

THE BULLETIN

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

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

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

The decisions are presented in the following way:

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

G. Buquicchio

Secretary of the European Commission for Democracy through Law

THE VENICE COMMISSION

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

Initially conceived as an instrument of emergency constitutional engineering against a background of transition towards democracy, the Commission since has gradually evolved into an internationally recognised independent legal think-tank. It acts in the constitutional field understood in a broad sense, which includes, for example, laws on constitutional courts, laws governing national minorities and electoral law.

Established in 1990 as a partial agreement of 18 member states of the Council of Europe, the Commission in February 2002 became an enlarged agreement, comprising all 45 member States of the organisation and working with some other 12 countries from Africa, America, Asia and Europe.

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| Inter-American Court of Human Rights | S. Garcia-Ramirez / F. J. Rivera Juaristi |

Strasbourg, March 2006

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There was no relevant constitutional case-law during the reference period 1 January 2005 – 30 April 2005 for the following countries:

Germany, Iceland, Japan, Liechtenstein, Norway, Sweden (Supreme Court).

Précis of important decisions of the reference period 1 January 2005 – 30 April 2005 will be published in the next edition, *Bulletin* 2005/2 for the following countries:

Lithuania, Russia.

Albania

Constitutional Court

Important decisions

Identification: ALB-2005-1-001

a) Albania / b) Constitutional Court / c) / d) 07.01.2005 / e) 1 / f) Constitutionality of the law / g) *Fletore Zyrtare* (Official Gazette), 4, 207 / h) CODICES (English).

Keywords of the systematic thesaurus:

1.2.2.4 **Constitutional Justice** – Types of claim – Claim by a private body or individual – Political parties.

1.3.4.2 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between State authorities.

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

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

4.9.3 **Institutions** – Elections and instruments of direct democracy – Electoral system.

4.9.4 **Institutions** – Elections and instruments of direct democracy – Constituencies.

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

5.2 **Fundamental Rights** – Equality.

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

Keywords of the alphabetical index:

Election, constituency, boundaries / Election, law, electoral / Election, vote, right, obligation.

Headnotes:

While the lawmaker has the right to define and evaluate criteria, it is the duty of the Constitutional Court to review whether the lawmaker's solution is in conformity with the Constitution. The term 'voter' includes even those persons that for various reasons have not exercised the right to vote. The participation in the voting process is not an obligation of the citizens. It is one of their rights and they should not be

prejudiced and left out of the voting process for this reason. Consequently, any other meaning given to the term 'voter' would be a constitutional limitation and would have an impact on the exercise of the right to vote.

By substituting a partial concept, which has a narrow and detached meaning, for the entire one, the electoral law departed from the constitutional provision (Article 64.1), which provides for the division of electoral zones according to the approximate number of voters and not according to the number of voters who took part in the voting in the last elections.

Summary:

The Social Democratic Party applied to the Constitutional Court, seeking to have the provision in Article 73.1 of the Electoral Code struck out on the ground that that provision laid down a criterion for establishing the boundaries of electoral zones that was different from the criterion provided for by the Constitution. According to the applicant, the Constitution set out that the criterion to be used for establishing the boundaries of electoral zones was that of the approximate number of voters, whereas Article 73.1 of Electoral Code provided for the division of electoral zones on the basis of the number of voters who had taken part in the voting in the last elections. That lack of conformity led to the unconstitutionality of that legal provision, since that provision intended to divide the Albanian territory in such a way as to have regions with greater electoral weight, which would produce more deputies than other regions with the same population. The applicant also contended that the implementation of such a principle would even violate the principle of equality of citizens in the voting process.

Firstly, the Constitutional Court considered the submissions made by a party having an interest in the proceedings (the Democratic Party of Albania) concerning the lack of standing of the applicant, which allegedly lacked an interest that was directly related to the case, a prerequisite provided for by Article 134.2 of the Constitution in order for a party to bring an application before the Constitutional Court. The Constitutional Court held that political parties amount to an important factor not only during the electoral process itself, but also during its initial phase. Representative democracy cannot be understood without the presence of political parties, so their interest is totally justified as to their legal standing as applicants in proceedings for constitutional review.

As to the instant case, the Constitutional Court held that the right to vote is a constitutional right of citizens, guaranteed by Article 45 of the Constitution. This right is enjoyed not only by the voters, but also by the persons standing for elections, and through them, the political parties. The principle of the equality of votes is closely related to the electoral system. Thus, in the majority or plurality voting electoral system (first-past-the-post system), this principle is understood as an equal opportunity for succeeding, whereas in the proportional representation electoral system, this principle is understood to mean that votes are to have both the same weight and the same impact in the result. Albania has adopted the mixed system of elections, which should reflect the idea of the same impact of votes in the result of elections. That being so, the establishment of the boundaries of electoral zones has a direct influence. The Albanian Constitution provides for the criterion of “an approximate number of voters”, whereas the law (the amended Electoral Code) provides for the number of voters who have taken part in the voting in the last elections.

For this reason, the Constitutional Court decided to strike out the expression “voters who have taken part in voting” as a criterion for establishing the boundaries of electoral zones.

Languages:

Albanian.



Identification: ALB-2005-1-002

a) Albania / **b)** Constitutional Court / **c)** / **d)** 18.01.2005 / **e)** 2 / **f)** Interpretation of the Constitution / **g)** *Fletore Zyrtare* (Official Gazette), 6/05, 275 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.1.2.3 **Constitutional Justice** – Constitutional jurisdiction – Composition, recruitment and structure – Appointment of members.

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

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

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

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

Keywords of the alphabetical index:

Judge, of Constitutional Court, appointment, qualifications / Judge, appointment, refusal of proposal / Parliament, power to verify merits of the appointment proposal / Loyalty, constitutional, principle.

Headnotes:

The Parliament of Albania examines the Presidential decrees for the appointment of judges to the Constitutional Court and the Supreme Court not only from the aspect of fulfilment of the formal criteria, but also from the aspect of the merits of their appointment. Thus, the Parliament has the power to grant or to refuse consent for the appointment of judges to the Constitutional Court and the Supreme Court.

Summary:

The President of the Republic requested an interpretation from the Constitutional Court as to Articles 125.1 and 136.1 of the Constitution with regard to his role in the appointment of judges to the Constitutional Court and the Supreme Court. According to the President, the role of the Assembly in the process of appointment of judges to the Constitutional Court and the Supreme Court should be focused on verifying whether the constitutional and legal criteria have been met, since the selection of the candidate falls under the powers of the President of the Republic. For that reason, the President was of the opinion that in cases where the Assembly does not consent to the candidates proposed by the President of the Republic, it goes beyond the limits of the powers assigned to it by the Constitution.

After having read the opinion of the experts of the Venice Commission, presented to the Constitutional Court upon its request, the Court held that the Constitution should be interpreted in such a way that its provisions are in harmony with each other. The questions put forward are: does the responsibility for selecting the candidate for judge of the Constitutional Court or the Supreme Court fall to the President of the Republic; and, should the Assembly be restricted to the examination of the case only from a formal point of view or should that examination be based on the candidate's merits? In the latter case, the examination made by the Assembly may result in the rejection of the candidate for judge. According to the Constitutional Court, the Constitution used the term “consent” to describe what the Assembly grants in reference to the selected candidates. “Consent” means “approval, acceptance”, so this term should

imply a kind of consensus between the constitutional bodies involved in the process of appointment of judges to the highest courts.

The Constitutional Court underlined the fact that the persons drafting the Constitution did not intend to leave the appointment of such judges exclusively to one body. They wished to choose a method that would eventually ensure a greater independence of those courts. In that context, the involvement of the Assembly of Albania in the process was aimed at balancing the power of the President of the Republic to appoint such judges. That is in harmony with the principle of the separation and balancing of state powers provided for by Article 7 of the Constitution.

Moreover, the Constitutional Court dwelt on the scope of the Assembly's examination of the candidates for judges of the highest state courts. The Constitutional Court emphasised the fact that the participation of the Assembly in the process of appointment of judges goes beyond a simple legal verification of the process and is in harmony with the political nature of that body and the fact that Albania is a Parliamentary Republic. The Assembly should verify not only the legal validity, but also the merits of the selection made by the President of the Republic. Both of these bodies should be guided by the principle of constitutional loyalty (*Verfassungstreue*) in order to ensure a qualitative and appropriate composition of the highest courts of the state.

Languages:

Albanian.



Identification: ALB-2005-1-003

a) Albania / **b)** Constitutional Court / **c)** / **d)** 19.01.2005 / **e)** 3 / **f)** Constitutionality of the law / **g)** *Fletore Zyrtare* (Official Gazette), 6/05, 279 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

4.13 **Institutions** – Independent administrative authorities.

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

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

Keywords of the alphabetical index:

Notary, exercise of profession, requirements / Ministry of Justice, power of supervision / Public function, right to exercise, maximum age limit / Regulation, executive, minister.

Headnotes:

The function of notary is a delegated function for achieving an independent, impartial and professional performance of the authentication of important documents. The increase or decrease of the level of the supervisory control exercised by the Minister of Justice is not a constitutional issue, but rather one left to the discretion of the legislator, as long as that supervisory control does not violate the independence, impartiality and confidentiality of the performance of notarial functions, exercised as a free activity, but with a public character.

The age requirement, including an age limit, for practising the profession of notary does not constitute an infringement of constitutional rights; it is rather a means that should, in principle, serve to strengthen the practice of the profession of notary and should enable better services to be offered in the interest of the general public.

Summary:

The Constitutional Court considered an application by the National Chamber of Notaries, which requested the striking out of certain provisions of the law "On notaries" for the reason that they infringed the ability of notaries to practise their profession freely by treating them as public state officials. The applicant brought an application against the impugned provisions, which are related to the Minister of Justice's exercise of continuous supervision over notaries, and the establishment of the age limit (65 years old) for practising the profession. According to the applicant, those provisions imposed limitations on the right to perform notarial services; those limitations were contrary to the European Convention on Human Rights and Article 11 of the Constitution. The applicant requested a stay on the application of the provisions in question until the delivery of the final decision of the Constitutional Court.

After having examined the preliminary request for a stay on the application of the provisions in question, the Constitutional Court decided to reject it on the ground that that request failed to meet the prerequisites for the granting of stays under of Article 45 of the law "On the Constitutional Court".

As to the instant case, the Constitutional Court examined the function of the profession of notary and defined it as a free profession that performs legal services in conformity with the Constitution and laws. In spite of the fact that the profession of notary is a free one, it differs greatly from other similar professions because of the great importance of notarial documentation for public and state institutions. According to the Constitutional Court, the offering of notarial services to the public is closely related to guaranteeing that the facts and will expressed in the activities carried out by citizens have been subject to adequate reflection. These services are crucial, even for state institutions, which on the basis of notarial services, are guaranteed to have certified and authentic documentation before them. Notarial documentation has the value of evidence in judicial and legal matters. For that reason, in order to ensure the kind of services that fulfil those criteria and have those qualities, the Constitutional Court held that the establishment by law of the Minister of Justice's supervisory powers over notarial services was not unconstitutional because it was related to the supervision of the function of notaries, a function delegated to them by the state.

The Constitutional Court found that the age requirement for the practice of the profession of notary formed the basis of the solution chosen by the legislator; the solution of age requirement was also the one chosen by the Latin notarial system. Requirements, adopted in the name of the public interest and reasonableness, lay down the qualities that a notary must have in order to enable him or her to carry out his or her functions in such a way as to offer clients the necessary guarantees that the documents prepared by him or her truly reflect the free will of the client and conform to the laws in force, as well as ensuring clients that the notary has the requisite ability and competence to deal with the complexity of the preparation of notarial documentation. There are currently a number of public functions and private professions that a person may not hold or practise unless he or she has reached a certain minimum age and that he or she may not continue to hold or practise once having reached a certain age. Contrary to the argument put forward by the applicant, the age limit of 65 provided for by the law, an age limit that is not merely "the retirement age" but one that is justified by a public reason and legitimate public interest,

amounts to a limitation, which is placed on the practice of the profession of notary, of the kind provided for by Article 11 of the Constitution.

The majority of the Constitutional Court rejected the application as unfounded.

Languages:

Albanian.



Argentina

Supreme Court of Justice of the Nation

Important decisions

Identification: ARG-2005-1-001

a) Argentina / b) Supreme Court of Justice of the Nation / c) / d) 14.06.2005 / e) S. 1767.XXXVIII / f) Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc. / g) *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 328 / h) CODICES (Spanish).

Keywords of the systematic thesaurus:

- 3.4 **General Principles** – Separation of powers.
- 3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.
- 4.5.2 **Institutions** – Legislative bodies – Powers.
- 4.5.8 **Institutions** – Legislative bodies – Relations with judicial bodies.
- 4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
- 4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.
- 5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
- 5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
- 5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.
- 5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.
- 5.3.38.1 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Criminal law.

Keywords of the alphabetical index:

Disappearance, of persons, forced / Amnesty, law, scope / Crime against humanity, prosecution / Torture.

Headnotes:

In the area of crimes against humanity, amnesty laws, statutes of limitations and laws removing

liability are unconstitutional. The case concerns two laws passed in 1987 applying to members of the armed forces, the police and the prison services, in respect of offences alleged to have been committed between 1976 and 1983.

Summary:

Law no. 23.49 of 1984 ordered the opening of proceedings against members of the armed forces and members of the police security forces and the prison services for offences alleged to have been committed between 24 March 1976 and 26 September 1983, in the course of operations undertaken for the stated purpose of suppressing terrorism (Article 10.1). Subsequently, in 1987, Laws nos. 23.492 and 23.521, known respectively as the “full stop” and “due obedience” laws, were passed. The first of these laws stated that “[the time period for bringing] Criminal action with regard to any person for their alleged involvement in any capacity in the offences referred to in Article 10 of Law no. 23.49, who is not a fugitive, has not been declared to have absconded and who has not been summoned to make a statement in answer to charges by a competent court, shall expire within sixty days from the date of enactment of this law”. For its part, Law no. 23.521 provided as follows: “It is presumed, notwithstanding any evidence to the contrary, that those who at the time the act was committed held the position of commanding officers, subordinate officers, non-commissioned officers and members of the rank and file of the armed forces, security forces, police force and prison force are not punishable for the offences referred to in Article 10.1 of Law no. 23.49 on the grounds that they were acting by virtue of due obedience. The same presumption shall apply to superior officers who did not hold the position of commander-in-chief, area head, sub-area head or head of a security, police or prison force unless it has been legally determined within 30 days of the enactment of this law that they had decision-making powers or were involved in the drawing up of orders.”

In the instant case, an application was made for a finding of unconstitutionality against Laws nos. 23.492 and 23.521 insofar as they prevented the indictment of an accused, a member of the federal police who had participated in the abduction of two persons to take them, in full knowledge of the facts, to a secret detention centre where they would be subjected to torture, in which the accused allegedly participated, the final intention being to physically eliminate those persons. The Court of first instance and the Court of appeal both declared the laws in question to be unconstitutional. The accused therefore lodged an extraordinary appeal with the Supreme Court, asking for a ruling in favour of their constitutionality.

The Court upheld the finding of unconstitutionality in a long judgment (310 pages) in which each of the seven judges forming the majority expressed a separate opinion; the eighth judge gave a dissenting opinion. The ninth judge did not wish to intervene.

The grounds adduced are many and varied, and include, in particular, the application of the 1969 American Convention on Human Rights, which places an absolute obligation on the states party to it to investigate such offences, to punish them and to combat impunity. Among the many precedents of the Inter-American Court of Human Rights, the Supreme Court mentioned the *Barrios Altos* case of 14 March 2001, in which a ruling of inadmissibility was given in respect of amnesty laws, statutes of limitations and laws removing liability which prevent the investigation and punishment of persons responsible for serious human rights violations, such as torture and summary, extrajudicial or arbitrary executions, which are prohibited because they infringe indisputable rights recognised by international human rights law.

The Court also pointed out that, under both international customary law and treaty law, crimes against humanity are subject to *ius cogens* principles, which apply to the facts of this case and under which these crimes are not subject to statutory limitations. Where treaty law is concerned, in addition to the American Convention on Human Rights, the Court explicitly applied the 1966 International Covenant on Civil and Political Rights, the Inter-American Convention on the Forced Disappearance of Persons, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (all these instruments have constitutional status in Argentina) and the Statute of the International Criminal Court. Some judges added that the application of *ius cogens* at domestic level was provided for in the national constitution as far back as 1853, where it referred to “public international law” (former Article 102, current Article 118). One of the opinions states that retroactive amendment of the rules on statutory limitation does not impair the principle of legality of criminal law.

The judgment also mentions other documents such as the Charter of the International Military Tribunal of Nuremberg, the 1969 Vienna Convention on the Law of Treaties, the Hague Convention of 1907 and Protocols I and II of 1977, and the Convention against Cruel, Inhuman or Degrading Treatment or Punishment. Some opinions also relied on the precedents of:

a. the Inter-American Court of Human Rights;

- b. the Human Rights Committee, including rulings on individual communications (eg *Quinteros v. Uruguay*, communication no. 107/1981) and final observations relating to Argentina's periodic reports;
- c. communications considered by the Committee against Torture (*O.R., M.M. and M.S. v. Argentina*, communications nos. 1, 2 and 3/1988), and
- d. judgments of the European Court of Human Rights (*K.-H.W. v. Germany*, 22.03.2001, *Reports of Judgments and Decisions* 2001-II and *Streletz, Kessler and Krenz v. Germany*, 22.03.2001, *Reports of Judgments and Decisions* 2001-II).

Some opinions stated that insofar as Law no. 23.521 established an absolute presumption of innocence, it violated the principle of separation of powers, with the legislature assuming functions proper to the judiciary, as it imposed on the courts a specific interpretation of the facts. They further argued that Law no. 23.492 actually entailed a “hidden amnesty” as it was not applicable to future cases, only to past cases, and that in setting a very short time-limit for prosecution, it sought to prevent the prosecution of crimes in which society had a keen interest, this time-limit being unreasonable in view of the seriousness of the crimes committed.

Languages:

Spanish.



Armenia

Constitutional Court

Statistical data

1 January 2005 – 30 April 2005

- 15 referrals made, 15 cases heard and 15 decisions delivered.
 - All 15 decisions concern the conformity of international treaties with the Constitution. All treaties examined were declared compatible with the Constitution.



Austria

Constitutional Court

Statistical data

Session of the Constitutional Court during March 2005

- Disputes of jurisdiction (Article 126a/148f B-VG): 2
- Financial claims (Article 137 B-VG): 3
- Conflicts of jurisdiction (Article 138.1 B-VG): 3
- Review of regulations (Article 139 B-VG): 41
- Review of laws (Article 140 B-VG): 37
- Challenge of elections (Article 141 B-VG): 0
- Complaints against administrative decrees (Article 144 B-VG): 405 (223 refused to be examined).



Azerbaijan

Constitutional Court

Important decisions

Identification: AZE-2005-1-001

a) Azerbaijan / b) Constitutional Court / c) / d) 25.01.2005 / e) 1/13/2005 / f) / g) *Azerbaijan, Respublika, Khalq gazetesi, Bakinski rabochiy* (Official Newspapers); *Azərbaycan Respublikası Konstitusiyası Mehkemesinin Məlumatı* (Official Digest) / h) CODICES (English).

Keywords of the systematic thesaurus:

1.6.6.1 **Constitutional Justice** – Effects – Execution – Body responsible for supervising execution.
 1.6.9 **Constitutional Justice** – Effects – Consequences for other cases.
 2.3.2 **Sources of Constitutional Law** – Techniques of review – Concept of constitutionality dependent on a specified interpretation.
 4.7.2 **Institutions** – Judicial bodies – Procedure.
 4.7.7 **Institutions** – Judicial bodies – Supreme court.
 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:

Remedy, violation, constitutional right / Proceedings, reopening, ground.

Headnotes:

The recognition of a decision of the Supreme Court or a judicial act as one violating the right of access to court contrary to the Constitution and laws constitutes one of the grounds for revision of judicial acts on new circumstances relating to the violation of human rights and freedoms. According to the amendments and additions introduced into procedural law by legislation, the Plenum of the Supreme Court shall examine only circumstances on legal issues relating to the execution of the decisions of the Constitutional Court and European Court of Human Rights with a view to restoring the human right or freedom that has been violated.

Summary:

Some provisions of the Law “On Introduction of Amendments into Certain Legislative Acts” provide that when executing the decisions of the Constitutional Court, the Plenum of the Supreme Court shall examine only the circumstances that relate to legal issues. The Ombudsman applied to the Constitutional Court alleging that those provisions created artificial obstacles for the execution of Constitutional Court decisions aimed at restoring the human rights and freedoms that had been violated. He requested the verification of the conformity of those provisions with the Constitution.

The Plenum of the Constitutional Court noted that the petition related to the judicial guarantee of human rights and freedoms listed under fundamental rights, as well as the clarification of principles concerning the full judicial protection of human rights and freedoms as well as the clarification of a number of issues and administration of justice. The Plenum also noted that the petition was important from the point of view of the clarification of questions that might arise as a result of carrying out of proceedings on new circumstances connected with the violation of human rights and freedoms, for instance, with the Article 6 ECHR.

The Constitutional Court noted that according to the constitutional guarantee of human rights and freedoms, only courts acting within the principles and procedures established by legislation should implement the settlement of conflicts and disputes. It is the Constitutional Court’s opinion that universal values such as the supremacy of law and justice, the domestic law (which is the reflection of the people’s will in a state), as well as the principles of judicial proceedings and international law applicable in contemporary democratic society are of high importance.

