> Including the conditions and manner of such appointment (election, nomination, etc.).

<sup>5</sup> Including the conditions and manner of such appointment (election, nomination, etc.).

<sup>6</sup> Vice-presidents, presidents of chambers or of sections, etc.

<sup>7</sup> E.g. State Counsel, prosecutors, etc.

<sup>8</sup> Registrars, assistants, auditors, general secretaries, researchers, etc.

<sup>9</sup> E.g. assessors, office members.

<sup>10</sup> Registrars, assistants, auditors, general secretaries, researchers, etc.

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<sup>13</sup> Enactment required by law to be reviewed by the Court.

<sup>14</sup> Review *ultra petita*.

<sup>15</sup> Horizontal distribution of powers.

<sup>16</sup> Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

<sup>17</sup> Decentralised authorities (municipalities, provinces, etc.).

<sup>18</sup> This keyword concerns decisions on the procedure and results of referenda and other consultations.

<sup>19</sup> This keyword concerns decisions preceding the referendum including its admissibility.

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<sup>20</sup> Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (questions relating to the distribution of powers as between the State and federal or regional entities are the subject of another keyword 1.3.4.3.)

<sup>21</sup> As understood in private international law.

<sup>22</sup> Including constitutional laws.

<sup>23</sup> For example, organic laws.

<sup>24</sup> Local authorities, municipalities, provinces, departments, etc.

<sup>25</sup> Or: functional decentralisation (public bodies exercising delegated powers).

<sup>26</sup> Political questions.

<sup>27</sup> Unconstitutionality by omission.

<sup>28</sup> For the withdrawal of proceedings, see also 1.4.10.4.

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<sup>37</sup> Presumption of constitutionality, double construction rule.

<sup>38</sup> Including the principle of a multi-party system.

<sup>39</sup> Includes the principle of social justice.

<sup>40</sup> See also 4.8.

<sup>41</sup> Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

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<sup>44</sup> Prohibition of punishment without proper legal base.

<sup>45</sup> Including compelling public interest.

<sup>46</sup> Only where not applied as a fundamental right.

<sup>47</sup> Including questions of treason/high crimes.

<sup>48</sup> Including prohibition on monopolies.

<sup>49</sup> For the principle of primacy of Community law, see 2.2.1.6.



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<sup>50</sup> Including the body responsible for revising or amending the Constitution.

<sup>51</sup> For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

<sup>52</sup> For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

<sup>53</sup> For example, the granting of pardons.

<sup>54</sup> Bicameral, monocameral, special competence of each assembly, etc.

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<sup>55</sup> Including specialised powers of each legislative body and reserved powers of the legislature.

<sup>56</sup> In particular, commissions of enquiry.

<sup>57</sup> For delegation of powers to an executive body, see keyword 4.6.3.2.

<sup>58</sup> Obligation on the legislative body to use the full scope of its powers.

<sup>59</sup> Representative/imperative mandates.

<sup>60</sup> Presidency, bureau, sections, committees, etc.

<sup>61</sup> Including the convening, duration, publicity and agenda of sessions.

<sup>62</sup> Including their creation, composition and terms of reference.

<sup>63</sup> State budgetary contribution, other sources, etc.

<sup>64</sup> For the publication of laws, see 3.15.

<sup>65</sup> For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

<sup>66</sup> For local authorities, see 4.8.

<sup>67</sup> Derived directly from the Constitution.

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<sup>68</sup> See also 4.8.

<sup>69</sup> The vesting of administrative competence in public law bodies having their own independent organisational structure, independent of public authorities, but controlled by them. For other administrative bodies, see also 4.6.7 and 4.13.

<sup>70</sup> Civil servants, administrators, etc.

<sup>71</sup> Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

<sup>72</sup> Other than the body delivering the decision summarised here.

<sup>73</sup> Positive and negative conflicts.

<sup>74</sup> Notwithstanding the question to which to branch of state power the prosecutor belongs.

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<sup>75</sup> For example, Judicial Service Commission, *Conseil supérieur de la magistrature*.

<sup>76</sup> Comprises the Court of Auditors in so far as it exercises judicial power.

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<sup>79</sup> See also keywords 5.3.41 and 5.2.1.4.

<sup>80</sup> Organs of control and supervision.

<sup>81</sup> Proportional, majority, preferential, single-member constituencies, etc.

<sup>82</sup> For aspects related to fundamental rights, see 5.3.41.2.

<sup>83</sup> For the creation of political parties, see 4.5.10.1.

<sup>84</sup> E.g. Names of parties, order of presentation, logo, emblem or question in a referendum.

<sup>85</sup> Tracts, letters, press, radio and television, posters, nominations, etc.

<sup>86</sup> Impartiality of electoral authorities, incidents, disturbances.

<sup>87</sup> E.g. signatures on electoral rolls, stamps, crossing out of names on list.

<sup>88</sup> E.g. in person, proxy vote, postal vote, electronic vote.

<sup>89</sup> E.g. *Panachage*, voting for whole list or part of list, blank votes.

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<sup>92</sup> E.g. Court of Auditors.

<sup>93</sup> The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

<sup>94</sup> *Staatszielbestimmungen*.

<sup>95</sup> Institutional aspects only: questions of procedure, jurisdiction, composition etc; are dealt with under the keywords of Chapter 1.

<sup>96</sup> Including state of war, martial law, declared natural disasters, etc: for human rights aspects, see also keyword 5.1.3.1.

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<sup>99</sup> The question of "Drittwirkung".

<sup>100</sup> The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in chapter 3.

<sup>101</sup> Includes questions of the suspension of rights. See also 4.18.

<sup>102</sup> Taxes and other duties towards the state.

<sup>103</sup> Here, the term "national" is used to designate ethnic origin.

<sup>104</sup> For example, discrimination between married and single persons.

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<sup>105</sup> This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.

<sup>106</sup> Detention by police.

<sup>107</sup> Including questions related to the granting of passports or other travel documents.

<sup>108</sup> May include questions of expulsion and extradition.

<sup>109</sup> Including the right of access to a tribunal established by law; for questions related to the establishment of extraordinary courts, see also keyword 4.7.12.

<sup>110</sup> This keyword covers the right of appeal to a court.

<sup>111</sup> Including the right to be present at hearing.

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<sup>113</sup> Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

<sup>114</sup> This keyword also includes the right to freely communicate information.

<sup>115</sup> Militia, conscientious objection, etc.

<sup>116</sup> Aspects of the use of names are included either here or under "Right to private life".

<sup>117</sup> Including compensation issues.



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<sup>118</sup> For institutional aspects, see 4.9.5.

<sup>119</sup> This keyword also covers "Freedom of work".

<sup>120</sup> Includes rights of the individual with respect to trade unions, rights of trade unions and the right to conclude collective labour agreements.

## Keywords of the alphabetical index \*

\* The précis presented in this *Bulletin* are indexed primarily according to the Systematic Thesaurus of constitutional law, which has been compiled by the Venice Commission and the liaison officers. Indexing according to the keywords in the alphabetical index is supplementary only and generally covers factual issues rather than the constitutional questions at stake.

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