The Plenum of the Constitutional Court considered that the issue of the compatibility of the impugned provisions (provided for by procedural legislation) with the Constitution should be resolved within the framework of competences of the supreme body of constitutional justice and the Supreme Court as provided for by legislation. The impugned provisions are compatible with the Constitution where the Plenum of Supreme Court:

1. holds proceedings on new circumstances in connection with the violation of human rights and freedoms, within the framework of legislation of the Azerbaijan Republic;
2. taking into account the binding nature of the legal positions of the Constitutional Court’s

decisions, including this decision, settles the legal issues that are necessary for their unconditional execution;

3. does not admit any distortion (revision, enlargement, limitation or interpretation in any other form) of the decisions of the Constitutional Court; and
4. when dealing with the revision of cases, adopts concrete decisions aimed at the elimination, within the time-limits prescribed in legislation, of judicial errors in judicial proceedings, as specified in the decision of the Constitutional Court, not only with the purpose of the revision of cases but also with the purpose of a speedier restoration of the human rights and freedoms that have been violated.

Languages:

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



Belgium

Court of Arbitration

Important decisions

Identification: BEL-2005-1-001

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 19.01.2005 / **e)** 16/2005 / **f)** / **g)** *Moniteur belge*, (Official Gazette), 31.01.2005 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.5.6 **Constitutional Justice** – Decisions – Delivery and publication.

3.16 **General Principles** – Proportionality.

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

5.1.3.2 **Fundamental Rights** – General questions – Limits and restrictions – General/special clause of limitation.

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

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

Keywords of the alphabetical index:

Drugs, sport, abuse / Sport, disciplinary suspension / Personal data, Internet.

Headnotes:

An interference with private life in the context of the regulation of a specific matter does indeed fall within the remit of the legislature competent to regulate that matter, in particular the legislature of the Flemish Community. However, that legislature is required to respect the general federal regulations, which have the value of minimum regulations for all matters.

The dissemination of personal data on an insecure website which, accordingly, is accessible to all, goes beyond what is required by the need to ensure effective compliance with sanctions imposed on sportsmen. Where such publication is not necessary in order to attain the legitimate objective pursued and

where the effects of the measure are disproportionate by reference to that objective, the contested provision is contrary to the constitutional and convention provisions which guarantee the right to respect for private life.

Summary:

An individual who had been suspended for life from participating in cycle races as an amateur cyclist for having used a prohibited anabolic product lodged an application before the Court of Arbitration for suspension and an application for annulment of a decree of the Flemish Community relating to the practice of the sport in compliance with health requirements. The decree provided that the disciplinary suspension of major sportsmen was to be published, while the suspension was in force, on the website which the Government had set up for that purpose and in other communications media. The publication contained the surname, forename and date of birth of the sportsman, the beginning and end of the period of suspension and the type of sport which gave rise to the offence. The applicant claimed that that provision infringed the right to private life recognised by Article 22 of the Constitution, Article 8 ECHR and Article 17 of the International Covenant on Civil and Political Rights.

By Judgment no. 162/2004 of 20 October 2004, the Court of Arbitration suspended the words “on the website which the Government set up for that purpose” in the decree. It therefore considered that the plea put forward was serious.

In its judgment of 19 January 2005, the Court considered that the plea was well founded and annulled the words which had been suspended.

It stated first of all that when it is required to ascertain whether a legislative norm infringes the constitutional provisions set out in Title II of the Constitution, “Belgians and their rights”, it takes account in its examination of the provisions of international law which guarantee analogous rights or freedoms.

The Court then noted that the applicant's complaints were directed only against publication of the suspension on a website and not against publication of the suspension through other communications media. It confined its examination to part of the impugned provision.

The Court then ascertained the aim pursued by the legislature which adopted the decree, whose express intention was to publish the relevant information on a website that was open and accessible to all. It considered that to publish personal data in such a

general manner constituted an interference with respect for private life. In order for such an interference to be admissible, it must be necessary in order to attain a specific legitimate aim, which implies, in particular, that there must be a reasonable link of proportionality between the consequences of the measure for the person concerned and the interests of the community.

Furthermore, in a Federal State, the legislature competent to issue decrees must have regard to Article 22.1 of the Constitution, which provides that only the federal legislature may determine in what cases and on what conditions the right to respect for private and family life may be limited. In that regard, the general federal regulations have the value of minimum regulations. In so far as the contested provision was aimed at the publication of personal data, it implied that the legislature competent to issue decrees was bound by the Law of 8 December 1992 on the protection of private life in respect of the processing of personal data.

The Court then accepted that a restricted form of electronic publication for the needs of officials responsible for supervision and those responsible for sporting associations was necessary in order to ensure effective compliance with the sanctions imposed on sportsmen. It therefore pursued a legitimate aim. However, the provision at issue went beyond what that aim required, since it allowed the published data to be used for other purposes and to be further processed, which had the consequence that they might still be disseminated after the suspension had lapsed and the publication had been removed from the website. Since such a measure was not necessary and since its effects were disproportionate by reference to the objective, there was a violation of Article 22 of the Constitution and of the analogous convention provisions. The Court therefore annulled the contested provision in part.

Supplementary information:

In view of the circumstances, the Court decided, exceptionally, to grant anonymity and used only the initials of the party concerned in the judgment.

Languages:

French, Dutch, German.



Identification: BEL-2005-1-002

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 02.02.2005 / **e)** 27/2005 / **f)** / **g)** *Moniteur belge*, (Official Gazette), 24.02.2005 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.4.8.4 **Constitutional Justice** – Procedure – Preparation of the case for trial – Preliminary proceedings.

3.13 **General Principles** – Legality.

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

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

Keywords of the alphabetical index:

Road traffic, offences, categories / Offence, categorisation, criteria.

Headnotes:

In spite of the principle of lawfulness in criminal matters guaranteed by the Constitution, it may be accepted that, on a transitional basis, the legislature left to the executive, without further detail, responsibility for placing certain serious road traffic offences in categories attracting heavier penalties. However, it is for the legislature itself, when it amends the law on road traffic, to fix the criteria on which offences are to be divided between categories according to gravity.

Summary:

The Law of 7 February 2003 adapted the legislation on the police of road traffic. The provision referred to the Court empowered the King to designate what were known as “serious” offences and to divide them into three categories for which the legislature fixed minimum and maximum penalties which increased in severity according to the category of the offence.

Numerous courts dealing with traffic offence cases asked the Court whether the contested principle was compatible with the principle of lawfulness in criminal matters (Articles 12 and 14 of the Constitution), in that it empowered the King to designate the offences in each of the three categories of serious offences.

The Court answered those preliminary questions by applying what is known as the preliminary procedure, which allows it to deliver an “immediate response” judgment by means of an expedited examination of

the case (without a public hearing) (see Article 72 of the Institutional Law on the Court – CODICES database).

On the substance, the Court first of all recalled the scope of the principle of lawfulness in criminal matters, guaranteed by the Constitution (Articles 12 and 14 of the Constitution). It held that those constitutional provisions do not require the legislature itself to regulate every aspect of the proceedings and of the penalty. A delegation of powers to the King is not contrary to the principle of lawfulness in criminal matters provided that the authorisation is defined sufficiently precisely and relates to the implementation of measures of which the essential elements are determined in advance by the legislature.

However, the provision in issue did not contain all the criteria which must permit the King to draw a distinction between the various categories of “serious” road traffic offences, so that in the present case the legislature delegated power without itself indicating the essential elements on the basis of which that power must be exercised. It might therefore not satisfy the constitutional requirements.

The Court nonetheless took into consideration the fact that a finding of violation would frustrate and render impossible numerous proceedings and also the objective of the legislature, which deemed it necessary to evaluate and adapt the law on a permanent basis.

According to the Court, however, those factors could not justify the classification of road traffic offences not being subject to discussion by parliament in future. It was for the legislature to set out, albeit in general terms, in the law itself, on the occasion of its next amendment, the criteria determining the categories in which offences must be placed according to gravity. Subject to that reservation, the Court answered the preliminary questions in the negative.

Languages:

French, Dutch, German.



Identification: BEL-2005-1-003

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 01.03.2005 / **e)** 48/2005 / **f)** / **g)** *Moniteur belge*, (Official Gazette), 15.03.2005 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.2 **Fundamental Rights** – Equality.
 5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.
 5.4.1 **Fundamental Rights** – Economic, social and cultural rights – Freedom to teach.

Keywords of the alphabetical index:

Education, university, organisation and financing, students, representation / Education, establishment, organs.

Headnotes:

Freedom of education entails that private persons may, without prior authorisation, and subject to respect for freedoms and fundamental rights, organise and provide education according to their own concept and presupposes that the organising authorities may, on certain conditions, claim public subsidies.

Where freedom of association is used in order to ensure the exercise of another freedom, it acquires a particular dimension which demands the special attention of the constitutional judge.

Summary:

A number of free universities in the French Community brought actions before the Court for annulment of a decree of that Community of 12 June 2003 which defined and organised the participation of students within universities.

The applicants criticised the legislature which had adopted the decree for having committed a disproportionate infringement of the constitutional freedom of education (Article 24.1 of the Constitution) by requiring them to provide that at least 20% of students would sit, with a right to vote, in the organs responsible for taking decisions, in particular as regards the appointment of administrative and scientific staff, teaching courses and policies or the

budget. They claimed that the decree also infringed the constitutional freedom of association (Article 27 of the Constitution) in the same way.

The Court defined, first of all, the outlines of freedom of education, which meant that private persons might, without prior authorisation, and subject to respect for freedoms and fundamental rights, organise and provide education according to their own concept and which presupposed that the organising authorities might, on certain conditions, claim public subsidies. The Court also recognised that the increasing complexity of the organisation of education had the effect that freedom to provide education was almost exclusively exercised collectively and had recourse to the principle of freedom of association.

Where freedom of association was used in order to ensure the exercise of another freedom, it acquired a particular dimension which demanded the special attention of the constitutional judge.

Where subsidies were granted to an educational establishment, the legislature competent to issue decrees might attach conditions to funding and subsidies which restricted the exercise of freedom of education and of the right to associate and of the right not to associate, without committing an essential infringement of the rights and freedoms. In keeping with its normal practice, the Court considered that where a convention provision which was binding on Belgium had a scope analogous to a constitutional provision, the guarantees enshrined by that provision constituted an inseparable whole with the constitutional guarantees. Where it exercised its power to review constitutionality by reference to the constitutional principle of freedom of association (Article 27 of the Constitution), the Court therefore also took into consideration the freedom of association guaranteed by Article 11 ECHR and the conditions which according to that article must be applied in order for an interference to be capable of being justified.

In providing for the presence of students in the decision-making organs and in allowing them to influence the policy of the association, the decree constituted an interference with the freedom of association of the free educational institutions which organised university education. The Court was therefore required to ascertain whether the measure was relevant and whether it was disproportionate to the objective pursued. That objective was to extend to all educational networks the participation of students by the application of the constitutional principle of equality.

The Court considered that the constitutional principle of equality and non-discrimination in education could not be relied upon to justify the interference with freedom of association. Article 24 of the Constitution required the legislature adopting the decree to take account of the objective differences justifying appropriate treatment, which included the particular characteristics of each organising authority. It followed that equal treatment for different universities, as regards student participation, required the legislature adopting the decree to justify itself. That justification was identical to the justification required for the interference with freedom of association.

The Court then observed that the legislature's desire was to protect students' rights. The legislature was entitled to take the view that this objective could be attained only if a minimum of student representation was guaranteed and if the students sat with a right to vote. Such a requirement was relevant by reference to the objective pursued but, if it imposed excessive representation, it might constitute an unreasonable or disproportionate interference with the organisation and functioning of the university institutions in receipt of subsidies. That applied in particular to the matters which were decisive for the overall policy of a university institution which concerns the interests of all of its component parts.

In this case there was no breach of the principle of proportionality because student participation was required only for matters which did not affect the freedom to set up an educational establishment and which did not prevent the organising authorities from freely fixing the religious or philosophical nature of their education and their teaching project or to determine the direction it would take. In so far as some of the matters concerned might indirectly affect one or other of those freedoms, the decree did not allow students to interfere disproportionately with the organisation and functioning of the subsidised establishments which they attended, since the weight of their vote, even on the assumption that it was unanimous, was only 20% and the universities remained free to allocate the remaining 80% as they deemed appropriate.

Languages:

French, Dutch, German.



Identification: BEL-2005-1-004

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 08.03.2005 / **e)** 54/2005 / **f)** / **g)** *Moniteur belge*, (Official Gazette), 11.04.2005 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.5.6.4.1 **Constitutional Justice** – Decisions – Delivery and publication – Publication – Publication in the official journal/gazette.

1.5.6.4.3 **Constitutional Justice** – Decisions – Delivery and publication – Publication – Private publication.

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

3.15 **General Principles** – Publication of laws.

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

Keywords of the alphabetical index:

Taxation, appeal, time-limit / Tax relief, conditions / Taxation, new facts, judgment of the Constitutional Court.

Headnotes:

While it may be justifiable that a period should be prescribed from the publication of a judgment of unconstitutionality of the Court of Arbitration in the *Moniteur belge* in order to obtain a tax readjustment and while it may also be justifiable that a taxpayer may not combine periods prescribed by separate provisions, it cannot be objectively and reasonably justified that the combination of separate provisions should lead taxpayers, who become officially aware of a judgment of unconstitutionality of the Court of Arbitration, to be treated in an appreciably different manner.

Summary:

The Belgian Income Tax Code allows a taxpayer to obtain a reduction by an ordinary claim (Article 371) or an “automatic” deduction (Article 376) of surtaxes resulting from new probative documents or facts. However, the time-limit for an ordinary claim (Article 371) is shorter. An automatic reduction may therefore be held admissible after the ordinary action has expired.

A taxpayer relied before the Mons Court of First Instance on a judgment of the Court of Arbitration declaring unconstitutional, on a preliminary question, a

provision of the tax law. However, that judgment was delivered at a time when the taxpayer was still able to dispute the amount of the tax because the period for lodging an ordinary claim had not expired. The tax authorities refused in those circumstances to allow the taxpayer to obtain an automatic reduction of his surtaxes, even though the period prescribed for that purpose, which was much longer, had not yet expired.

The Mons Court of First Instance asked the Court of Arbitration whether the tax provisions were compatible with the rules on equality and non-discrimination (Articles 10, 11 and 172 of the Constitution), since they created a difference in treatment between taxpayers who were deemed to become aware of the existence of a judgment of unconstitutionality of the Court of Arbitration before the expiry of the period for submitting an ordinary claim, who were unable to obtain an automatic reduction, and those who discovered the existence of that judgment after expiry of the period for submitting an ordinary claim, who could request an automatic reduction.

Relying on Article 190 of the Constitution, the Court of Arbitration stated that publication was an essential condition of the binding force of official texts. Publication in the *Moniteur belge* was the official means whereby the legislature guaranteed effective access to legislative norms and to the judgments of the Court of Arbitration reviewing the validity of those norms. The date of publication of a judgment in the *Moniteur belge* was therefore the date on which citizens were deemed to have become aware of that judgment. That date constituted a relevant starting-point for the period for submitting a claim. It mattered little in that regard that a person was aware before that date that a law might be unconstitutional, by reading an opinion in the *Moniteur belge* concerning a procedure before the Court or through unofficial publications.

The Council of Ministers and the Walloon Government had not established, and the Court did not see, what might objectively and reasonably justify the extent of the difference in treatment.

The Court therefore concluded that the tax provisions, as interpreted by the referring court, were incompatible with Articles 10 and 11 of the Constitution. It went on to state that a different interpretation might be given to those provisions in such a way as to render them compatible with Articles 10, 11 and 172 of the Constitution. In that interpretation, the taxpayer may obtain an automatic reduction of surtaxes resulting from a judgment of the Court of Arbitration declaring a provision of tax law unconstitutional, even if he becomes officially aware of that judgment before expiry of the period for submitting an ordinary claim.

Languages:

French, Dutch, German.



Identification: BEL-2005-1-005

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 23.03.2005 / **e)** 62/2005 / **f)** / **g)** *Moniteur belge*, (Official Gazette), 08.04.2005 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
 4.7.1.2 **Institutions** – Judicial bodies – Jurisdiction – Universal jurisdiction.
 4.7.2 **Institutions** – Judicial bodies – Procedure.
 4.7.4.3.1 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel – Powers.
 5.2 **Fundamental Rights** – Equality.
 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.
 5.3.15 **Fundamental Rights** – Civil and political rights – Rights of victims of crime.

Keywords of the alphabetical index:

International humanitarian law, serious breach / Genocide / Crime against humanity / Extraterritorial jurisdiction, criminal law / Proceedings, criminal, capacity to initiate.

Headnotes:

Where, for serious breaches of international humanitarian law, the legislature intends that matters may be dealt with by the Belgian criminal courts, by derogation from the general rules on jurisdiction, it may also, in order to avoid the consequences of misuse of the possibilities offered by the law, derogate from the general right to initiate criminal proceedings and claim civil damages (see further information) and entrust the prosecution solely to the Federal Prosecutor, who specialises in such matters. However, there is no reasonable justification for the

fact that the decision to take no further action is not taken by an independent and impartial judge, upon application by the Federal Prosecutor.

Summary:

The Law of 16 June 1993 on the prevention of serious breaches of international humanitarian law, amended by the Laws of 10 February 1999 and 23 April 2003, conferred on the Belgian courts universal jurisdiction in regard to serious breaches of international humanitarian law, irrespective of the place where the offence was committed, the nationality of the perpetrator of the offence or that of the victim, and even if the presumed perpetrator of the offence was not in Belgium.

The Law of 5 August 2003 restricted the possibilities of proceedings in respect of those offences by providing for a criterion of personal connection of the perpetrator or the victim with Belgium.

On that occasion, the legislature limited the possibility of initiating a prosecution by means of a “complaint together with a claim for civil damages” (see further information): under the new provisions, only the Federal Prosecutor was entitled to initiate proceedings in Belgium and no appeal lay against his decision.

Two human rights associations brought an action before the Court of Arbitration for annulment of that new statutory rule. The Court acknowledged that they had a collective interest in taking action as associations whose object was to combat injustice and any arbitrary interference with the rights of an individual or a community.

In the applicants' submission, by reserving to the Federal Prosecutor the power to initiate proceedings, and excluding the possibility for individuals to lodge a complaint together with a claim for civil damages, and by also establishing that there was no remedy against the Federal Prosecutor's decision not to initiate proceedings, the contested provisions created an unwarranted and disproportionate difference in treatment between the victims of the offences referred to in those provisions and the victims of offences against the general law. The applicants maintained that in adopting those provisions the legislature failed to observe the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) and also the right to a fair hearing (Article 6 ECHR).

The Court held that it was for the legislature to determine, in compliance with Belgium's international obligations and the principle of equality and non-

discrimination, the rules governing proceedings in respect of serious breaches of international humanitarian law or other serious offences committed outside Belgian territory. Owing to the problems which had arisen in the application of the Law of 16 June 1993, it was reasonable for the legislature to consider that limitations on extra-territorial criminal jurisdiction in relation to serious violations of international humanitarian law were required and to introduce, *inter alia*, a criterion that the perpetrator or victim must be personally connected with Belgium. It was also reasonable for the legislature to consider it necessary to limit the possibilities of initiating criminal proceedings in certain cases by reserving the power to do so to the Federal Prosecutor.

The Court then considered whether, by abolishing in certain cases the possibility of initiating criminal proceedings by lodging a complaint together with a claim for civil damages, the contested provisions constituted a disproportionate infringement of the rights of the victims concerned. In that regard, the Court observed, in particular, that the Federal Prosecutor did not have any discretion in such matters and that he could decide to discontinue the proceedings only on one of the four grounds set out exhaustively in the Law: where the case was manifestly unfounded, where there was an error of classification, where the action was inadmissible or where certain specific circumstances of the case revealed that another jurisdiction was more indicated.

In answering the complaint that there was no provision for review of the Federal Prosecutor's decision to discontinue the proceedings in respect of serious infringements of international humanitarian law, the Court took into account, in particular, the legislature's desire not to seriously damage Belgium's international relations or the safety of Belgian citizens. It considered, however, that in not allowing the Federal Prosecutor's decision not to continue the proceedings to be reviewed by an independent and impartial judge in any case, the legislature had taken a measure which went beyond the objective pursued.

The Court specified what parts of the contested provisions must therefore be annulled, but it also decided to maintain the effects of the annulled provisions until 31 March 2006 in order to allow the legislature the necessary time to amend the Law.

Supplementary information:

The “complaint together with a claim for civil damages” (Article 63 of the Code of Criminal Procedure) gives those who have suffered harm as a result of an offence the possibility of initiating criminal proceedings themselves and lodging a complaint

directly with the investigating judge where they consider that the prosecuting authorities are not initiating proceedings or are not doing so sufficiently quickly.

Cross-references:

- See also Judgment no. 68/2005 of 13.04.2005 [BEL-2005-1-006] abridged decision below, in response to a preliminary question concerning the same Law.

Languages:

French, Dutch, German.



Identification: BEL-2005-1-006

a) Belgium / b) Court of Arbitration / c) / d) 13.04.2005 / e) 68/2005 / f) / g) *Moniteur belge*, (Official Gazette), 09.05.2005 / h) CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
- 4.7.1.2 **Institutions** – Judicial bodies – Jurisdiction – Universal jurisdiction.
- 5.1.1.3.1 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2.2.3 **Fundamental Rights** – Equality – Criteria of distinction – National or ethnic origin.
- 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:

Genocide / Crime against humanity / Extraterritorial jurisdiction, criminal law, limits / Refugee, rights / Investigation, criminal, discontinuance.

Headnotes:

Where the legislature adopts a transitional measure concerning the possibility to initiate criminal proceedings before the Belgian criminal courts for serious breach of international humanitarian law in favour of persons who are connected with Belgium by the legal link of nationality, it is disproportionate to preclude refugees recognised in Belgium, since, in accordance with Article 16.2 of the Convention of 28 July 1951 relating to the Status of Refugees, those persons are entitled to the same treatment as nationals in matters pertaining to access to the courts. However, the legislature is not required to adopt identical rules in respect of candidate refugees.

Summary:

A Law of 5 August 2003 limited the possibilities of initiating criminal proceedings before the Belgian criminal courts for serious breaches of international humanitarian law. It was the legislature's intention to amend the Law of 16 June 1993 on the suppression of serious breaches of international humanitarian law on the ground that persons who had no ties with Belgium were making full use of that Law for reasons unconnected with the proper administration of justice and with the objectives of that Law.

The new law allowed pending cases to be removed from the Belgian criminal courts, by decision of the Court of Cassation upon application by the Federal Prosecutor. Under the transitional measure laid down in Section 29 § 3 of the Law of 5 August 2003, those cases might, in particular, be removed from the Belgian courts where there was no link between the perpetrator or the victim and Belgium.

In application of that transitional provision, the Federal Prosecutor had requested that a number of pending criminal investigations be discontinued. In those cases, the Court of Cassation found that the facts had taken place outside the territory of the Kingdom; that on the date of entry into force of the Law of 5 August 2003 no suspected perpetrator had his main residence in Belgium and that there was no complainant of Belgian nationality when the criminal proceedings were initiated. The Court therefore concluded that the conditions of discontinuance were satisfied.

Upon application by the persons who had lodged the complaints, the Court of Cassation asked the Court of Arbitration whether there was a violation of the constitutional principle of equality and of non-discrimination (Articles 10 and 11 of the Constitution) and of the fundamental rights of aliens in Belgium

(Article 191 of the Constitution) since the law required that the case be removed from the Belgian court although at least one complainant was an alien with the status of refugee in Belgium when the criminal proceedings were first initiated, whereas the law prevented a case from being removed from a court when at least one complainant was of Belgian nationality at the same time.

The Court replied that in accordance with the aim pursued, the legislature was entitled to adopt a transitional measure in favour of persons linked to Belgium by the legal link of nationality. Such a transitional measure was relevant by reference to the objective of the legislature.

That measure was nonetheless disproportionate in that, contrary to Article 16.2 of the Convention of 28 July 1951 relating to the Status of Refugees, it also excluded refugees recognised in Belgium. That provision states: "A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as nationals in matters pertaining to access to the courts, ...".

On the other hand, since that provision of the Convention does not apply to candidate refugees, the legislature was entitled, in the Court's view, to treat such persons differently from Belgians.

Cross-references:

- See also Judgment no. 62/2005 of 23.03.2005 [BEL-2005-1-005] abridged decision above, in answer to a preliminary question concerning the same Law.

Languages:

French, Dutch, German.



Identification: BEL-2005-1-007

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 20.04.2005 / **e)** 72/2005 / **f)** / **g)** *Moniteur belge*, (Official Gazette), 11.05.2005 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.19 **General Principles** – Margin of appreciation.
4.10.7 **Institutions** – Public finances – Taxation.
5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.

Keywords of the alphabetical index:

Tax, amnesty / Taxation, privilege / Tax, evasion, regularisation.

Headnotes:

The "one-time tax amnesty" which grants exemption from criminal proceedings and which cancels tax actions against those who in 2004 make a declaration of evaded tax and who pay a single contribution on such tax (6 or 9%) is not contrary to the constitutional principle of equality and of non-discrimination (Articles 10 and 11 of the Constitution and – in tax matters – Article 172 of the Constitution).

Summary:

A number of individuals brought an action for annulment of the Law of 31 December 2003 "introducing a one-time full-relief declaration". This Law, which formed part of the measures designed to combat tax fraud, offered a unique opportunity to regularise a situation.

The applicants maintained that in their capacity as "ordinary" taxpayers, who had paid their taxes and social security contributions, they were the victims of discrimination by comparison with those who, in return for a single contribution of 6 or 9% of the sums which they had evaded, were exempted from criminal proceedings and from recovery proceedings (6% if the amounts were invested according to certain procedures for at least three years). The applicants observed that the "normal" tax rates were between 15 and 25% on income from securities, between 25 and 55% on income from a trade or profession and between 45 and 65% on rights of succession.

The Court observed that the contested Law came within the framework of measures intended to combat tax fraud and that it sought to re-inject capital into the economy. The tax authority undoubtedly could not grant a privilege by failing retroactively to collect tax that was payable, but it was for the legislature to adopt measures designed to recover evaded tax and to regularise certain situations: the legislature had a wide discretion in such matters and the Court could make a finding of unconstitutionality only where the measure manifestly had disproportionate effects.

According to the *travaux préparatoires*, the legislature, in fixing the rates (6 and 9%), sought to strike a balance “by introducing a tax which [was] substantial and at the same time not prohibitive”. According to the *travaux préparatoires*, it was not possible to draw a distinction according to the origin of the fraud and a clear and simple system was necessary.

On the basis of that and other factors (see paragraphs B.21 to B.26 of the judgment), and taking account, in particular, of the once-and-for-all nature of the operation, the Court considered that the legislature had not adopted a manifestly unjustified measure in this case.

There was therefore no breach of the constitutional principle of equality and of non-discrimination and – in tax matters – Article 172 of the Constitution).

(Only the first plea raised in the application for annulment is dealt with in this abridged decision – that is to say, paragraphs B.15 to B.28 inclusive of the judgment. The two other pleas were also rejected.)

Languages:

French, Dutch, German.



Identification: BEL-2005-1-008

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 24.04.2005 / **e)** 73/2005 / **f)** / **g)** *Moniteur belge*, (Official Gazette), 03.05.2005 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

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

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

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

5.2 **Fundamental Rights** – Equality.

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

Keywords of the alphabetical index:

Extraterritorial jurisdiction, criminal law / Prosecution, legal basis, European Convention on the Suppression of Terrorism.

Headnotes:

A provision of the Code of Criminal Procedure which extends the extraterritorial jurisdiction of the Belgian courts for offences contrary to the European Convention on the Suppression of Terrorism provides a legal basis for a prosecution in Belgium. It must therefore be regarded as a provision of substantive criminal law to which criminal legislation must apply.

In accordance with the case-law of the European Court of Human Rights, Article 7 ECHR embodies the principle that only the law can define a crime and prohibits, in particular, the retroactive application of the criminal law where it operates to the detriment of the person concerned. It is thus essential that at the time when the accused committed the act which gave rise to the proceedings and to the conviction, a legislative provision existed which rendered that act punishable.

Summary:

An alien who was the subject of a request for extradition which was refused by Belgium brought an action before the Court of Arbitration for annulment of a law which, in her submission, was a special law enacted with a view to making it possible to try her in Belgium; the law in question repealed a provision of the Code of Criminal Procedure which limited the extension of the extraterritorial jurisdiction of the courts to offences committed after the entry into force of that Code.

The Court of Arbitration acknowledged that the person concerned had *locus standi* because the *travaux préparatoires* for the law made clear that her situation was taken into consideration and because the question of the entry into force of the law was related directly to his case. She had therefore shown sufficient direct and personal interest to seek its annulment.

The applicant claimed that there had been a breach of the constitutional provisions guaranteeing equality and non-discrimination and also of the rights of aliens (Articles 10, 11 and 191 of the Constitution), read with Article 7.1 ECHR and Article 15.1 of the International Covenant on Civil and Political Rights. She contended that the law constituted a discriminatory breach of the principle of non-retroactivity of the criminal law, as it had the effect of applying a

provision of criminal procedure to offences committed before that provision entered into force.

The Court stated, first of all, that it must determine the precise nature of the contested law, since the principle of non-retroactivity of a criminal law applied irrespective of whether the legislature chose to classify it as a “criminal law” or as a “procedural law”. It was therefore for the Court to determine whether, in this case, the law in question was or was not a criminal law, to which the principle of non-retroactivity must apply.

After referring to the content of the *travaux préparatoires* for the law, the Court concluded that the law did not create any new offences, since all the offences referred to in Article 2 of the European Convention on the Suppression of Terrorism were already punishable in themselves under Belgian criminal law. Nonetheless, in so far as it extended the extraterritorial jurisdiction of the Belgian courts, the contested law provided a legal basis for proceedings in Belgium. It must therefore be regarded as a provision of substantive criminal law.

In accordance with the case-law of the European Court of Human Rights, Article 7 ECHR embodies the principle that only the law can define a crime and prohibits, in particular, the retroactive application of the criminal law where it operates to the detriment of the person concerned (*Kokkinakis v. Greece*, Judgment of 25 May 1993, Series A, no. 260-A, § 52; *Coëme and Others v. Belgium*, Judgment of 22 June 2000, § 145). It was therefore essential that at the time when the accused committed the offence giving rise to proceedings and to conviction, a legislative provision existed which rendered that offence punishable (see *Coëme and Others v. Belgium*, loc. cit., § 145).

It followed from the foregoing that at the time when the applicant was alleged to have committed the offences of which she was suspected, there was no legal basis in Belgium on which she could be prosecuted and tried for those offences before the Belgian criminal courts.

The Court therefore considered that the plea was well founded and annulled the contested provision.

Languages:

French, Dutch, German.



Bosnia and Herzegovina Constitutional Court

Important decisions

Identification: BIH-2005-1-001

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 28.01.2005 / **e)** AP 35/03 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 30/05 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 2.1.3.2.1 **Sources of Constitutional Law** – Categories – Case-law – International case-law – European Court of Human Rights.
- 4.5.3.1 **Institutions** – Legislative bodies – Composition – Election of members.
- 4.9.3 **Institutions** – Elections and instruments of direct democracy – Electoral system.
- 4.9.9 **Institutions** – Elections and instruments of direct democracy – Voting procedures.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
- 5.3.41 **Fundamental Rights** – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Election, allocation of seats / Chamber, deputies, indirect election.

Headnotes:

Article 3 Protocol 1 ECHR does not create an obligation for a State to introduce a specific election system. It does not exclude the possibility of people freely expressing their opinion on the final composition of the legislature through indirect elections.

Summary:

The Social-Democratic Party (the appellant) filed an appeal with the Constitutional Court against a ruling of the Court of Bosnia and Herzegovina, seeking the annulment of the results of the election of delegates to the House of Peoples of the Federation of Bosnia and Herzegovina in all ten cantons of the Federation of Bosnia and Herzegovina. The grounds for the appeal was that the impugned decision of the Election Commission, approved by the Court of Bosnia and Herzegovina, violated the appellant's right to free elections, set out to in Article 3 Protocol 1 ECHR. The appellant maintained that the number of votes received by each party in the elections for Cantonal Legislatures should have been taken into consideration during the election of delegates to the House of Peoples. Consequently, the appellant argued that the number of seats allocated to it should have been proportionate to the voting results in the direct general elections for Cantonal Legislatures.

However, the Court of Bosnia and Herzegovina and the Election Commission took the position that, firstly, the results of the elections for the House of Peoples were established on the basis of the results of the direct elections conducted in the cantonal assemblies, whose representatives elect delegates for the House of Peoples and, secondly, the delegates to the House of Peoples were not to be elected on the basis of the results of the political parties in the direct and general elections for the cantonal assemblies.

The Constitutional Court pointed out that the Constitution of the Federation of Bosnia and Herzegovina sets out that elections for Cantonal Legislatures and elections for the House of Peoples of the Parliament of the Federation are two different types of elections. Elections for Cantonal Legislatures are provided for by the original text of the Constitution of the Federation of Bosnia and Herzegovina, the provisions of which stipulate direct elections in which voters cast a secret ballot to elect representatives to a Cantonal Legislature. Elections for the House of Peoples of the Parliament of the Federation are provided for by Amendment XXXIV to the Constitution of the Federation of Bosnia and Herzegovina. The manner of election of the delegates to the House of Peoples of the Parliament of the Federation is determined in detail in the Law on Amendments to the Election Law. The above-mentioned constitutional and legal provisions refer to indirect elections, which are to be held after direct elections for Cantonal Legislatures; the elected representatives of Cantonal Assemblies elect delegates to the House of Peoples of the Parliament of the Federation.

It is possible under the Constitution of the Federation of Bosnia and Herzegovina and the Election Law for the political party with the highest number of votes in the direct elections for Cantonal Legislatures not to be allocated any seats in the House of Peoples of the Parliament of the Federation. That is so because the constitutional and legal provisions do not provide for the number of seats allocated to the political parties in the House of Peoples of the Parliament of the Federation to be determined solely in proportion to the number of votes received by the political parties in the direct elections for Cantonal Legislatures.

Consequently, the Constitutional Court found no reason to impose the results of the direct elections for Cantonal Legislatures on the election of delegates to the House of Peoples of the Parliament of the Federation, since two different types of elections were at issue. The results of the elections for the House of Peoples of the Parliament of the Federation may only be calculated on the basis of results of indirect elections held in accordance with the above-mentioned constitutional and legal provisions. If the composition of the House of Peoples of the Parliament of the Federation were to be proportionate to the election results of the parties in the direct elections for Cantonal Legislatures, one could rightfully ask the questions: "What is the point of holding indirect elections?"; "Why was Amendment XXXIV to the Constitution of the Federation of Bosnia and Herzegovina adopted in the first place?"; and "Why were the amendments to the Election Law concerning the election of delegates to the House of Peoples of the Parliament of the Federation adopted?".

The Constitutional Court noted that Article 3 Protocol 1 ECHR contains the concept of subjective political rights relating to "the right to vote" and "the right to stand for election to the legislature". As important as the rights under Article 3 Protocol 1 ECHR are, they are not absolute. Since Article 3 Protocol 1 ECHR recognises them without setting them forth in express terms or defining them, there is room for "implied limitations". In their internal legal orders, the Contracting States have made the rights to vote and to stand for election subject to conditions which are not in principle excluded under Article 3 Protocol 1 ECHR. The rights in question must not be limited "to such an extent as to impair their very essence and deprive them of their effectiveness". Care must be taken to ensure that any limitation pursues a legitimate aim and that the means employed are not disproportionate. As regards the method of appointing the "legislature", Article 3 Protocol 1 ECHR provides only for "free" elections "at reasonable intervals" "by secret ballot" and "under conditions which will ensure the free expression of

the opinion of the people". Subject to that, it does not create any obligation to introduce proportional representation or majority voting with one or two ballots. Moreover, the phrase "conditions which will ensure the free expression of the opinion of the people in the election of the legislature" implies essentially – apart from freedom of expression (already protected under Article 10 ECHR) – the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election. The Constitutional Court held that Article 3 Protocol 1 ECHR also relates to the system of indirect election of the legislature. Moreover, the Constitutional Court found that the European Court of Human Rights had not expressed in any of its decisions any intention to exclude the system of indirect elections from Article 3 Protocol 1 ECHR.

Supplementary information:

Judge Constance Grewe delivered a dissenting opinion.

Languages:

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



Identification: BIH-2005-1-002

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 22.04.2005 / **e)** U 4/05 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 32/05 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

5.3.41 **Fundamental Rights** – Civil and political rights – Electoral rights.

Keywords of the alphabetical index:

Election, municipal, allocation of seats / Multi-ethnicity, principle / Constituent peoples, equal treatment.

Headnotes:

The concept of equality and the prohibition of discrimination are violated if the constituent peoples are treated differently.

When a city council or any other State body is formed on the basis of regulations that are not in conformity with the principle of constituent peoples, the formation itself of the body is not in conformity with the Constitution of Bosnia and Herzegovina.

Summary:

The First Deputy Chair of the Parliamentary Assembly of Bosnia and Herzegovina (the applicant) filed a request with the Constitutional Court for a review of the constitutionality of Article 21 of the Statute of the City of Sarajevo (Statute).

Article 21.3 of the Statute of the City of Sarajevo reads as follows: "Bosniacs, Croats and Others are each guaranteed a minimum of 20% of places in the City Council regardless of the election results."

The applicant pointed out that the Constitution of Bosnia and Herzegovina and Decision of the Constitutional Court U-5/98 guaranteed the status of all three constituent peoples on the entire territory of Bosnia and Herzegovina. Moreover, the Constitution of the Federation of Bosnia and Herzegovina provided that "the constituent peoples and 'Others' shall be proportionally represented in the public institutions of the Federation of Bosnia and Herzegovina". That being so, according to the applicant, it was indisputable that Article 21 of the Statute was not in conformity with the decision of the Constitutional Court on the constituent status of peoples and the Constitution of the Federation of Bosnia and Herzegovina, since the said article of the Statute did not make any reference to Serbs as a constituent people. The applicant maintained that the representatives of the Serb people were not at all elected to the City Council of the City of Sarajevo and that that fact constituted an absolute denial of Serbs as a constituent people and resulted in discrimination against them, contrary to Article II.4 of the Constitution with respect to Serbs as a constituent people in Bosnia and Herzegovina.

The Constitutional Court recalled that since the creation of the modern state of Bosnia and Herzegovina, the principle of multi-ethnicity (Bosniacs, previously Muslims, Serbs and Croats) has been one of the most important elements to find its place in the Constitution, which is the supreme legal act of the State.

The composition of the population of Bosnia and Herzegovina suggests that it is a pronouncedly multi-ethnic state. This is supported by the figures from the last census in Bosnia and Herzegovina which was held in 1991. According to the 1991 census, 17.4% of the total population of Bosnia and Herzegovina declared themselves as Croats, 43.5% of the total population declared themselves as Muslims and 31.2% of the total population declared themselves as Serbs. According to the 1991 census, the figures relating to the area of the then City of Sarajevo were as follows: Croats – 6.6% of the total population, Muslims – 49.2% of the total population, Serbs – 29.8% of the total population, Yugoslavs – 10.7% of the total population and Others – 3.6% of the total population.

The Constitutional Court concluded in an earlier decision, Decision U 5/98, the following: "... the constitutional principle of collective equality of constituent peoples following from the designation of Bosniacs, Croats and Serbs as constituent peoples prohibits any special privilege for one or two of these peoples, any domination in governmental structures, or any ethnic homogenisation through segregation based on territorial separation...." In that decision, the Constitutional Court clearly stated that the Bosniacs, Croats and Serbs were constituent peoples on the entire territory of Bosnia and Herzegovina and that the provisions of the Entities' Constitutions excluding the principle of constituent peoples were unconstitutional. The aforementioned decision also stated that: "... it is an overall objective of the Dayton Peace Agreement to provide for the return of refugees and displaced persons to their homes of origin and thereby, to re-establish the multi-ethnic society that had existed prior to the war without any territorial separation that would bear ethnic inclination...".

In the case at instance, the Constitutional Court found that the aforementioned constitutional principle of the multi-ethnicity of Bosnia and Herzegovina, i.e. the principle of constituent peoples in the entire territory of Bosnia and Herzegovina elaborated in more detail in the aforementioned decision of the Constitutional Court, had to apply to the impugned provisions of the Statute in view of the fact that all pieces of legislation in Bosnia and Herzegovina must be harmonised with the Constitution. The Court held that it clearly followed from the impugned provision of the Statute that it did not provide to Serbs a minimum of 20%

seats in the City Council of the City of Sarajevo irrespective of the election results. That minimum was guaranteed to other constituent peoples – Bosniacs and Croats – and even Others. The Court further held that failure to designate Serbs as a constituent people that had to participate in the City Council of the City of Sarajevo irrespective of the election results was absolutely unacceptable in view of the fact that, pursuant to the Preamble of the Constitution and the aforementioned Constitutional Court decision on constituent peoples, Serbs are a constituent people in the entire territory of Bosnia and Herzegovina.

Therefore, it was necessary for Serbs, like Bosniacs and Croats, to be given minimum guarantees of participation in the City Council irrespective of the election results, since that was the only way to respect the principle of constituent peoples in the entire territory of Bosnia and Herzegovina. That could only be achieved if the Statute designated Serbs as one of the constituent peoples in the same line with Bosniacs, Croats and Others.

The Court found that it clearly followed from the impugned provision of Article 21.3 of the Statute that Bosniacs, Croats and Others would be granted a minimum of 20% of seats in the City Council of the City of Sarajevo irrespective of the election results. Serbs were not granted that privilege, and they, like Bosniacs, Croats and Others, were also one of the constituent peoples. On the contrary, Serbs were not even mentioned in the text of the impugned provision. In view of the fact that there was no justified reason for Bosniacs and Croats to be granted such privileged status as to the election of members to the City Council of the City of Sarajevo, the Constitutional Court held that the provision of Article 21.3 of the Statute violated the right of Serbs not to be discriminated against, as provided for under Article II/4 of the Constitution of Bosnia and Herzegovina, in relation to the political rights under Article 5.1.c of the Convention on the Elimination of All Forms of Racial Discrimination of 1995.

Cross-references:

- Decision U 5/98 of 01.07.2000, *Bulletin* 2000/3 [BIH-2000-3-003].

Languages:

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



Bulgaria

Constitutional Court

Statistical data

1 January 2005 – 30 April 2005

Number of decisions: 1

Important decisions

Identification: BUL-2005-1-001

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 10.02.2005 / **e)** 09/04 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 16, 18.02.2005 / **h)** CODICES (Bulgarian).

Keywords of the systematic thesaurus:

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

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

4.7.1.1 **Institutions** – Judicial bodies – Jurisdiction – Exclusive jurisdiction.

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

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

5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Supreme Court, competence / Law, interpretation, uniform.

Headnotes:

The constitutional principles of the rule of law and equality of the citizens before the law result in the powers and the obligation of the Supreme Court of Cassation to provide for supreme judicial control by way of a precise and equal application of the laws. In respect of all the laws and all courts, with the exception of those subject to the oversight of the Supreme Administrative Court. The scope of the oversight pertains to the laws applied by the courts in respect of all legal disputes and there can be no exception depending on the appeal jurisdiction of the court.

Summary:

The case was brought upon the request by the Supreme Court of Cassation (SCC) Commercial Tribunal General Meeting. The Constitutional Court was asked to provide a benching interpretation of Article 124 of the Constitution concerning the scope of supreme judicial control by the Supreme Court of Cassation in respect of the precise and equal application of the laws by all courts and whether it is related to the control instance competence of the Court only or covers all possible categories of cases, without the ones subject to the oversight of the Supreme Administrative Court. The Supreme Court of Cassation Commercial Tribunal has exercised its powers for approach on the occasion of a proposal by the Minister of Justice for giving preliminary ruling, due to the existence of unequal and controversial court practice. The Supreme Court of Cassation has motivated the need for interpretation with the possible maintenance of two conflicting opinions: the first being that under Article 124 of the Constitution all laws are subject to supreme oversight irrespective whether they concern cases which are subject to appeal to the Supreme Court of Cassation, and the second – that the supreme oversight covers only the application of the laws to cases, subject to the appeal jurisdiction of the Supreme Court of Cassation. Considerations have been developed that the interpretation of laws under cases not subject to cassation control could be related to interference of the judicial branch in the legislative branch, as far as only the latter can make authentic interpretation of the laws.

When ruling on this case, the Constitutional Court has taken into consideration the following:

- The judicial branch of government shall safeguard the rights and legitimate interests of all citizens, legal entities, and the state (Article 117 of the Constitution). This safeguarding is exercised by the constitutionally established judicial bodies: the Supreme Court of Cassation, the Supreme Administrative Court, courts of appeals, district courts, courts-martial and municipal courts. The Supreme Court of Cassation, along with the other courts provided for in Article 119.1 of the Constitution, performs a jurisdictional function, which is the main function of the judicial branch. The Supreme Court of Cassation, consistent with its place in the hierarchy of the courts, is also assigned the power to exercise supreme judicial oversight as to the precise and equal application of the laws by all courts (Article 124 of the Constitution). The Supreme Administrative Court exercises supreme judicial oversight as to the precise and

equal application of the laws in administrative justice (Article 125 of the Constitution). The considerations developed below pertain only to the interpretation power of Supreme Court of Cassation.

The Constitutional Court, considering Articles 119 and 124 of the Constitution, assumes that the Supreme Court of Cassation competence is not exhausted with its cassation function only, but it is the only one solely assigned, along with the main jurisdictional activities, to exercise its powers under Article 124 of the Constitution for the precise and equal application of the laws by all courts and its interpretation activity. The organic law does not oblige the Supreme Court of Cassation to perform its control and dissolving function over all judicial acts. This enables the legislator to narrow the scope of the acts, subject to appeal before the Supreme Court of Cassation, whereby to reduce the overburden of the Court with cases, so that it would be able to exercise its interpretation power under Article 124 of the Constitution.

Pursuant to Article 133 of the Constitution, the general power of the Supreme Court of Cassation to exercise supreme judicial oversight as to the precise and equal application of the laws by all courts is defined in the Law on the Judiciary (LJ). Of importance for the interpretation made by this ruling is that this power of the Supreme Court of Cassation is a means to apply the principles of rule of law and equality of the citizens before the law provided for in the organic law (Articles 4 and 6.2 of the Constitution).

Article 124 of the Constitution establishes the power of the Supreme Court of Cassation to exercise supreme judicial oversight as to the precise and equal application of the laws by all courts. This supreme oversight is exercised by means of the appeal jurisdiction of the Court, but even more importantly by means of issuing specific acts interpreting the laws, which are binding for the courts. For the Supreme Court of Cassation, there is a constitutional obligation to exercise the supreme judicial oversight.

There is no constitutional limit for the Supreme Court of Cassation competence for supreme oversight. In the first place, the oversight should ensure precise and equal application of the laws. The use of the noun in the plural and using a definite article explains fully its content – all laws without any limitation. Consequently, the scope of the supreme oversight does not allow any exceptions in respect of the laws that might be subject to interpretation because of imprecise application or different interpretation in the courts' practice. Neither does the Constitution contain

any limitation on the supreme oversight in respect of all laws with respect to the appeal jurisdiction of the Supreme Court of Cassation. Secondly, the oversight as to the precise and equal application of the laws pertains to all courts. Article 124 of the Constitution provides that the supreme oversight exercised by the Supreme Court of Cassation aims at the precise and equal application of the laws by all courts.

On the considerations developed by the applicants as to the interference of the judicial branch in the work of the legislative branch, the Constitutional Court is of the opinion that the authentic interpretation of laws is within the competence of the National Assembly as regards subsequent clarification and specification of the wording of a law and is encompassed through the adoption of an Act, which because of its author and form is binding for everybody. The interpretation by Parliament in no way displaces or excludes the powers given to Supreme Court of Cassation and Supreme Administrative Court by the Constitution to exercise supreme judicial oversight as to the precise and equal application of the laws by all courts. The preliminary rulings of the supreme courts represent an interpretation of a different scope and nature. They have no effect on the legislative branch, therefore they cannot be interference in its work.

According to the above considerations, the Constitutional Court has ruled that the supreme judicial oversight as to the precise and equal application of the laws by all courts, exercised by the Supreme Court of Cassation, covers the applicable laws to all categories of court cases, with the exception of those subject to the oversight by the Supreme Administrative Court, and is not limited by the appeal jurisdiction of the Court.

Languages:

Bulgarian.



Identification: BUL-2005-1-002

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 05.04.2005 / **e)** 02/05 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 33, 15.04.2005 / **h)** CODICES (Bulgarian).

Keywords of the systematic thesaurus:

1.1.3.7 **Constitutional Justice** – Constitutional jurisdiction – Status of the members of the court – End of office.

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

4.7.4.3.4 **Institutions** – Judicial bodies – Organisation – Prosecutors / State counsel – Term of office.

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

Keywords of the alphabetical index:

Supreme Court, chairperson, period of office / Prosecutor General, period of office.

Headnotes:

In accordance with the Constitution, the period for which the President of the Republic, on a motion from the Supreme Judicial Council, appoints the chairpersons of the supreme courts and the Chief Prosecutor, is seven years. This period had been determined taking into account the newly introduced ban on re-election.

Such a period is the interval of time during which the three magistrates take up and perform their respective duties. It expires with the expiry of the seven calendar years and then comes the end of the mandate of the appointed persons which also puts an end to their powers and their further exercise is impermissible. It cannot be extended by law.

Summary:

The case was opened upon the request of the of the Supreme Court of Cassation Criminal Tribunal General Meeting and a case opened upon the request of the Supreme Court of Cassation Plenum was joined to it for joint consideration and decision.

Both requests pertain to the same matter. They are based on Article 149.1.2 of the Constitution and they challenge the constitutionality of Article 28.9.2 of the Law on the Judiciary (LJ) in the wording after its amendment – State Gazette no. 29/2004. It is maintained that the provision contradicts Article 129.2 of the organic law because it gives an opportunity for extension of the constitutionally provided seven-year period for which the Chairperson of the Supreme Court of Cassation, the Chairperson of the Supreme Administrative Court, and the Chief Prosecutor are appointed.

The Constitutional Court considered both requests, the considerations contained therein and in the opinions of the stakeholders and in order to rule took into account the following:

- Under Article 28.9 of the LJ the term of office of the Chairperson of the Supreme Court of Cassation, the Chairperson of the Supreme Administrative Court, and the Chief Prosecutor starts with their taking up their duties and they continue to exercise those until the newly appointed persons come into office. The content of the provision shows that thereby the beginning of the term of office for the three magistrates is specified. Along therewith, it specifies when they finish exercising their powers, and the time of conclusion is made dependent on the successful completion of the procedure on the election and appointment of the respective persons and their coming into office. That part of the provision, providing for the end of the powers of the Chairpersons of the Supreme Courts and the Chief Prosecutor, contradicts Article 129.2 of the Constitution.

The period for which the President of the Republic, on a motion from the Supreme Judicial Council, appoints the Chairpersons of the Supreme Courts and the Chief Prosecutor, is seven years (Article 129.2 of the Constitution). The period of seven years was determined taking into account the newly introduced ban on re-election and the term of office of the National Assembly, electing the eleven members of the Supreme Judicial Council.

To guarantee the stability of the status of these magistrates and their tenure in office, the organic law in Article 129.3 comprehensively lists the grounds for termination of their powers before the expiry of the set period. No opportunity for extension of that period is provided for. There is no explicit provision in the Constitution allowing the duration of the period to be extended, while such a provision exists, for instance, in respect of the mandate of the National Assembly in Article 64.2. It cannot be derived from the constitution that the three magistrates are not only to be appointed but also dismissed by the President.

The challenged provision allows the chairpersons of the supreme courts and the Chief Prosecutor to continue to exercise their duties after the expiry of the constitutionally period of seven years provided for. By allowing this in fact changes this period and extends it with the period from the expiry of the seven years until the newly appointed persons take up their duties, hence for unlimited duration of time.

By deciding under these considerations that the challenged provision is unconstitutional, the Constitutional Court finds that the request should be admitted and for that reason has ruled: as unconstitutional Article 28.9.2 of the Law on the Judiciary.

Languages:

Bulgarian.



Identification: BUL-2005-1-003

a) Bulgaria / b) Constitutional Court / c) / d) 21.04.2005 / e) 11/04 / f) / g) *Darzhaven vestnik* (Official Gazette), 37, 29.04.2005 / h) CODICES (Bulgarian).

Keywords of the systematic thesaurus:

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

1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.

Keywords of the alphabetical index:

Supreme Court, jury, power.

Headnotes:

Under Article 150.1 of the Constitution, the plenums of the Supreme Court of Cassation and the Supreme Administrative Court, comprising all the judges, as well as the general meetings of their chambers, have the power to refer to the Constitutional Court.

Summary:

The case was opened upon the request of the Chief Prosecutor. The Constitutional Court was requested to provide an interpretation of Article 150.1 of the Constitution to the effect that only the plenary panels of the Supreme Court of Cassation (SCC) and the Supreme Administrative Court (SAC) have the right to refer to the Constitutional Court under the procedure of the text quoted.

The considerations given maintain that the provisions of Article 84.1.2, second part of the sentence and Article 95.3, second part of the sentence of the Law on the Judiciary are in contradiction with Article 150.1 of the Constitution.

The Constitutional Court decided the following:

- Under Article 150.1 of the Constitution, the right to refer to the Constitutional Court can be exercised by at least one fifth of all Members, one-fifth of all Members of the National Assembly, the President, the Council of Ministers, the Supreme Court of Cassation, the Supreme Administrative Court, and the Chief Prosecutor. Municipal councils are also given the right to refer to the Constitutional Court to rule on conflicts of competence between the bodies of local self-government and the central executive branch of government. Along with this, Article 150.2 of the Constitution also provides that, should it find a discrepancy between a law and the Constitution, the Supreme Court of Cassation or the Supreme Administrative Court shall suspend the proceedings on a case and shall refer the matter to the Constitutional Court.

Under the procedural codes, the hearing of a case and the suspension of its proceedings may be made only by a particular court chamber. Hence, only a court jury is authorised to refer a case to the Constitutional Court when it finds in a particular case a discrepancy between a law and the Constitution. Neither the Supreme Court of Cassation or Supreme Administrative Court plenums, nor the general meetings of their chambers, can suspend the proceedings on cases which are before particular chambers of the supreme courts.

When the constitutional legislator speaks of supreme courts within the hypothesis of Article 150.2 of the Constitution, he is not referring to the supreme representative bodies of the Supreme Court of Cassation and the Supreme Administrative Court, but rather to the relevant Supreme Court as a body administering justice, i.e. its chambers. This conclusion can be drawn even if Article 150.2 of the Constitution does not explicitly provide for that the right belongs to the chamber hearing the case.

In its regular practice, the Constitutional Court has always decided that the plenums of the Supreme Court of Cassation and the Supreme Administrative Court and the general meetings of their chambers are entitled to refer to the Constitutional Court under Article 150.1 of the Constitution. The Constitutional Court has no grounds to diverge from its regular practice.

Under the considerations stated, the Constitutional Court ruled:

- Under Article 150.1 of the Constitution, the plenums of the Supreme Court of Cassation and the Supreme Administrative Court, comprising all the judges, as well as the general meetings of their chambers have power to refer to the Constitutional Court.
- The Court dismissed the request of the Chief Prosecutor of the Republic of Bulgaria to establish the unconstitutionality of Article 84 of the Law on the Judiciary.

Languages:

Bulgarian.



Canada Supreme Court

Important decisions

Identification: CAN-2005-1-001

a) Canada / **b)** Supreme Court / **c)** / **d)** 31.03.2005 / **e)** 29297 / **f)** Solski (Tutor of) v. Quebec (Attorney General) / **g)** *Canada Supreme Court Reports* (Official Digest), [2005] 1 S.C.R. xxx / **h)** Internet: <http://www.lexum.umontreal.ca/csc-scc/en/index/html;CODICES> (English, French).

Keywords of the systematic thesaurus:

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

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

5.3.40 **Fundamental Rights** – Civil and political rights – Linguistic freedom.

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

Keywords of the alphabetical index:

School, language of instruction / Language, minority, education.

Headnotes:

Properly interpreted, Section 73.2 of the Charter of the French language, which limits access to English-language public schools in Quebec, is constitutional. A reading down of Section 73.2, by qualitatively defining the “major part” requirement set out in that section as meaning a “significant part”, permits Quebec to meet its legislative objective of protecting the French language, while ensuring that no persons eligible for minority-language education under Section 23.2 of the Canadian Charter of Rights and Freedoms are excluded from minority-language schools if they choose to attend them.

Summary:

I. S, C and L requested certificates of eligibility to allow their children to attend English-language public

schools in Quebec. The requests were denied by the Minister's designated person on the ground that the children had not completed the "major part" of their instruction in English as required by Section 73.2 of the Charter of the French language. In the cases of S and L, this decision was upheld by the review committee and the Administrative Tribunal of Quebec. Concurrently with the proceeding before the Administrative Tribunal, S sought declaratory relief in the Superior Court. The court declared Section 73.2 to be inconsistent with Section 23.2 of the Canadian Charter of Rights and Freedoms to the extent that it limited the category of persons eligible to receive minority language education. The Attorney General of Quebec appealed that decision. S decided not to contest the appeal, and the Court of Appeal authorised C and L to intervene. The Court of Appeal set aside the Superior Court's decision, concluding that the "major part" requirement set out in Section 73.2 was constitutional.

II. The Supreme Court of Canada in a unanimous judgment upheld the constitutionality of Section 73.2, but concluded that C's and L's children were eligible for English education in Quebec.

The minority language education rights entrenched in Section 23 of the Canadian Charter of Rights and Freedoms are national in scope and remedial in nature. They must be interpreted in a broad and purposive manner consistent with the preservation and promotion of both official language communities. The application of Section 23 is contextual and must take into account the differences between the situations of the minority language community in Quebec and the minority language communities of the territories and the other provinces. In Quebec, the latitude given to the provincial government in drafting legislation regarding education must be broad enough to ensure the protection of the French language while satisfying the purposes of Section 23.

The specific purpose of Section 23.2 of the Canadian Charter of Rights and Freedoms is to provide continuity of minority language education rights, to accommodate mobility and to ensure family unity. In order to comply with Section 23.2, the "major part" requirement set out in Section 73.2 of the Charter of the French language must involve a qualitative rather than a strict quantitative assessment of the child's educational experience. The child's past and present educational experience is the best indicator of genuine commitment to a minority language education. The qualitative assessment will determine if a significant part, though not necessarily the majority, of the child's instruction, considered cumulatively, was in the minority language. The focus of the assessment is both subjective, in that it is necessary to examine all

the circumstances of the child, and objective, in that the Minister, the Administrative Tribunal of Quebec and the courts must determine whether the admission of a particular child is, in light of his or her personal circumstances and educational experience, consistent with the general purposes of Section 23.2. While there is nothing in the language of Section 23.2 that strictly restricts the nature of the instruction, it would be contrary to the purpose of the provision to equate immersion programs with minority language education.

To purposefully assess the requirement for participation in Section 23.2, therefore, all the circumstances of the child must be considered including the time spent in each program, at what stage of education the choice of language of instruction was made, what programs are or were available, and whether learning disabilities or other difficulties exist. The relevance of each factor will vary with the facts of each case and other factors may also arise depending on the circumstances of the particular child and his or her educational experience.

Once a commitment to instruction in the minority language is shown on the facts of the case, the purpose of Section 23.2 is engaged. If children are in a recognised education program regularly and legally, they will in most instances be able to continue their education in the same language. This is consistent with the wording of Section 23.2 and the purposes of protecting and preserving the minority-language community, as well as with the reality that children properly enrolled in minority-language schools are entitled to a continuous learning experience and should not be uprooted and sent to majority-language schools, which would not be in the interest of the minority language community or of the child. Nevertheless, a qualitative assessment of the situation to determine whether there is evidence of a genuine commitment to a minority-language educational experience is warranted, with each province exercising its discretion in light of its particular circumstances, obligation to respect the objectives of Section 23, and educational policies.

In this case, a qualitative assessment of the educational experience of C's and L's children indicates that they are entitled to English instruction in Quebec pursuant to Section 73.2.

Languages:

English, French (translation by the Court).



Identification: CAN-2005-1-002

a) Canada / **b)** Supreme Court / **c)** / **d)** 31.03.2005 / **e)** 29298 / **f)** Gosselin (Tutor of) v. Quebec (Attorney General) / **g)** *Canada Supreme Court Reports* (Official Digest), [2005] 1 S.C.R. xxx / **h)** Internet: <http://www.lexum.umontreal.ca/csc-scc/en/index/html>; CODICES (English, French).

Keywords of the systematic thesaurus:

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

5.3.40 **Fundamental Rights** – Civil and political rights – Linguistic freedom.

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

Keywords of the alphabetical index:

School, language of instruction / Language, minority, education.

Headnotes:

Section 73 of the Charter of the French language, which limits access to English language schools in Quebec, does not infringe the equality rights of the children of the French language majority who are not entitled to instruction in English. In light of Section 23 of the Canadian Charter of Rights and Freedoms, which constitutionally protects the minority language education rights, the right to equality in the context of minority language instruction does not require that all children in Quebec, including the children of the French language majority, be given access to publicly funded English language education. Section 23 can be viewed not as an exception to equality guarantees, but as the fulfilment of these guarantees in the case of linguistic minorities by making available to them an education, adapted to their particular circumstances and needs, equivalent to the education provided to the majority.

Summary:

I. Section 73 of the Charter of the French language provides access to English language schools in Quebec only to children who have received or are receiving English language instruction in Canada or whose parents studied in English in Canada at the primary level. The appellant parents, who do not qualify as rights holders under Section 73 or under Section 23 of the Canadian Charter of Rights and Freedoms, claim that Section 73 discriminates between children who qualify and the majority of French-speaking Quebec children who do not, and violates the right to equality guaranteed at Sections 10

and 12 of the Quebec Charter of Human Rights and Freedoms. Equality requires, the appellants argue, that all children in Quebec be given access to publicly funded English language education. The Superior Court, the Court of Appeal and the Supreme Court of Canada dismissed their claims.

II. Since the appellants are members of the French language majority in Quebec, their objective in having their children educated in English simply does not fall within the purpose of Section 23 of the Canadian Charter of Rights and Freedoms. The appellants have no claim to publicly funded English language instruction in Quebec and, if adopted, the practical effect of their equality argument would be to read out of the Constitution the compromise contained in Section 23.

There is no hierarchy amongst constitutional provisions. Equality guarantees cannot therefore be used to invalidate other rights expressly conferred by the Constitution. All parts of the Constitution must be read together. It cannot be said that in implementing Section 23, the Quebec legislature has violated the equality rights contained in either Section 15.1 of the Canadian Charter of Rights and Freedoms or Sections 10 and 12 of the Quebec Charter.

The purpose of Section 73 is not to “exclude” entire categories of children from a public service, but rather to implement the positive constitutional responsibility incumbent upon all provinces to offer minority language instruction to its minority language community. In seeking to use the right to equality to access a right guaranteed in Quebec only to the English language minority, the appellants put aside the linkage between Section 73 of the Charter of the French language and Section 23 of the Canadian Charter of Rights and Freedoms, and attempt to modify the categories of rights holders under Section 23. This is not permissible. Section 23 provides a comprehensive code for minority language education rights and achieves its purpose of protecting and promoting the minority language community in each province by helping to bring about the conditions under which the English community in Quebec and the French communities of the other provinces can flourish.

Languages:

English, French (translation by the Court).



Croatia

Constitutional Court

Important decisions

Identification: CRO-2005-1-001

a) Croatia / b) Constitutional Court / c) / d) 12.01.2005 / e) U-I-2597/2003 / f) / g) *Narodne novine* (Official Gazette), 11/05 / h) CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

1.3.2.3 **Constitutional Justice** – Jurisdiction – Type of review – Abstract review.

1.3.3 **Constitutional Justice** – Jurisdiction – Advisory powers.

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.

Keywords of the alphabetical index:

Law, consolidated text.

Headnotes:

The Constitutional Court is not competent to review the constitutionality of the consolidated wording of an Act, since the consolidated text cannot be considered an Act within the meaning of Article 128.1 of the Constitution and the addressees do not have the obligation to refer to the provisions of the consolidated wording of an Act.

However, the competent body of the Croatian Parliament must pay special attention to the authenticity of the contents and numerical designations when compiling the consolidated text of an Act.

Summary:

The applicant, the Croatian Legal Centre, submitted a proposal for a review of the constitutionality of the

Criminal Procedure Act ("*Narodne novine*" no. 62/03 – consolidated text), which includes the Criminal Procedure Act ("*Narodne novine*", no. 110/97) and its revisions and amendments ("*Narodne novine*", nos. 27/98, 58/99, 112/99, 58/02 and 143/02) relating to the entry into force of the Act in question. In accordance with Article 194 of the Act on revisions and amendments of the Criminal Procedure Act ("*Narodne novine*" no. 58/02), on 14 March 2003 the Legislation Committee of the Croatian Parliament presented the cleared text of the Act at its 106th session.

The applicant pointed out several places in the consolidated text where the Legislative Committee had revised the Act. The applicant referred to the Conclusion of the Supreme Court of the Republic of Croatia of 6 June 2003 (no. II-1 Kr-27/03), which stated: "the numerical designation of legal provisions is part of the wording of an Act". The applicant then attempted to prove that there had been an unauthorised change of the wording of the Act. It alleged that the Legislative Committee, in preparing the consolidated wording of the Criminal Procedure Act, exceeded the limits of its authority established in Article 59.6 of the Rules of Procedure of the Croatian Parliament ("*Narodne novine*" no. 6/02), on the ground that only the legislator, acting in the manner and according to the procedures laid down by the Constitution, may enact and amend statutes. The consolidation of the wording of Acts should be carried out in such a way as to respect constitutionality, in particular, the principle of the protection of the legal certainty of citizens. The applicant argued that the disputed consolidated wording of the Criminal Procedure Act was not in conformity with the provisions of Articles 3, 5, 80, 82.2, 83, 84, 86, 88 and 89 of the Constitution, and requested the Court to strike it down. Relying on the provision of Article 104.1 of the Constitutional Act on the Constitutional Court of the Republic of Croatia, the applicant requested that the Constitutional Court communicate to the Croatian Parliament any finding of unconstitutionality or illegality.

In accordance with the provision of Article 42.1 of the Constitutional Act, the applicant's proposal was delivered to the Croatian Parliament for its response. In his submission of 13 August 2003, the President of the Croatian Parliament informed the Court that its official communication of the proposal had been delivered to the Committee for the Constitution, Rules of Procedure and Political System of the Croatian Parliament. No response was ever received.

The Court rejected the proposal on the ground it lacked jurisdiction, and expressed an opinion that the consolidated wording of an Act, according to its legal

nature, could not be considered an Act within the meaning of Article 128.1 of the Constitution, and that the addressees were not under an obligation to refer to the provisions of the consolidated wording of an Act.

However, bearing in mind the applicant's argument of the existence of the widespread practice of persons consulting only the consolidated texts, the Court found it necessary to observe that the applicant was right in claiming that numerical and other differences in the content of the consolidated wording of Acts may lead to certain difficulties in their practical application.

The consolidated wording of texts is as a rule prepared when major or extensive amendments have been made to an Act. The consolidated wording of an Act merely enables the addressees to find a certain legal matter in one place. The consolidated wording is the whole of the legal provisions in force, collected from several valid Acts of the same kind and compiled and arranged in a systematic order in one text. All of the original Acts are still in force, and the compilation of the consolidated wording does not influence their contents or validity.

The competent body of the Croatian Parliament should prepare the consolidated wording of an Act in such a way as to bring all the amendments together into one relevant wording. Such a text is not a new attempt to regulate the subject-matter. The amendments to the Act are not out of force. Therefore, the competent body of the Croatian Parliament has a special responsibility as to the authenticity of the contents and the identity of the numerical designations put into the consolidated wording.

Bearing in mind that Article 3 of the Constitution lays down that the principle of the rule of law – legal certainty of the legal system – is the highest value of the constitutional order and the basis of the interpretation of the Constitution, the Constitutional Court held that the demands that the wording of an Act must fulfil must also be taken into account when preparing the consolidated wording. The Court also considered that principle to be of the greatest importance because the Croatian legislative body often amends the consolidated wordings of Acts, which are in their contents not Acts at all.

The Court would follow the proposal of the applicant to inform the Croatian Parliament of any finding of unconstitutionality or illegality in individual Constitutional Court cases.

Languages:

Croatian, English.



Identification: CRO-2005-1-002

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 19.01.2005 / **e)** U-II-4255/2004 / **f)** / **g)** *Narodne novine* (Official Gazette), 12/05 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

1.3.5.9 **Constitutional Justice** – Jurisdiction – The subject of review – Parliamentary rules.

4.5.10.2 **Institutions** – Legislative bodies – Political parties – Financing.

Keywords of the alphabetical index:

Parliament, member, allowance / Parliament, member, independent / Minority, national, deputy.

Headnotes:

There are no obstacles in constitutional law to national minority representatives and independent members obtaining funding for work by way of the appropriate application of provisions in Article 19 of the Political Parties Act because the criteria are based on the total number of MPs currently sitting in the Croatian Parliament. Consequently, the minority representatives and independent members elected from lists of parliamentary and non-parliamentary political parties are also factors in the calculation of the allocation of the total amount of funding.

However, since national minority representatives and independent members are not considered to amount to bodies or persons to which budgetary funds may be allocated, the Constitutional Court points out that any funding from the national budget allocated to them for work, until otherwise regulated in a relevant act, should not be paid into their private accounts. It is necessary to ensure control over the expenditure of the budgetary funding allocated to them by the appropriate application of Article 19 of the Political Parties Act, in accordance with the relevant regulations of the Republic of Croatia in force.

Summary:

The Constitutional Court rejected the proposal by the Croatian Peasant Party to review the conformity of the Decision (Amendments) on the Allocation of Funding for the Work of Political Parties in 2004, class 400-06/04-01/01, entry no: 612/2-04-02 of 3 November 2004 with the Constitution, on the ground of lack of competence.

The impugned decision was rendered by the Committee for the Constitution, Standing Rules and Political System of the Croatian Parliament at its session on 3 November 2004.

The applicant alleged that the provision of Article 19 of the Political Parties Act (*Narodne novine*, nos. 76/93, 111/96, 164/98 and 36/01) was breached by point III of the impugned decision. The applicant challenged, in particular, the part of the decision establishing that the Ministry of Finance of Croatia was, in the period from 1 October to 21 December 2004, to determine the amount of and allocate funding directly to MPs representing national minorities and to independent members, since in the applicant's view, according to Article 19 of the Political Parties Act "there is no legal provision for approving payment and allocating funding to individual members of parliament, even to those who represent national minorities, since the Act gives that right exclusively to political parties".

Point I of the impugned decision provides that point III of the decision shall be followed by the new point IIIa. Point IIIa introduces an exception to point III of the decision, whereby the Ministry of Finance shall in the period from 1 October to 31 December 2004 allocate funding to the central accounts of political parties or directly to MPs who represent national minorities and to independent members.

Article 128.2 of the Constitution of Croatia provides that the Constitutional Court is to decide on the conformity of other regulations with the Constitution and law. Other regulations include all subordinate regulations of a general and binding nature, rendered by competent governmental bodies or units of local and regional self-government, and other bodies vested with public authority that adopt regulations in a general manner, and which as a rule apply to an unspecific group of addressees.

In its ruling no. U-II-1589/2001 of 10 October 2001, the Court held that the decisions of the competent working body of the Croatian Parliament on allocating funding for the work of political parties in the current year were not regulations within the meaning of Article 128.2 of the Constitution.

Bearing in mind the importance of that issue, which was not yet completely regulated, the Court pointed out that MPs were elected to the Parliament on different grounds, and that until that issue was regulated in a relevant act, there were no obstacles in constitutional law to national minority representatives and independent members obtaining funding for work by way of the appropriate application of the criteria in Article 19 of the Political Parties Act. This was so because the criteria were based on the total number of MPs sitting in the Croatian Parliament, so national minority representatives and independent members elected from lists of parliamentary and non-parliamentary political parties were also factors in calculating the allocation of the total amount of the funding.

However, since national minority representatives and independent members were not considered to amount to bodies or persons to which budgetary funds might be allocated, the Constitutional Court pointed out any funding from the national budget allocated to them for work, until otherwise and specifically regulated in a relevant act, should not be paid into their private accounts. It was necessary to ensure control over the expenditure of the budgetary funding allocated to them by the appropriate application of Article 19 of the Political Parties Act, in accordance with the relevant regulations in force in Croatia.

Languages:

Croatian, English.

**Identification:** CRO-2005-1-003

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 09.02.2005 / **e)** U-II-1917/2004 / **f)** / **g)** *Narodne novine* (Official Gazette), 26/05 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Referendum request, nullity / Referendum, local.

Headnotes:

A local referendum may be called only on issues on which the unit of local self-government has the right to make decisions within its self-governmental responsibility. There is no special law providing that the issue of the establishment of a centre for asylum seekers falls within the competences of a unit of local self-government.

Summary:

The Government of the Republic of Croatia made a request to the Constitutional Court for a review of the constitutionality and legality of the Decision to Call a Referendum for the Slatina Settlement in the District of the City of Oroslavje, published in the Official Gazette of the Krapisko-zagorska County *Službeni glasnik Krapinsko-zagorske županije*, no. 6/04 (hereinafter: Decision). The Constitutional Court quashed that decision.

The impugned decision called a referendum for the Slatina Settlement in the District of the City of Oroslavje on 23 May 2004, for the purpose of enabling citizens to express their opinion on the intention of the Ministry of Internal Affairs to establish a centre for asylum seekers in the former army barracks in Slatina.

The petitioner argued that the impugned decision did not conform to the provision of Article 4.2 of the Act on Referendums and Other Forms of Personal Participation in State Government and Local and Regional Self Government, and Article 24.2 of the Local and Regional Self Government Act, because the issue to be put to referendum did not fall within the self-governmental responsibility of the unit of local self government, and there was no specific law setting out that a representative body of a unit of local self government could take a decision on the establishment of centres for asylum seekers.

According to the provision of Article 22.2 of the Asylum Act (*Narodne novine* no.103/3), the establishment of centres for asylum seekers is regulated by the Decree on the Internal Organisation of the Ministry of Internal Affairs.

For those reasons, the Court held that the impugned decision was not in compliance with the provision of Article 4.2 of the Act on Referendums and Other Forms of Personal Participation in State Government and Local and Regional Self Government, with the provision of Article 24.2 of the Local and Regional Self Government Act, and with the provision of Article 132.3 of the Constitution setting out that citizens may directly participate in the local management through meetings, referenda and other forms of direct decision-making in conformity with law and statute.

The instant case was not about managing local affairs but about establishing a centre for asylum seekers, which falls, according to the Act on Asylum, within the powers of the Ministry of Internal Affairs.

Languages:

Croatian, English.



Identification: CRO-2005-1-004

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 09.02.2005 / **e)** U-I-3254/2004 / **f)** / **g)** *Narodne novine* (Official Gazette), 32/05 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

5.2 **Fundamental Rights** – Equality.

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

Keywords of the alphabetical index:

Housing, tenancy right / Housing, tenant, right to purchase the privately-owned flat / Discriminatory treatment.

Headnotes:

The distinction between former holders of a specially protected tenancy of publicly-owned flats and persons holding a specially protected tenancy of privately-owned flats with respect to the right to

buy such flats is not discriminatory, as there is an objective and reasonable justification to deny such right to former holders of specially protected tenancies of privately-owned flats, that is to say, the protection of the rights of the owners of such flats. Therefore, the difference in treatment originating from the exclusion of persons holding a specially protected tenancy of privately-owned flats from the category of occupiers entitled to purchase the flats they occupy is not discrimination within the meaning of Article 14 ECHR.

Summary:

The Constitutional Court refused the proposal of 104 applicants, including associations and unions of tenants and individuals, to review the constitutionality of Article 3.1.2 of the Specially Protected Tenancies (Sale to Occupier) Act (*Narodne novine*, nos. 27/91, 33/92, 43/92 – consolidated wording – 69/92, 25/93, 48/93, 2/94, 44/94, 58/95, 11/96, 11/97, 68/98, 96/99, 120/00, 94/01 and 78/02).

The impugned provision of the Act, which has not been revised since its adoption in 1991, lays down that the provisions of the Act do not concern the sale of flats that are:

- “2. Privately owned and let under specially protected tenancies if not included in the provision of Article 2 of this Act”.

In an earlier case resolved by Ruling no. U-I-762/1996, the Constitutional Court had already reviewed the conformity of the impugned provision of Article 3.1.2 of the Act with Article 3 of the Constitution as to equality and the rule of law as the highest values of the constitutional order of Croatia, and with Articles 14.2, 35 and 61.1 of the Constitution. In that ruling, the Court had not accepted the applicant’s proposal.

In view of the repeated requests by the applicants to the Constitutional Court for the review of the conformity of the same Act with the Constitution on the ground of the same allegations as those that had been put forward in case no. U-I-993/2003, the Court took the same legal position that it had taken in the previous case: the Court did not find any new circumstances concerning the impugned provision of the Act which would make it change the legal opinion delivered in the two above-mentioned rulings. Nor did the applicants present any new reasons relevant to constitutional law which would provide the Constitutional Court with grounds to institute proceedings to review the conformity of the impugned provision of the Act with Articles 3, 14.2, 35 and 61.1 of the Constitution. Moreover, the Court found the

proposal to review the conformity of the impugned provision of the Act with Article 30 of the Constitution to be unfounded on the ground that that provision was obviously not relevant in the case.

Equally, the Court affirmed the legal opinion it had delivered in case no. U-I-993/2003 regarding the applicants’ reference to the above mentioned articles of the Agreement on Succession Issues, signed in Vienna on 29 June 2001. The Court particularly emphasised that the applicants had always been in a position significantly different from the one of the persons whose right to purchase flats of which they previously held a specially-protected tenancy was recognised by the Act. While such persons were holders of a specially-protected tenancy of publicly-owned flats (whether such flats were those that had always been in public ownership or whether they had been transferred from private into public ownership by acts of expropriation, nationalisation, confiscation or similar acts), the applicants were *ab initio* lessees of privately-owned flats.

Moreover, as the applicants were the occupiers of privately-owned flats, the Court noted the existence of the legitimate interest of owners to have their ownership protected. If the persons in the applicants’ position were vested with the right to buy the privately-owned flats which they occupied, the owners would be put under a compulsory obligation to sell their flats. By contrast, the occupiers of publicly-owned flats who are entitled to purchase such flats do not endanger the property rights of other persons, as the ownership of these flats is not private.

Languages:

Croatian, English.



Identification: CRO-2005-1-005

a) Croatia / b) Constitutional Court / c) / d) 24.02.2005 / e) U-X-835/2005 / f) / g) *Narodne novine* (Official Gazette), 30/05 / h) CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

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

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

1.5.4.2 **Constitutional Justice** – Decisions – Types – Opinion.

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

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

3.15 **General Principles** – Publication of laws.

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

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:

Procedure, length, remedy / Constitutional Court, caseload, effects / Regulation, sub-legislative, issuing after statutory deadline / Supreme Court, jurisdiction / Law, uniform application / Judicial practice, harmonisation.

Headnotes:

Acting in accordance with Article 128.5 of the Constitution and Article 104 of the Constitutional Act on the Constitutional Court of the Republic of Croatia and on the basis of its competence to observe the realisation of constitutionality and legality and to notify the Croatian Parliament on the instances of unconstitutionality and illegality it has observed, the Constitutional Court at its session of 25 February 2005 delivered a Report containing its remarks and observations on the following:

- the right to a trial within a reasonable time;
- the exercise of the obligation of the Supreme Court of the Republic Croatia, as the highest court in the Country, to secure the uniform application of laws and equal justice to all; and
- the passing of delegated legislation (by-laws) after expiry of the statutory deadline.

1. Right to a trial within a reasonable time

Article 29.1 of the Constitution sets out that everyone shall have the right to an independent and fair trial provided by law which shall, within a reasonable time, decide on his or her rights and obligations, or on the suspicion or the charge of a penal offence. The

procedure of the exercise and the protection of this right is regulated in Article 59a (63) of the Constitutional Act on the Constitutional Court of Croatia, which provides that if a party to ordinary court proceedings deems that those proceedings have lasted for an unreasonably long period of time, that party may submit a constitutional complaint to the Constitutional Court even before all legal remedies have been exhausted, which is otherwise a prerequisite for the admissibility of a constitutional complaint. If the complaint is accepted, the Constitutional Court has the obligation to set a deadline for adjudication by the trial court and to determine appropriate compensation for the applicant for the violation of his or her constitutional right. That compensation is to be paid from the state budget. The European Court of Human Rights has found this procedure to be an effective legal remedy on a national level for the legal protection of the right to a trial within a reasonable time, in accordance with Article 6.1 ECHR.

Regarding the unfinished and unresolved proceedings concerning the protection of the right to a fair trial within a reasonable time, the Court included in its Report a detailed statistical overview of the preceding five years. The Croatian Parliament was informed of the Court's being overburdened with constitutional complaints, among which the number of cases in connection with the right to a trial within a reasonable time was progressively growing, thereby threatening the ability of the Constitutional Court to fulfil its competence in an appropriate manner and within a reasonable time, especially its fundamental competence of reviewing the constitutionality of laws and the constitutionality and legality of other regulations. The Court noted that at the time the only legal means in the Croatian legal order to protect the right to a fair trial within a reasonable time was the constitutional complaint and that the inefficiency of the Croatian judicial system demanded that ordinary and specialised courts participate in the review of a violation of the right to a trial in a reasonable time, in the setting of a deadline for bringing judicial proceedings to an end, and in the determination of just satisfaction for the violation suffered. To that end, the Court proposed that the proceedings for the protection of a right to a trial within a reasonable time should be regulated in the Judicial Act, whereas the Constitutional Court would remain competent for adjudication only after the parties had made use of all legal means available to them for the protection of that right before the competent courts. The Court noted that in order for that proposal to be realised, it would be necessary to amend or possibly enact a new Constitutional Act on the Constitutional Court of the Republic of Croatia.

2. Realising the constitutional responsibility of the Supreme Court of the Republic of Croatia, as the highest court, to secure the uniform application of laws and equal justice to all

According to Article 118.1 of the Constitution, the Supreme Court secures the uniform application of laws and equal justice to all. The constitutional case-law indicated that several thousand civil suits were either pending or had been finally adjudicated concerning the right of civil servants and civil-service employees to receive a Christmas bonus or a gift for their children in 2000, as provided for by the Collective Agreement for Civil Servants and Civil-Service Employees for 2000. The constitutional case-law demonstrated that the various county courts competent for those cases did not have a uniform practice on the subject-matter. In that respect, the Court had asked the Supreme Court of the Republic of Croatia for its legal opinion or a transcript of its decision in revision proceedings relating to the judicial cases on that matter. However, the Supreme Court notified the Court that it had not delivered a legal opinion on that matter and that it had rejected as inadmissible the applications for judicial revision in cases of that kind in ruling no. Revr-557/04-2 of 13 January 2005. The cases were ruled inadmissible because they involved small amounts of money. Consequently, the Court of second instance could not admit them for revision under Article 382.2 of the Civil Procedure Act. At the time the Constitutional Court delivered its Report, the judicial practice of county courts regarding those suits remained inconsistent.

The provisions of Articles 382 and 385 of the Civil Procedure Act lay down the conditions for admitting revision in civil proceedings. In cases where the value of the dispute is small (up to 5,000 kunas), those provisions prevent the Supreme Court from harmonising the different practices of county courts, even where it has indisputably found that different judicial practices exist. In that regard, the Constitutional Court notified the Croatian Parliament of the need for the appropriate changes to be made to the Civil Procedure Act so that the Supreme Court would be able to decide on individual cases and harmonise the judicial practices of county courts, and thereby be able to fulfil its constitutional obligation.

3. Passing delegated legislation after expiry of the statutory deadline

The Constitutional Court has dealt with an increasing number of applications for the review of the constitutionality and legality of other regulations (by-laws, delegated legislation) passed after the expiry of the statutory deadline. Those applications sought to have such regulations struck down on the ground of

their failure to comply with the provisions of Articles 5.2 and 14.2 of the Constitution. In ruling no. U-II-4343/2004 of 24 February 2005, the Constitutional Court provided a detailed explanation for not accepting such applications. In that ruling, the Court took the legal stand that the legal certainty of the objective legal order prevailed over the application seeking to have the impugned delegated legislation struck down. The Court pointed out that delegated legislation was often passed after the expiry of the statutory deadline, a practice which was not in conformity with the principle of constitutionality and legality.

Languages:

Croatian, English.



Identification: CRO-2005-1-006

a) Croatia / b) Constitutional Court / c) / d) 09.03.2005 / e) U-I-993/2003 / f) / g) *Narodne novine* (Official Gazette), 32/05 / h) CODICES (Croatian, English).

Keywords of the systematic thesaurus:

- 1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
 1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.
 3.11 **General Principles** – Vested and/or acquired rights.
 5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Housing, tenancy, specially protected, transformation in lease / State, successor, liability.

Headnotes:

The obligation of successor states is to respect on a non-discriminatory basis all contracts concluded by citizens or other persons of the SFRY as of 31 December 1990, including those concluded by public enterprises. However, this obligation does not include the obligation of successor states to retain in

their legal systems the legal institutes of the socialist order of the former SFRY that are contrary to the fundamental guarantees of human rights and freedoms of persons and citizens guaranteed in the Constitution of Croatia, *inter alia*, the institute of specially protected tenancies and the contracts granting them.

The Leases Act translated the previous legal status of the holders of specially protected tenancies into the status of protected lessees without discriminating against any of them on any grounds. All the previous contracts on the use of flats and the acquisition of specially protected tenancies went out of force *ex lege*, which is in accordance with Articles 6 and 8 of Annex G to the Agreement on Succession Issues.

Summary:

The Constitutional Court dismissed the application by 104 applicants, including associations, unions of tenants and individuals, to review the constitutionality of Article 30.1 and 30.2 of the Leases Act (hereinafter: "the Act"), *Narodne novine*, nos. 91/96, 48/98 – Decision and Ruling of the Constitutional Court of the Republic of Croatia no. U-I-762/1996 and others, and 66/98 – Correction of the Decision and Ruling of the Constitutional Court of the Republic of Croatia;

The impugned provisions of Article 30.1 and 30.2 read:

- a. On the day this Act enters into force, the specially protected tenancies of persons who acquired these tenancies in accordance with regulations that were valid until the entry into force of this Act, shall cease.
- b. The persons in paragraph 1 of this Article shall acquire the rights and obligations of lessees on the day this Act enters into force.

In ruling no. U-I-762/1996 and other rulings of 13 March 1998, the Constitutional Court had already reviewed the conformity of Article 30.1 and 30.2 of the Act with Article 3 of Constitution, which lays down that equality, the rule of law and inviolability of ownership are the highest values of the constitutional order of Croatia, and also with Articles 14.2, 16, 48 and 50 of the Constitution. According to Article 54 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (*Narodne novine* nos. 99/99, 29/02, 49/02 – consolidated wording; hereinafter: "the Constitutional Act"), the Constitutional Court may review the constitutionality of a law even in cases where the same law has already been reviewed by the Constitutional Court. The Court did not find any new circumstances between the date of the above-

mentioned rulings and that of the decision on the constitutional proceedings at instance that would lead it to change the legal opinion it had expressed in those rulings. The applicants themselves failed to present new relevant reasons from a constitutional law point of view, which would provide the Constitutional Court with the grounds to institute proceedings to review the conformity of the impugned provisions of the Act with Articles 3, 14.2, 48 and 50 of the Constitution, and with Articles 35 and 61.1 of the Constitution, which set out that everyone shall be guaranteed respect for legal protection of his or her personal and family life, dignity, respect and honour.

The Court started by examining the content of the impugned provisions of the Act. Those provisions changed the legal position of tenants by terminating *ex lege* their previous specially protected tenancies on privately-owned flats by force of law and by granting them at the same time the rights and obligations of lessees of those flats. The Court did not find the impugned provisions to be in breach of the above-mentioned Articles of the Constitution.

In an admissibility decision on Application no. 43447/98, on 16 March 2000 the European Court of Human Rights in Strasbourg (hereinafter: "the European Court") had reviewed the impugned provisions of the Act in light of a possible violation of the right to respect of private and family life, guaranteed in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (*Narodne novine – međunarodni ugovori* (international treaties), nos. 18/97, 6/99 – consolidated wording, 9/99 – correction, 14/02; hereinafter: "the European Convention"). The European Court had found that application inadmissible on the ground of being manifestly ill-founded.

Likewise, in the instant case the Constitutional Court did not find any grounds to review the conformity of the impugned provisions of Article 30.1 and 30.2 of the Act with Article 30 of the Constitution ("The sentence for a serious and exceptionally dishonourable criminal offence may, in conformity with law, have as a consequence the loss of acquired rights or a ban on acquiring, for a specific period of time, certain rights relating to the conduct of specific affairs, if this is required for the protection of legal order.").

As to the applicants' allegations that the impugned provisions of the Act discriminated against them contrary to the provisions of Articles 2.2 and 6 of Annex G to the Agreement on Succession Issues (hereinafter: "Annex G to the Agreement"), signed in Vienna on 29 June 2001, ratified by the Act on Ratifying the Agreement on Succession Issues, which

entered into force on 2 June 2004, the Court found that the above-mentioned provisions of Annex G were not relevant in the concrete case. The obligation of successor states is to respect on a non-discriminatory basis all contracts concluded by citizens or legal persons of the SFRY as of 31 December 1990, including those concluded by public enterprises. However, that obligation by no means includes the obligation of successor states to retain in their legal systems the legal institutes of the socialist order of the former SFRY that are contrary to the fundamental guarantees of human rights and fundamental freedoms guaranteed in the Constitution, *inter alia*, the institute of specially protected tenancies, including the contracts granting them.

The Court stated that Annex G to the Agreement would be relevant only to the question of whether the impugned provisions of the Act, as a part of the domestic legal order, had any direct or indirect discriminatory effects on the grounds of gender, race, colour of the skin, language, religion, political or other belief, national or social origin, association with a national minority, property, birth or other status on a person who was a citizen of the SFRY and enjoyed the status of a holder of specially protected tenancy. Since the impugned provisions of the Act had no direct or indirect discriminatory effects within the meaning of Article 6 of Annex G to the Agreement, the Constitutional Court found that part of the applicants' proposal to be manifestly ill-founded.

Languages:

Croatian, English.



Cyprus Supreme Court

Important decisions

Identification: CYP-2005-1-001

a) Cyprus / **b)** Supreme Court / **c)** / **d)** 12.01.2005 / **e)** 7691 / **f)** to be published in Cyprus Law Reports (Official Digest) / **g)** / **h)**.

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Trial, decision to discontinue, basis.

Headnotes:

Article 30.2 of the Constitution stipulates that in the determination of his or her civil rights and obligations or of any criminal charge against him or her, every person is entitled to a fair and public hearing within a reasonable time by an independent, impartial and competent court established by law.

The decision to discontinue a case is an extreme measure which should only be used for the better administration of justice.

Summary:

The respondents were indicted for the offences of forgery, obtaining money by false pretences and conspiracy. The Assize Court discontinued the case and discharged the respondents from all counts. It noted that the provisions of Article 30.2, which safeguard the right to a hearing within a reasonable time, had been violated.

In an appeal to the Supreme Court, the decision was reversed. The Supreme Court held that the period that elapsed between the arrest and the time of first appearing before the court did not exceed a reasonable time. The Supreme Court went on to state that the decision to discontinue a case is an extreme

measure which should only be used for the better administration of justice. In the present case, the hearing had already begun with the testimony of one prosecution witness and, therefore, the decision to discontinue the case was legally wrong.

The reasonableness of the length of proceedings is to be determined in the light of the conduct of the accused.

The appeal was allowed and a retrial was ordered.

Languages:

Greek.



Czech Republic Constitutional Court

Statistical data

1 January 2005 – 30 April 2005

- Judgment of the plenum: 14
- Judgment of panels: 70
- Other decisions of the plenary Court: 20
- Other decisions by chambers: 1044
- Other procedural decisions: 78
- Total: 1217

Important decisions

Identification: CZE-2005-1-001

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 19.01.2005 / **e)** Pl.US 10/03 / **f)** Payment of the periodical allowance to political parties / **g)** *Sbírka zákonu* 86/2005 Sb. (Official Gazette) / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

- 3.3.1 **General Principles** – Democracy – Representative democracy.
- 3.16 **General Principles** – Proportionality.
- 4.5.10.2 **Institutions** – Legislative bodies – Political parties – Financing.
- 4.9.8.2 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material – Campaign expenses.
- 5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Political party, equal treatment / Political party, free competition / Election, electoral expenses, reimbursement, requirements / Threshold.

Headnotes:

Ensuring the openness of the political system is the basic constitutional criteria for setting the level of the minimum threshold for the payment of the periodical allowance to political parties. The purpose of state

financing of political parties is to support the equality of opportunity to participate in a pluralistic, democratic political system. Particular forms of this financing pursue specific aims and support various activities of the parties. The purpose of the allowance for electoral expenses is to enable participation in the elections by the political parties that fulfil the condition of the “seriousness of electoral intentions”.

The periodical allowance is a form of financing available both to political parties which are in Parliament and those which are not. For this reason, its constitutionality is conditional on its ability to ensure the openness of the pluralistic political system. The threshold for granting it must be markedly lower than that required for the party to obtain a seat under the proportional electoral system. If the statutory scheme for payment of the periodical allowance meets the constitutional requirement of ensuring the openness of the political system, then, given the fact that the purpose of the periodical allowance differs from that of the allowance for electoral expenses, there is no reason for the threshold level of those two to be the same.

Summary:

In its constitutional complaint, the complainant objected to the violation of its right to the disbursement of the periodical allowance for political parties. The complainant had obtained 2.78 % of the valid votes cast in the elections for the Assembly of Deputies. It had submitted to the Ministry of Finance a request for the disbursement of the periodical allowance for political parties; however, the Ministry rejected the request on the ground that the complainant did not meet the statutory requirements for the disbursement of the periodic allowance, that is, obtaining at least 3 % of the votes.

The complainant submitted that the threshold for the disbursement of the periodic allowance was unjustifiably high and discriminatory in relation to smaller political parties. The complainant considered it unconstitutional for the periodic allowance to be disbursed only to parties which were successful in the elections for the Assembly of Deputies, and not to parties which successfully took part in Senate, regional or communal elections. It therefore joined to its constitutional complaint a petition for the striking down of the relevant provisions of the Act on Association concerning Political Parties and Political Movements.

The Constitutional Court had already had occasion in its earlier case-law to consider the constitutional guarantees of the democratic formation of the Parliament. On that occasion, the Court had determined that in keeping with the principle of

representative democracy, it was permissible, where serious reasons existed, to build certain integrative stimuli into the electoral mechanism. The Court had noted, in particular, the assumption that an unrestricted proportional system resulted in the splintering of votes between a large number of political parties and thereby in a threat to the functioning and continuity of the parliamentary system, as well as the capacity to take decisions within it. In assessing the bounds of the acceptability of integrational stimuli, the Constitutional Court had consistently taken the principle of proportionality as its starting point.

The financial support of political parties could not exceed the boundary marking the separation of political parties from the State. The Constitutional Court had established that boundary in light of two principles: that of integration and that of representativeness. The principle of representativeness primarily embraces the requirement that the composition of the representative body is derived from the political structure of civic society. It also includes the requirement of the minimum representativeness of subjects taking part in political competition. As to the allowance for electoral expenses, in the event of a conflict between the principle of integration and the principle of pluralism of democratic society, the Constitutional Court had acknowledged the precedence of the latter, and laid down the criterion for the restriction of the allowance for electoral expenses in terms of the “seriousness of the electoral intentions of the parties”, that is to say, the degree of their representativeness.

In the financial support of political parties, if free competition under fair conditions of political forces were not respected and if there were an effort to create different conditions for large or larger parties and, consequently, create, whether directly or indirectly, political parties with a better or worse status, that financial support would not be constitutional. The Constitutional Court assessed the respect for the maxim of the equal status of political parties, the guarantee of their free and fair competition and the openness of the political system on the basis of the “seriousness of the electoral intentions of parties” (as measured by their minimal representativeness), as well as by the purpose of specific kinds of state financing.

However, lowering the threshold for the periodical allowance for political parties below the level of 3 % of votes cast would not solve the problem. On the contrary, it would enlarge the group of parties entitled to that allowance and would entail a further growth in the state’s share of the financing of political parties.

If the statutory scheme for granting the periodical allowance were based on the results of the elections for the Assembly of Deputies, it would mirror the actual position of political parties in the State's constitutional system, in particular, the extent of their participation or, in the case of non-parliamentary parties, potential participation in the legislative power, as well as in the formation of the supreme executive organ – the government. Moreover, if the scheme were not based on the results of the elections to municipal or regional representative bodies, then it would mirror the conceptual characteristics of political parties of nationwide significance and not merely those of political subjects of regional relevance.

According to the dissenting opinions, the principle of free competition of political parties conceptually encompassed an obligation on the part of the State to respect their equality of opportunity. It could not be the purpose of the allowance for electoral expenses to restrict the freedom of electoral competition, instead of ensuring its seriousness. Financial support only for certain parties also amounted to a *de facto* financial sanction for other parties. The impugned provision was thus unconstitutional, and the petition should be granted. The funds in question had to also be distributed to the less powerful political parties. It was not appropriate to accord such significance to the elections for the Assembly of Deputies, rather a political party's success in elections for other bodies should have also been taken into account.

Languages:

Czech.



Identification: CZE-2005-1-002

a) Czech Republic / **b)** Constitutional Court / **c)** Third Chamber / **d)** 25.01.2005 / **e)** III. US 252/04 / **f)** Equalising adjustment / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.6.9 **Constitutional Justice** – Effects – Consequences for other cases.

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

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

5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.

5.4.16 **Fundamental Rights** – Economic, social and cultural rights – Right to a pension.

Keywords of the alphabetical index:

State, dissolution / Legal order, continuity / Pension, entitlement / Treaty, on social security, effect in domestic law / Treaty, *lex specialis derogat legi generali* / Constitutional Court, decision, binding effect.

Headnotes:

In a case involving a special incorporation clause establishing the priority of a treaty over domestic law and the application of law being governed by the principle of interpretation of *lex specialis derogat legi generali*, the principle of interpretation that specific rules take precedence over general rules must yield to the constitutional principle affecting the application and interpretation of the relevant ordinary law, that is, the principle of the constitutional conformity of interpretation and application. This constitutional principle is also a fundamental right flowing from the constitutional principle of the equality of citizens and excluding any unjustified legal distinctions between citizens.

To the extent that in its judgment, the Supreme Administrative Court failed to reflect the constitutional interpretation set out in a Constitutional Court judgment, it violated the maxim, arising from the sense and purpose of an effective and meaningful constitutional judgment, that enforceable decisions of the Constitutional Court are binding on all authorities and persons. The failure by a public authority to respect the proposition of law laid down by the Constitutional Court amounts to a violation of the principle of equality and also prejudices the legal certainty of the citizens.

Summary:

The complainant sought the annulment of the Supreme Administrative Court decision rejecting her appeal on a point of law against the Superior Court appellate decision affirming a regional court judgment. In the latter judgment, the regional court had upheld a decision by the Czech Social Security Administration, which had turned down the complainant's request to be granted an "equalising adjustment" amounting to the difference between the old-age pension to which she would be entitled under the law of the Czech Republic, the state where she

has citizenship and permanent residence, and the old-age pension paid by the Slovak Social Insurance pursuant to a Treaty on Social Security concluded by the two countries (hereinafter: "the Treaty").

By the terms of that Treaty, the appeal on a point of law should not be granted, since the pension time accumulated prior to the dissolution of the Czech and Slovak Federative Republic is considered as pension time relating to the state on whose territory the employer had its headquarters on the day of dissolution which, in the complainant's case, was the Slovak Republic.

The complainant, however, had her pension ensured in accordance with the laws of the Republic of Czechoslovakia (from 1990 until the time her pension was insured in accordance with the laws of the Czech and Slovak Federative Republic), and not on the basis of the national laws of the Czech or Slovak Republic. She had made payments into the budget of the unitary, and subsequently the federative, state and was of the view that she had to be ensured at a level of pension that was at least as high as that to which, were it not for the Treaty, she would be entitled under the laws of the Czech Republic, where she has permanent residence, as she fulfilled all the conditions to claim a pension that was higher than that for which she qualified in the Slovak Republic. She argued that the principle of legal certainty had been violated, and that that constituted discrimination and unequal treatment.

It is not the main mission of the Constitutional Court to interpret legal enactments in the area of public administration, but rather to interpret the Constitution in order to protect the rights and freedoms guaranteed by the constitutional order.

In an earlier judgment, the Court had declared its acceptance of the internationally recognised principle that the ratification of international treaties did not affect more favourable rights, protection, and conditions provided and guaranteed by the domestic legislature. The Czech and Slovak Republics came into being with the dissolution of the common Czechoslovak state, which had a unitary system of old-age pensions. According to the law then in effect, it was entirely irrelevant in which part of the Czechoslovak state the citizen was employed. After the separation, the Czech Republic recognised the principle of the continuity of the legal order. Therefore, the period of employment with an employer with its headquarters in the Slovak part of the Czechoslovak State could not be looked upon as "employment abroad". The Constitutional Court considered such a distinction between citizens of the Czech Republic to be discriminatory.

The Constitutional Court emphasised that the Czech Republic's international obligations towards the Slovak Republic, the effects of which extend back into the past and into the legal relations of their citizens and which arose and developed within Czechoslovakia and the Czechoslovak legal order, must respect certain constitutional limits. The Constitutional Court noted that the complainant had met, while the common Czechoslovak state was still in existence, the condition of a minimal number of years of insurance coverage, and the application of an international treaty could not lead to a situation where the fulfilment of those conditions was retroactively negated. That would conflict with the principle of legal certainty and the foreseeability of law, which form the very basis of the concept of the law-based state.

As a general matter, the binding nature of judicial case-law is such that an earlier interpretation should be the starting point for decision-making in subsequent cases of the same type, unless the court determining the matter makes a finding of sufficiently relevant reasons grounded on rational and persuasive arguments, which in their totality more nearly conform to the legal order and thus point to a change in the case-law. That results from the assumption of legal certainty, the foreseeability of the law, the protection of justified reliance on the law, legitimate expectations and the principle of formal justice (equality).

The relevant assumption in the instant case was that of justified reliance on the legal order and on the fact that public authorities would take an identical approach to factually and legally identical cases, where the subjects of rights have the legitimate expectation that they will not be disappointed in their reliance. That assumption did not, however, lead to the requirement that the interpretation and application of law be absolutely immutable. Rather it led to the requirement that in respect of the specific circumstances of a case, any change should be foreseeable, or should change not be foreseeable, that the change in interpretation be transparently explained and rest upon acceptable rational and objective grounds. To the extent that a citizen fulfils all statutory conditions for the right to a pension to come into existence even without the existence of the Treaty, and to the extent that the amount of the claim would be higher than a claim pursuant to the Treaty, the Czech pension insurance system is responsible for ensuring that that citizen receives pension payments in an amount corresponding to the higher claim pursuant to the domestic laws and that the amount of pension drawn from the other party to the Treaty be brought up to the level of pension that could be claimed pursuant to Czech laws.

Languages:

Czech.

*Identification:* CZE-2005-1-003

a) Czech Republic / b) Constitutional Court / c) Plenary / d) 26.01.2005 / e) Pl. US 73/04 / f) Honest electoral campaign / g) *Sbírka zákonu* (Official Gazette), 140/2005 Sb. / h) CODICES (Czech).

Keywords of the systematic thesaurus:

1.3.4.5.2 **Constitutional Justice** – Jurisdiction – Types of litigation – Electoral disputes – Parliamentary elections.
 3.3.1 **General Principles** – Democracy – Representative democracy.
 3.16 **General Principles** – Proportionality.
 4.9.8 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material.
 5.3.23 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.
 5.3.31 **Fundamental Rights** – Civil and political rights – Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Election, campaign, access to media / Election, invalidity, purpose / Defamation, candidate for public office / Media, defamation, through press / Election, purity.

Headnotes:

The purpose of an electoral campaign in a pluralistic democracy is to allow for consideration of even the most controversial issues in political parties' and candidates' programmes, as well as their personal characteristics and their capability to hold elected public office. Where the Act on Elections speaks of the requirement of an honest and honourably conducted electoral campaign, it refers to what had previously been designated by the term "purity of the election". This term cannot be interpreted as a matter of private law and general morality, since it refers to

the conditions of an electoral campaign, which is something the electorate must vote upon. Its negative characteristics can be regulated by law, but not entirely eliminated.

The rules concerning the verification of elections are based upon the presupposition of an objective connection, or at least a possible causal connection, between a defect in electoral procedure and the composition of the representative body. However, such a possible causal connection must be interpreted in the light of certain facts, rather than it simply being an abstract possibility. The annulment of the election must not be seen as a sanction for the violation of electoral enactments but rather as a means of ensuring the legitimacy of the elected body. What is decisive is the probability of the impact of the electoral defect on the actual electoral results.

Summary:

In order to obtain compensation, a political party filed proceedings to contest the decision of the Supreme Administrative Court to the effect that the election to the Senate held in Electoral District Y was invalid. The Supreme Administrative Court certified the election of a Senator in this district on the motion of candidate X, who did not get through to the second round of the election. In his petition, candidate X objected that the electoral campaign was not conducted in an honest and honourable manner, due to the fact that false information about him found in an anonymous letter was published on several occasions in the local press, as were further critical articles by various authors, including the local mayor. The Supreme Administrative Court declared the election invalid as, in its view, the information published in the local press could have markedly damaged candidate X in the eyes of his potential voters.

The basic function of the Constitutional Court, in remedial actions based on decisions concerning the certification of the election of a Deputy or Senator, is to ensure that elections are properly conducted. The decision of the voters, which constitutes sovereign authority, can be modified by the judiciary authority only in exceptional cases where defects in the electoral process caused, or could demonstrably have caused, the voters to decide differently, as a result of which another candidate would have been elected. Therefore, the issue before the Constitutional Court was the validity of the election of the petitioner's candidate, and not the non-election of candidate X itself.

The Constitutional Court resolved the issue of whether it could, with a sufficient degree of probability, be asserted that, as a consequence of candidate X's hypothetical advancement into the second round of the election, the petitioner's candidate would not have been elected Senator. However, this was something which could not be either logically or statistically deduced from the electoral results.

Mass media held by territorial self-governing units, and thus in the hands of public authorities, must always maintain a correct stance and neutrality and are subject to stricter rules than a private publisher is when covering an electoral campaign. When used for the purpose of campaigning, they must comply with the principle of equal opportunity.

There is no doubt that the purpose of an electoral campaign in a pluralistic democracy is to allow for the scrutiny of even the most controversial issues in political parties' and candidates' programmes, as well as their personal characteristics and their capability to hold elected public office. Only with all this information to hand will the voters be able to make an accurate decision. Accordingly, the Constitutional Court concluded that neither an objective, nor even a potential, causal connection had been proved between the content of the publicly printed matter at issue with the election of the petitioner's candidate. It was not proven that the provisions of the Act were violated in such a manner as to influence the outcome of the election because the material elements defined in the basic substantive provisions of Czech electoral proceedings had been met.

The Supreme Administrative Court could not, however, be overruled for annulling the election as a whole. The Act on Elections did not provide any other option. While this outcome conflicts with the principle of proportionality of intervention by public authorities, the constitutional review of the Act on Elections was not the principal object of this type of proceeding.

The Constitutional Court thus concluded that the petitioner's candidate was validly elected to the Senate.

According to the dissenting opinions, both publicly funded periodicals engaged in an intensive encroachment of public power into the electoral process by discrediting, in a grossly defamatory manner, the senatorial candidate of a rival political party. Nonetheless, when gauging this flaw in the campaign on the one hand and the importance of the election itself on the other, the conclusion could be reached that this defect did not call for the invalidity of

the election. This is so because, while the intensity of such violation affected the Constitution's structural principle, it did not breach a substantive constitutional principle. Such a defect could, in the future, be resolved by means of a sanction provided for in the electoral law.

When a public authority defamed a candidate in an electoral campaign, it meant that the election could not be described as "genuine". As a matter of substantive constitutional law, such a process could not be considered an election. Therefore, such an election must be declared invalid and the Supreme Administrative Court was correct in doing so.

It cannot be said that there is free competition if some of the candidates taking part in an election are advantaged by the fact that they benefit from means which should serve entirely different purposes. These means were abused for the purpose of the electoral campaigns of local government politicians, which resulted in a violation of the principle of neutrality of public authorities in pre-election campaigns. The municipal publications involved in this dispute did not uphold either a correct attitude or neutrality; to canvas against one of the candidates is to abandon even the minimal standards of decency.

Languages:

Czech.



Identification: CZE-2005-1-004

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 31.03.2005 / **e)** I. US 554/04 / **f)** Unreasonable delay in criminal proceedings / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.9 General Principles – Rule of law.
3.16 General Principles – Proportionality.
3.17 General Principles – Weighing of interests.
5.3.5 Fundamental Rights – Civil and political rights – Individual liberty.
5.3.13.1.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.

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

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:

Proceedings, criminal, length / Proceedings, delay, undue, mitigation / Delay, undue, compensation.

Headnotes:

In the case of the imposition of a sentence of imprisonment without parole, it is necessary also to consider whether or not, in connection with the length of the proceedings, the loss of the complainant's personal liberty, generally foreseen by the constitutional order, remains an intrusion that is proportional. It is necessary to consider the relationship between the well-being of the populace as a whole, represented by the purpose of punishment, and the fundamental right to personal liberty, which may only be restricted by law. This restriction of liberty can only be restricted on condition that it is a measure necessary in a democratic society and if the aim pursued cannot be accomplished by less restrictive means. Even statutorily foreseen restrictions on fundamental rights must be interpreted in conformity with the constitution, in such a way that their application meets the test of proportionality.

The protection of the right to a trial within a reasonable time, or the compensation for the violation of this right, can be attained even by means which are peculiar to criminal law. Therefore, the ordinary courts are obliged to make use of all such means so that, in addition to respecting the right to personal liberty, an accused be compensated for the violation of his right to have his case heard within a reasonable time.

Summary:

The complainant contested the Supreme Court's decision that rejected as manifestly unfounded his extraordinary appeal against the appellate court's judgment finding him guilty of fraud and embezzlement and sentencing him to a term of imprisonment. He claimed there was a violation of his right to fair trial as the criminal prosecution should have been dismissed due to undue delay in the proceedings. He referred to an earlier Supreme Court ruling which held that proceedings lasting over a period of more than six years would constitute a conflict with the Convention for the Protection of

Human Rights and Fundamental Freedoms (hereinafter referred to as "Convention").

The complainant's prosecution began in 1993 and in the years 1995-97 not a single procedural step was taken. The preliminary proceedings were concluded in 1998, an indictment was issued in 1999, and the main trial was ordered to begin in 2002.

The constitutional complaint was admissible. The right to have one's case heard without unreasonable delay was an integral component of the right to fair process. The time frame within which a party to proceedings obtained a final decision in the matter is an integral part of the overall fairness of the proceeding. A disproportionately lengthy case was directly reflected in the nation's faith in the state, its institutions and in the law, which is a basic condition for the functioning of a legitimate, democratic, state of law.

The Constitutional Court concluded that, coupled with the issue of fair process and the right to have one's case considered within a reasonable time, it was necessary to consider what consequences flowed from the violation of fundamental procedural rights in the sphere of the complainant's basic rights. In order to carry out this test, it was first necessary to review the factors that were significant for assessing the length of the proceedings in terms of the delays caused by public authorities. Then, the factors important for assessing the purpose of punishment as set out in the Criminal Code should also be assessed, such as the necessity of protecting society from perpetrators of crimes, the ascertainment as to whether the accused required rehabilitation towards an upright life, and the actual effectiveness of the punishment imposed. Following an analysis of these individual factors, it must be concluded whether the restriction upon the complainant's personal liberty resulting from the sentence imposed were still proportionate to the protection of the wealth of society as a whole thereby attained.

The criminal proceedings in question took over 10 years. There is no doubt that an extended trial has the impact of altering the basic relation between a criminal offence and the punishment imposed thereafter. The time that passes between the complainant's commission of the criminal offence and the announcement of the final decision has a direct impact on the aims of punishment, which should be attained by the imposition of a specific sentence. With the growing lapse of time from the date of the commission of a criminal offence, both the components of specific and general prevention become weaker.

The Constitutional Court came to the conclusion that, in imposing this specific sentence, they failed to respect the constitutional requirement of proportionality. The restriction upon personal liberty represented by the imposition of a sentence of imprisonment without parole seemed disproportionate to the public interest in the punishment of perpetrators. It was not the Constitutional Court's task to anticipate the specific punishment which should be imposed, nor to what degree.

The Constitutional Court had already ruled that judicial decision-making must remain within the constitutional framework of the protection of individual fundamental rights. If the protection of fundamental rights and freedoms is a pivot of the functioning of a democratic state of law, it is necessary, when applying them, to observe the principle that such protection be direct and immediate. If the ordinary court itself finds a breach of a fundamental right or freedom, it must take all measures to make sure that further violations do not result and, with the means it has at its disposal, redress the violation that has already occurred.

The Supreme Court had not respected its constitutional obligation to provide protection of the complainant's fundamental rights, as a consequence of which it violated the fundamental principles upon which the substantive state of law is based.

In further proceedings, the ordinary courts must proceed, in conformity with the existing case-law of the European Court of Human Rights, in such a way as both to respect and protect the complainant's personal liberty as well as to sufficiently compensate the violation of the right to have his case heard within a reasonable time. The ordinary courts' deliberations on the prosecution or sentence in connection with the period of time that has passed since the commission of the offence, or in view of the length of the criminal proceeding, must be structured onto three levels. The first consists of considerations resting on criminal law enactments, then the test of proportionality flowing from the imperative of the state of law and personal liberty deriving from it (the constitutional plane), and finally the projection of the length of the proceeding into the imposition of any sentence (the plane of the Convention and responsibility under international law).

According to the concurring opinion, delays in criminal proceedings did not result in further criminal prosecution becoming inadmissible. Should the State be unable to ensure that the criminal proceedings were conducted without unreasonable delays, the violation of the right of the accused could be sufficiently compensated through an adjustment

of the length of the sentence or through a compensation that allowed for damage.

Languages:

Czech.



Denmark

Supreme Court

Important decisions

Identification: DEN-2005-1-001

a) Denmark / b) Supreme Court / c) / d) 21.01.2005 / e) 22/2004 / f) / g) / h) *Ugeskrift for Retsvæsen* 2005, 1265; CODICES (Danish).

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 5.1.2.2 **Fundamental Rights** – General questions – Effects – Horizontal effects.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2.1.2.1 **Fundamental Rights** – Equality – Scope of application – Employment – In private law.
- 5.2.2.6 **Fundamental Rights** – Equality – Criteria of distinction – Religion.
- 5.3.18 **Fundamental Rights** – Civil and political rights – Freedom of conscience.
- 5.3.20 **Fundamental Rights** – Civil and political rights – Freedom of worship.

Keywords of the alphabetical index:

Discrimination, indirect / Discrimination, justification / Headscarf, refusal to remove, dismissal / Employment, dress code.

Headnotes:

Dismissal of a Muslim woman for wearing a headscarf contrary to the dress code of the employer neither implies unlawful indirect discrimination nor contravenes Article 9 ECHR.

Summary:

In 1996 the plaintiff was employed by the defendant, the supermarket Føtex, for the purpose of serving customers. According to the dress code of Føtex, the employees should be partially uniformed, and in certain cases must wear caps or other specific headgear. In the employer's official rules concerning the dress code, which was handed out to the

employees, it was added that in all areas where there was no requirement of specific headgear, it was a part of the uniform requirement that the employees not wear headgear. This, however, only applied to employees with direct customer contact. Thus, employees without customer contact were not bound to follow the rules in the dress code. The purpose of these rules in the dress code was for employees to present a neutral, uniform appearance vis-à-vis the customers. In 2001 the plaintiff informed her employer that in the future she would wear a headscarf for religious reasons. After a meeting where the parties failed to reach an agreement, the plaintiff was dismissed.

Relying on Article 2 in the Danish Act on Prohibition of Discrimination on the Labour Market (the Discrimination Act), the plaintiff alleged that the defendant's prohibition of headgear implied indirect discrimination because the prohibition only affected the employees who for religious reasons needed to cover their hair and neck with headscarves. Furthermore, the discrimination was contrary to the principle of equal treatment because the rules in the dress code were not objectively justified, and because the rules – which made it impossible for certain employees to observe religious precepts – were not proportionate to the employer's aim of the neutral, uniform appearance of employees vis-à-vis the customers. The dismissal was therefore unlawful pursuant to the Discrimination Act.

Furthermore the plaintiff noted that the Discrimination Act had to be interpreted in the light of Denmark's convention obligations. Thus, a prohibition on headgear contravened Article 9 ECHR on freedom of religion. The case-law of the European Court of Human Rights showed that in each case a concrete assessment of evidence with regard to objectivity and proportionality must be made.

The defendant alleged that the rules in the dress code had been adopted for commercial and operational reasons. The rules were objectively justified and proportionate, and they pursued a legitimate aim. The defendant wanted to appear as a politically, religiously and culturally neutral company and wished to meet the customers on their own terms. Furthermore the employees had to be easily recognisable for the customers. The dress code was the same for all employees in the same position and was enforced consistently. Accordingly, there was no indirect discrimination. If the court would find that there was an indirect discrimination, it was justified for the reasons mentioned above.

Even though the form of the rules of the dress code was neutral, the Supreme Court was convinced that

the prohibition of headgear particularly affected the Muslim women who for religious reasons wore headscarves.

However, according to the legislative history of the Discrimination Act, there is no unlawful indirect discrimination if the rules which imply discrimination are objectively justified by the interest in the performance of the work. As an example of lawful indirect discrimination, it is mentioned that it will still be permitted to require employees to wear uniforms or specific clothing if this is a part of the company's appearance vis-à-vis the customers, and if it is a consistent requirement which applies to all employees in the same position. The legislator has thus weighed the interests of an employer who requires use of uniforms or specific clothing against the interests of an employee who for religious reasons cannot conform to the dress code. The Supreme Court found that – where the conditions mentioned in the example are fulfilled – it cannot be decisive for the lawfulness of the dress code whether the company prescribes use of specific headgear or prescribes that the employees cannot wear headgear.

In the light of the foregoing, the Supreme Court held that the enforcement against the plaintiff of the prohibition of wearing headgear was not an infringement of Article 2 in the Discrimination Act. Furthermore, the Supreme Court held that, according to the case-law of the European Court of Human Rights, there was no basis for regarding the enforcement of the prohibition as contrary to Article 9 ECHR.

For these reasons the Supreme Court ruled in favour of the defendant.

Languages:

Danish.



Finland

Supreme Administrative Court

Statistical data

1 January 2005 – 30 April 2005

Total number of decisions was 1092 during the reference period. The number of precedents to be published in the Court's Yearbook was 25.

Important decisions

Identification: FIN-2005-1-001

a) Finland / **b)** Supreme Administrative Court / **c)** / **d)** 18.01.2005 / **e)** 2005/2 / **f)** / **g)** *Korkeimman hallinto-oikeuden vuosikirja* (Yearbook), 2005 / **h)** CODICES (Finnish).

Keywords of the systematic thesaurus:

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

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:

Family ties / Foreigner, entry, residence / Residence, permit, temporary, revocation, grounds.

Headnotes:

The maintenance in force of a residence permit cannot be made subject to the condition that a person who has reached the age of eighteen refrains from marriage for an indefinite period of time after being issued a residence permit on the basis of a family tie, and nor may a marriage in such circumstances be considered an essential change of the purpose of entry into the country or an essential change of the ground for the issue of the residence permit.

Summary:

The Directorate of Immigration, by its decision of 25 July 2002, revoked the temporary residence permit it had issued to person A. on 1 February 2002. The residence permit had been issued on the basis of a family tie as the father of A. resided in Finland and A. had not reached the age of eighteen years when the application was filed and was neither married nor had a common law wife. Upon his arrival in Finland on 14 March 2002, A. stated that he had married a Ukrainian national and his wife was pregnant. He stated that he had met his wife in the summer of 2000 and moved in the same apartment with her after the wedding. The Directorate of Immigration considered that A. had, in applying for the residence permit, knowingly given false information on the purpose his entry into the country, affecting the decision as referred to in Section 21, Subsection 1, of the Aliens Act. In particular, he had concealed a fact that would have affected the contents of the decision.

The Administrative Court dismissed the appeal lodged by A. from the decision of the Directorate of Immigration.

The Supreme Administrative Court quashed the decisions of the Administrative Court and the Directorate of Immigration.

According to Section 21, Subsection 1, of the Aliens Act (378/1991), a residence permit may be revoked if the foreign national, in applying for it, knowingly gives false information on his or her identity or other false information affecting the decision, or conceals a fact that could affect the contents of the decision. A temporary residence permit may also be revoked on other serious grounds.

A. who was born on 5 January 1982 was, as an unmarried child under the age of eighteen years, a family member of his father residing in Finland when the application for a residence permit was filed on 18 March 1999, within the meaning of Section 18b (537/1999) of the Aliens Act of 1991. He had been interviewed at the Embassy of Finland in Kiev on 16 June 2000. In the application for a residence permit that he had himself signed on that occasion, A. had stated that he was not married. The Directorate of Immigration, by its decision of 1 February 2002, issued A. a temporary residence permit for the period of time from 1 February 2002 to 1 February 2003 on the basis of a family tie, in accordance with Section 18c (537/1999) of the Aliens Act. The processing of the application for the residence permit lasted two years and ten months, and during that time A. reached the age of eighteen. The decision of the Directorate of Immigration was served on A.'s father on 20 February 2002.

A. arrived in Finland on 14 March 2002. When heard at the police station on 21 March 2002, A. stated that he had got married on 20 February 2002, his wife was pregnant and the baby was expected to be born in two months. He stated that he had met his spouse in the summer of 2000.

In the aforementioned circumstances, the Supreme Administrative Court finds that A. did not knowingly give false information or conceal a fact that could have affected the contents of the decision. A. was issued a temporary residence permit on the basis of his family tie with his father residing in Finland. The Directorate of Immigration was aware of the fact that A. reached the age of eighteen during the processing of the application and this fact cannot therefore constitute a ground for revoking the residence permit. Accordingly, it would only be possible to revoke the residence permit on other serious grounds.

According to the detailed explanations for Section 21 in the Government Bill (HE 47/1990) submitted to Parliament for the enactment of the Aliens Act, it should be possible to revoke a temporary residence permit not only when false information has been given but also on other serious grounds. Such serious grounds could include, among others, an essential change in the purpose of the foreign national's entry into the country.

Considering the provisions of Article 23.2 of the International Covenant on Civil and Political Rights and Article 12 ECHR as well as the provisions of Section 10, Subsection 1, of the Constitution of Finland and Section 1, Subsection 4, of the Aliens Act, the maintenance in force of a residence permit cannot be made subject to the condition that a person who has reached the age of eighteen refrains from marriage for an indefinite period of time after being issued a residence permit on the basis of a family tie, and nor may a marriage in such circumstances be considered an essential change of the purpose of entry into the country or an essential change of the ground for the issue of the residence permit. Therefore, the fact that A. got married on 20 February 2002 does not constitute a serious ground that would make it possible to revoke the temporary residence permit he had been issued on 1 February 2002, in view of Section 21 of the Aliens Act (378/1991).

Languages:

Finnish.



France

Constitutional Council

Important decisions

Identification: FRA-2005-1-001

a) France / **b)** Constitutional Council / **c)** / **d)** 13.01.2005 / **e)** 2004-509 DC / **f)** Law establishing a programme for social cohesion / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 19.01.2005, 896 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

3.18 **General Principles** – General interest.

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

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

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

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

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

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

Keywords of the alphabetical index:

Social cohesion, programme law / Territorial community, powers, transfer, allocation of resources / Powers, discretionary, creation, job centre / Employee, reinstatement, available post / Legislation validation, administrative act.

Headnotes:

It follows from the provisions of the fourth paragraph of Article 72-2 of the Constitution that where the legislature transfers to the territorial communities powers previously exercised by the State, it must allocate to them resources corresponding to the burdens established on the date of the transfer. That transfer relates only to powers of a mandatory nature.

That does not apply to the establishment of or participation in the operation of “job centres” (*maisons de l'emploi*), or to the recruitment of persons experiencing problems in obtaining access to employment by means of an “employment support contract” (*contrat d'accompagnement pour l'emploi*), which are discretionary powers.

On the other hand, the opening of apprenticeship to a new category of persons constitutes an extension of the powers devolved on the regions which involves new resources, which, in this instance, were provided for by the legislature.

In making provision for compensation based on objective and rational criteria for the travelling time of an employee between his place of residence and a place of employment different from his normal place of employment, the legislature introduced a measure which does not constitute a breach of equality between employees, since it is the consequence of a difference in situation inherent in the freedom to choose a place of residence.

The legislature is required to exercise in full the power conferred on it by Article 34 of the Constitution. In that regard, the principle of clarity of the law, which flows from that article of the Constitution, and the constitutional objective of intelligibility and accessibility of the law, which flows from Articles 4, 5, 6 and 16 of the Declaration of 1789, require that it adopt sufficiently precise provisions and unequivocal wording. The legislature must protect those concerned against an interpretation contrary to the Constitution or against the risk of arbitrariness and must not transfer to the administrative or judicial authorities responsibility for fixing rules the determination of which was entrusted by the Constitution solely to statute. However, those authorities retain the power of assessment and, in case of necessity, of interpretation inherent in the application of a rule of general scope to particular situations.

It follows from the very words of the first paragraph of Article L.122-14-4 of the Employment Code, in the version resulting from paragraph V of Article 77 of the Law establishing a programme for social cohesion, that it will be for the court, on an application to that effect, where it finds that the dismissal procedure is void in the absence of the redeployment plan provided for in the event of collective dismissal on economic grounds (Article L.321-4-1 of the Employment Code) to order the reinstatement of the employee unless reinstatement is no longer possible. By way of illustration of a situation in which reinstatement is impossible, the legislature provided a number of examples such as closure of the establishment or the site, or the absence of an

available post of such a kind as to permit the reinstatement of the employee. The legislature established a sufficiently precise rule which the courts shall implement.

Furthermore, the legislature thus reconciled the right of each person to obtain employment, of which the right to redeployment of dismissed employees is a direct consequence, and freedom of enterprise, which may be infringed by the reintegration of dismissed employees, in a way that is not vitiated by any manifest error.

Although the legislature may validate an administrative act with an aim of sufficient general interest, that is subject to compliance with decisions of the courts which have become binding and with the principle that penalties and sanctions must not be retroactive. Furthermore, the validated act must not infringe any rule or any principle of constitutional value, unless the aim in the general interest pursued by the validation is itself of constitutional value. Last, the scope of the validation must be strictly defined, failing which there will be a breach of Article 16 of the Declaration of 1789.

Summary:

The Law establishing a programme for social cohesion was referred to the Constitutional Council on 23 December 2004 by 164 deputies. A second reference relating to certain provisions different from those covered by the first reference, and signed by 25 deputies, was declared inadmissible.

The contested provisions concerned various points.

The applicants maintained that a series of provisions were in breach of the fourth paragraph of Article 72-2 of the Constitution, which provides for a right to compensation (allocation of resources) for local communities where powers are transferred to them or created or where their existing powers are extended. Those provisions concerned, in particular, the establishment of "job centres" (*maisons de l'emploi*) at regional level with the aim of coordinating action taken in connection with employment and the possibility of recruiting persons experiencing problems in obtaining access to employment, by means of an "employment support contract".

The Constitutional Council considered that as the local communities were not obliged to have recourse to these new possibilities, the contested provisions were outside the scope of the fourth paragraph of Article 72-2 of the Constitution.

The applicants also challenged the provisions which, on certain conditions and in particular for those wishing to set up or take over a business, permit a new derogation from the maximum age (normally 25 years) for entering into a contract of apprenticeship. The Constitutional Council considered that those provisions constituted an extension of the powers of the regions.

Also challenged was a provision relating to the length of time spent travelling to work where the place of performance of a contract of employment is not the normal place and where the employer imposes additional travelling time by reference to the travelling time between the place of residence and the normal working place. The Constitutional Council considered that the compensation provided for was based on an objective and rational criterion and did not infringe the principle of equality.

Other provisions concerned the reinstatement of employees whose dismissal has been declared null and void and which provides, *inter alia*, for financial compensation where reinstatement is impossible, owing, for example, to the closure of the establishment or the site, or to the absence of a suitable post allowing the employee to be reinstated. In examining those provisions, the Council had the opportunity to define precisely the interrelation between the task of the legislature and that of the courts.

Last, the Constitutional Council was required to examine an article (Article 139) of the law referred to it which constituted the validation of an administrative act, which had been annulled by decision of the administrative court, authorising the extension of the Strasbourg tram system. In annulling that article, the Council took the opportunity to reiterate firmly its case-law on legislative validation.

Languages:

French.



Identification: FRA-2005-1-002

a) France / **b)** Constitutional Council / **c)** / **d)** 14.04.2005 / **e)** 2005-513 DC / **f)** Law on airports / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 21.04.2005, 6974 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

4.5.2.4 **Institutions** – Legislative bodies – Powers – Negative incompetence.

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

4.10.8.1 **Institutions** – Public finances – State assets – Privatisation.

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

Keywords of the alphabetical index:

Public ownership, asset, declassification / Transport, public airport service, fee / Public service, continuity principle / Public service, task.

Headnotes:

The declassification of an asset in public ownership cannot have the effect of depriving of their legal guarantees the constitutional requirements that result from the existence and continuity of the public services for which the asset continues to be used.

Under the combined provisions of Articles 34 and 37 of the Constitution, the Executive is competent to define, in terms and conditions approved by decree in the Council of State, the assistance which *Société Aéroports de Paris* will contribute to the air navigation services provided by the State. In conferring on the Executive the task of defining that contribution, the procedures and, where necessary, the necessary consideration, the legislature did not disregard the scope of its powers.

Although the power to determine the rules concerning the base, rates and methods of collection of taxes of all types is attributed to the legislature by Article 34 of the Constitution, the Constitution does not reserve to statute the task of establishing or administering the fees payable by users in order to cover the burden of a public service or the costs of establishing or maintaining public works which have their counterpart in the services provided by the service or in the use of those works.

It is for the administration of a public service, by making use of the revenues from the service, to maintain, extend and improve the equipment

necessitated by developments in the circumstances of law and of fact, and in particular by an increase in the number of users. Consequently, the fact that the determination of the amount of the fees takes into account a return on the capital invested, and also the expenditure, including future expenditure, connected with the construction of infrastructures or new installations before they are brought into service, does not deprive those contributions of their nature as fees for service rendered.

Summary:

The Law on airports was referred to the Constitutional Council on 6 April 2005 by more than 60 deputies. The Council rejected all the arguments of the applicant deputies.

The applicant deputies challenged Article 6 of the Law, on the company «*Aéroports de Paris*», and Article 9, on airport fees. They maintained that the first of these provisions failed to have regard to the principle of continuity of the public service and that both articles were vitiated by a failure by the legislature to exercise its powers in full (*incompetence négative*).

According to the provisions in question, following declassification the new company «*Aéroports de Paris*» became the full owner of publicly-owned assets of the public establishment which it replaced (and which bore the same name) which the State had placed at its disposal in the past. On the other hand, the assets of «*Aéroports de Paris*» necessary for the performance of the public services of the State ancillary to the airport activity (air navigation, immigration control, customs) reverted to the public property of the State.

The new company is the delegate of the public airport service in the context of terms and conditions approved by decree in the Council of State, the chapter headings of which are defined by the law referred to the Constitutional Council.

The Constitutional Council rejected the applicants' argument that those provisions did not lay down the "guarantees necessary for compliance with the constitutional requirements" which result from the existence and continuity of the public services.

In doing so, it relied on:

- the fact that the majority of ADP's capital will be held by the State;
- the guarantees provided for by the terms and conditions, in particular as regards the monitoring, by the State, of compliance with the relevant

obligations, of the penalties which may be imposed or, again, of the monitoring, by the State, of the delegation of the performance of certain tasks to third parties.

The Constitutional Council also rejected the argument that the legislature failed to observe the scope of its powers. As regards the contribution made by *Aéroports de Paris* to the air navigation service, the Constitutional Council considered that it is for the Executive to define the rules of the “contribution made by *Aéroports de Paris* to the performance of the air navigation services provided by the State”, as provided for by the Law.

The Constitutional Council also adopted a more flexible approach to the concept of fees for services rendered. The fact that fees incorporate expenditure, including future expenditure, associated with the construction of new infrastructures and that they may be varied within limited proportions for a reason of general interest and offset against one another does not deprive them of their quality as fees for services rendered. Nor does the principle of equality preclude changes and setoffs according to differences in situation or considerations of general interest.

Languages:

French.



Identification: FRA-2005-1-003

a) France / **b)** Constitutional Council / **c)** / **d)** 21.04.2005 / **e)** 2005-512 DC / **f)** Law on policy and a programme for the future of schools / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 24.04.2005, 7173 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

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

4.5.6.4 **Institutions** – Legislative bodies – Law-making procedure – Right of amendment.

Keywords of the alphabetical index:

School, future, programming / Law, normative scope / Debate, sincerity / Law “verbose” / Procedural defect, Economic and Social Council, consultation, absence.

Headnotes:

It is always permissible for a parliamentary assembly not to adopt an article where a vote is taken on it, including where it has adopted an amendment to that article, provided however that the sincerity of the debate, a requirement of constitutional value, has not been impaired and there has been no failure to comply with a requirement of constitutional value. The alleged breach of a provision of the Rules of Procedure of the Senate cannot in itself have the effect of rendering the legislative procedure contrary to the Constitution.

It follows from the wording of Article 6 of the Declaration of the Rights of Man and the Citizen of 1789, which provides that “a statute is the expression of the general will ...”, that the purpose of a statute is to lay down rules and that a statute must therefore have a normative scope.

The legislature is required to exercise its powers in full: the principle of clarity of the law and the objective of constitutional value of intelligibility and accessibility of the law require that it adopt sufficiently precise provisions and unequivocal wording in order to protect the persons concerned against an interpretation contrary to the Constitution or against the risk of arbitrariness and must not transfer to the administrative or judicial authorities responsibility for fixing rules whose determination was entrusted by the Constitution solely to statute.

The complaint alleging absence of normative scope could not be validly raised against the entire report annexed to the law referred to the Council, approved by Article 12 of that law, since its provisions, which set objectives for State action in primary and secondary education, are those which may come within the category of programme laws of an economic or social nature.

However, under Article 70 of the Constitution such a Bill should have been submitted to the Economic and Social Council for its opinion. The failure to comply with that essential procedural requirement vitiated the lawfulness of the procedure implemented for the approval of the Bill. Consequently, the section of the law referred to the Council which approves the annexed report is contrary to the Constitution.

Furthermore, the provisions referred which set out a very general objective of “success for all pupils”, which have no normative scope, are contrary to the Constitution.

In addition, since certain provisions which provide for appropriate arrangements or specific actions in favour of certain pupils are obligations of imprecise scope, it follows from the parliamentary proceedings that they impose not obligations of result but obligations of means. Subject to that reservation, they do not infringe the principle of clarity of the law.

Last, a number of provisions are clearly of a regulatory nature.

Summary:

The Law on policy and a programme for the future of schools was the subject of a twofold reference, by more than sixty deputies and more than sixty senators, on 29 March 2005.

The applicants challenged the normative and legislature nature of the law in its entirety. More particularly, they disputed Articles 9 and 12 of the Law.

They maintained that the first of these (Article 9) was adopted following an unlawful procedure, since the Senate had initially rejected the section in a public vote because an amendment would have impaired its scope. That section, in a slightly amended form, had been adopted again in another public vote.

The Constitutional Council considered, in the light of the parliamentary proceedings, that the sequence of votes had not had the effect of impairing the sincerity of the debate and, moreover, that as the Rules of Procedure of the Senate were not of constitutional value, the alleged breach could not have affected the constitutionality of the legislative procedure.

Article 12 and the other provisions referred were challenged by the applicants in so far as they had no place in a legislative text.

In that regard, the Constitutional Council had only to confirm its position already asserted on several occasions on “fluid statements”, “legislative neutrons”, policy laws and also encroachment by the law on regulations.

The Constitutional Council once again condemned the “talkative law”, which leads to the degradation of the legislation, and reasserted the constitutional principle of clarity of the law and the constitutional

objective of intelligibility and accessibility of the law. It recalled that the role of interpreter of the law conferred on the courts cannot go as far as that of co-legislature.

It held that an assertion without normative scope is not a law and cannot appear in a law and is contrary to the Constitution.

Admittedly, there are exceptions as a consequence of the particular provisions of the Constitution, for example, programme laws, of economic or social nature. The Council considered that the report annexed to the Law came within that category. Contrary to the requirement of Article 70 of the Constitution for that type of law, however, the prior opinion of the Economic and Social Council had not been obtained.

The Constitutional Council therefore annulled the report annexed to the law and also the section approving it, since the failure to consult the Economic and Social Council substantially vitiated the procedure.

The Council also considered that Article 7, which defined the mission of schools in very general terms, was devoid of all normative effect.

The Council also expressed a reservation of interpretation in respect of the provisions imposing on the educational system obligations formulated in unclear terms.

Last, the Council declared that a number of articles of the Law were of a regulatory nature.

Languages:

French.



Identification: FRA-2005-1-004

a) France / **b)** Constitutional Council / **c)** / **d)** 28.04.2005 / **e)** 2005-514 DC / **f)** Law on the establishment of the French international register / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 04.05.2005, 7702 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.

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

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

5.4.17 **Fundamental Rights** – Economic, social and cultural rights – Right to just and decent working conditions.

5.5.1 **Fundamental Rights** – Collective rights – Right to the environment.

Keywords of the alphabetical index:

Law, applicable, status, seafarer, residence / Vessel, French international register / Seafarer, social protection regime / International Labour Organisation.

Headnotes:

Neither Article 34 of the Constitution nor the constitutional objective of intelligibility and accessibility of the law requires that the legislature expressly indicate the rules from which it is derogating. In this instance, the provision which states that the regulations applicable to seafarers residing outside France are not applicable to seafarers residing in France has neither the effect nor the object of derogating from the law applicable to the latter seafarers (Maritime Employment Code).

In providing, in Article 12 of the Law on the establishment of the French international register, that contracts of employment and the social protection arrangements for seafarers residing outside France employed on board vessels entered on that register are to be subject to the law chosen by the parties, the legislature defined, in the case of contracts concluded in an international framework, a criterion which enables the applicable law to be clearly determined.

Moreover, the legislature defined, in Title II of that law, which determines the regulations applicable to seafarers residing outside France, public social policy rules which will be applicable to them in any event. As regards daily and weekly rest periods, leave, freedom to join trade unions and the right to strike, those provisions lay down rules identical to those of the French Maritime Employment Code. They also establish minimum guarantees in relation to salaries and social protection.

The legislature thus adopted unequivocal and sufficiently precise provisions to define the rules applicable to seafarers covered by Title II.

The legislature provided, in the second paragraph of Article 13 of the Law on the establishment of the French international register, that the remuneration of seafarers residing outside France employed on board a vessel entered on the register cannot be less than the amounts fixed, after consultation of the representative trade and union organisations, by a decree of the Minister responsible for the merchant marine by reference to the remuneration generally applied or recommended at international level.

Paragraph I of Article 24 of the Law on the establishment of the French international register provides that seafarers residing outside France “may” be subject to the collective conventions or agreements applicable under the law governing their contract of employment. The legislature’s intention in using that formulation was to preclude agreements or conventions whose scope excluded the seafarers concerned or which set a level of protection below that resulting from the provisions of Title II of that law. The legislature did not disregard the extent of its powers.

Under the eleventh paragraph of the 1946 Preamble, the nation “guarantees to all, in particular children, mothers and elderly workers, the protection of health, material security, rest and leisure ...”. It is for the legislature to determine, in compliance with the principle thus set forth, the procedures for its implementation.

In this case, the law referred to the Constitutional Council does not misconstrue the right to health and to rest of seafarers residing outside France. In fact, it follows from the very words of Article 4 of that law that vessels entered on the French international register are subject to the rules on health and safety at work that apply under French law, the Community regulations and France’s international commitments. Articles 16 and 17 limit the working hours of seafarers residing outside France and provide for rest periods. Articles 20 and 21 define the conditions on which they may be repatriated, in particular in the event of disease or accident.

In providing, in Article 16 of the Law on the establishment of the French international register, for the drawing-up of a table setting out the organisation of work and indicating, for each function, the service programme at sea and in port, the legislature necessarily intended to refer to the single service table provided for both by Convention no. 180 of the International Labour Organisation and by the Decree

of 31 March 2005 on the working hours of seafarers. Articles 16 and 17 of that law establish, for minimum daily and weekly rest periods, public holidays and leave for seafarers residing outside France, rules identical to those applicable to other seafarers. As regards health and safety at work, all the rules resulting from French law, Community regulations and France's international commitments are applicable. The legislature thus fixed, in respect of working conditions on board, rules which do not draw any distinction, nor allow any distinction to be drawn, on the basis of a seafarer's country of residence. The complaint alleging breach of the principle of equality is factually incorrect.

It follows from Articles 13, 16 and 26 of the Law on the establishment of the French international register that the rules on the remuneration of seafarers residing outside France, whether in regard to the level of the minimum salary or of payment for overtime, and also the social security scheme for those seafarers, are different from those applicable to seafarers residing in France.

The complaint alleging breach of the principle of equality must nonetheless be rejected. It follows from the current rules of the law of the sea that a vessel flying the French flag cannot be considered to be part of French territory. Therefore seafarers residing outside France who are employed on board a vessel on the French international register cannot rely on all the rules associated with the territorial application of French law. Furthermore, as regards remuneration and social protection, those seafarers are not in the same position as seafarers residing in France in view of the specific economic and social conditions of the countries in which the centre of their material and non-material interests is situated. In the light of that objective difference in situation, it was permissible for the legislature to apply to them in those matters minimum rules different from those laid down for seafarers residing in France.

In adopting Article 4 of the Law on the establishment of the French international register, the legislature adopted measures of such a kind as to enhance maritime security and environmental protection. It therefore did not ignore the requirements of Article 6 of the Charter on the Environment.

Summary:

On 20 April 2005, the Law on the establishment of the French international register was referred to the Constitutional Council by more than 60 deputies and more than 60 senators.

By decision of 28 April 2005, the Constitutional Council declared that the law was not contrary to the Constitution.

Most of the contested provisions related to living and working conditions on board, remuneration and social protection, in view of the fact that a vessel flying the French flag employed both seafarers residing in France and seafarers residing outside France.

The Constitutional Council held that, from the point of view of living and working conditions on board a vessel entered on the register, the Law referred to it treats seafarers residing outside France in the same way as seafarers residing in France.

As regards remuneration and social protection, the Council considered that as a vessel flying the French flag cannot be considered to be part of French territory, seafarers residing outside France who are employed on board a vessel entered on the register cannot rely on all the rules associated with French public policy.

It held that, in view of the standard of living in their countries, seafarers who reside outside France are in a different situation from that of French seafarers and that, in the light of the objective of maintaining a French merchant fleet, this difference justifies a difference in treatment.

It nonetheless ascertained that, as regards both remuneration and social cover, the law referred to it ensured that seafarers residing outside France were given protection consistent with the requirements of the Preamble to the 1946 Constitution.

Furthermore, the law referred to the Council, which is designed to protect the existence of a French merchant fleet subject to all the rules on maritime safety and environmental protection, does not breach the principle of sustainable development laid down in Article 6 of the Charter on the Environment.

Languages:

French.



Georgia

Constitutional Court

Important decisions

Identification: GEO-2005-1-001

a) Georgia / **b)** Constitutional Court / **c)** Second Chamber / **d)** 16.02.2005 / **e)** N1/2/213, 243 / **f)** Citizens of Georgia – Uta Lipartia, George Khmelidze, Eliso Janashia and Gocha Ghadua v Parliament of Georgia / **g)** *Adamiani da Konstitutsia* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

4.9.3 **Institutions** – Elections and instruments of direct democracy – Electoral system.

5.2 **Fundamental Rights** – Equality.

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

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

Keywords of the alphabetical index:

Election, municipal / Mayor, manner of election / City, status.

Headnotes:

The opportunity of every individual to take part in the formation of the representative and executive bodies of local self-government directly or through freely chosen representatives is a right guaranteed by the European Charter on Local Self-government and the International Covenant on Civil and Political Rights of 1966.

In providing for the mayors of the cities of Tbilisi and Poti shall be appointed and dismissed by the President of Georgia while the mayors of the towns which do not belong to a region will be elected by the population of the relevant town, the impugned provision violates the principle of equality of citizens protected by the Constitution.

Summary:

The Constitutional Court of Georgia considered the merits of the applications brought by certain citizens of Georgia against the Parliament of Georgia. The applicants sought a declaration of unconstitutionality concerning those norms of the law of Georgia “on the Capital of Georgia – Tbilisi” and the organic law of Georgia “on Local Self-Government and Government”, in accordance with which the mayors of the cities of Tbilisi and Poti shall be appointed and dismissed by the President of Georgia, while the mayors of the towns which do not belong to a region will be elected by the population of the relevant town.

The instant case concerned two constitutional applications, which were lodged separately on different dates with the Constitutional Court of Georgia.

The subject of the dispute was the issue of the constitutionality of the second sentence of Article 22.1 of the law of Georgia “on the Capital of Georgia – Tbilisi” in relation to Articles 14 and 39 of the Constitution of Georgia, and the issue of the constitutionality of Article 10.3.b of the organic law of Georgia “on Local Self-Government and Government”, in particular, the words separated with brackets of the first sentence of Article 13.4, that is to say “(on dismissal of the mayor of Poti)”, and the second sentence of Article 26.1.u, that is to say “A mayor of Poti who renounces his powers before the President of Georgia is the exception”, in relation to Article 14 of the Constitution.

In the constitutional application registered as N213, two Georgian citizens residing in Tbilisi, Uta Lipartia and George Khmelidze, alleged that Article 22.1 of the law of Georgia “on the Capital of Georgia – Tbilisi” violated the rights and legitimate interests guaranteed to them by Chapter 2 of the Constitution. In general, the mayors of cities which are not parts of a region shall be elected by the procedure determined by the legislation of Georgia. The mayors of Rustavi, Kutaisi and Batumi are elected by their fellow citizens. In the applicants’ opinion, the impugned norm, amounted to clear discrimination on the basis of the place of residence of citizens, which might be expressed as follows: “The Citizens of Tbilisi have no rights to elect a mayor on the basis of universal, equal and direct right of election. By force of the impugned norm, the mayor is appointed by the President of Georgia.”

The constitutional application registered as N243, filed by two Georgian citizens residing in Poti, Eliso Janashia and Gocha Ghadua, concerned the organic law of Georgia “on Local Self-Government and

Government” adopted on 16 October 1997, and in force since the day of the official announcement of the results of elections of representative bodies of local self-government and government, i.e. November 1998. In the applicants’ opinion, the law contained a great number of flaws. It was especially noteworthy that self-government is not exercised in cities which are not subject to a region. In accordance with the applicants’ statement, the situation contradicted Article 2.4 of the Constitution. Changes and amendments were made to the above-mentioned organic law on 2 August, 2001, in particular, by Article 4.1 of the organic law, which provides for local self-government to be exercised in a village, a tribe, a settlement, a city as well as in a city which is not a part of a region. According to Article 4.3, local government is exercised by the local government of the region, and also, by the representative and executive bodies of local self-government of a city which is not part of a region. The applicants considered it a step forward that Article 7 of the organic law provides for the exclusive powers of the bodies of local self-government, and that the competence of local government is defined in Article 8.

The respondent, the representatives of the Parliament of Georgia, considered that the impugned norms did not contradict the provisions of the Constitution of Georgia. The kinds of local self-government bodies and their legal status are not directly determined by the Constitution. Thus, the argument of the incompatibility of the impugned norms with the Constitution was absolutely groundless. The adoption of the laws containing the impugned norms stemmed from the wording of Article 2.4 of the Constitution that was in force at the time the constitutional applications were filed. The norms did not contradict the articles of the Constitution that the applicants relied on to found their applications. The applicants’ reference to Articles 14 and 39 of the Constitution was completely illogical. The existence of the impugned norms was conditioned by the need to observe the country’s sovereignty. The respondent submitted that at the date of the hearing, the situation had essentially changed. The new wording of Article 2.4 of the Constitution had been adopted. Draft laws, providing for the election of mayors of Tbilisi and Poti by the relevant City Assembly, had been prepared and were under discussion in the Parliament.

In the opinion of the representatives of the respondent, the applicants’ rights, as guaranteed under the Constitution, had not been and were not violated.

The Board of the Constitutional Court considered that the State was obliged to ensure the right of the population to form – independently, without intervention of state bodies or officials – the bodies of local self-government and elect the relevant administration. The Constitutional Court of Georgia noted that the Constitutional Law of Georgia “on Changes and Amendments to the Constitution of Georgia” had been adopted on 6 February 2005 and had been in force since its publication on 7 February. The Parliament, the President and the Government of Georgia had two years from the entry into force of that law to ensure the compatibility of the normative acts adopted before its entry into force and the adoption of the normative acts provided for by the constitutional law under the new wording of Article 2.4 of the Constitution concerning local self-government. The new wording reads: “The office of the superiors of the executive bodies and a representative office of local self-government shall be electoral.” The new wording of Article 2.4 of the Constitution shall enter into force only after the relevant organic law comes into effect. The draft laws dealing with, *inter alia*, the issue of the election of the mayor (including that of Tbilisi and Poti) by the City Assembly had already been submitted and were under discussion.

Considering all of the above, in a judgment delivered on 16 February 2005, the First Board of the Constitutional Court of Georgia declared the impugned norms unconstitutional and struck them down in so far as those norms were in contradiction with the principle of the equality of a person before law regardless of his or her place of residence, as recognised by the Constitution of Georgia. In particular, the citizens of the cities of Tbilisi and Poti, unlike the population of the other towns in Georgia, were deprived of the opportunity to elect the head of city administration – the mayor.

Languages:

English.



Hungary

Constitutional Court

Statistical data

1 January 2005 – 30 April 2005

Number of decisions:

- Decisions by the plenary Court published in the Official Gazette: 12
- Decisions by chambers published in the Official Gazette: 5
- Number of other decisions by the plenary Court: 30
- Number of other decisions by chambers: 10
- Number of other (procedural) orders: 28

Total number of decisions: 85

Important decisions

Identification: HUN-2005-1-001

a) Hungary / b) Constitutional Court / c) / d) 28.04.2005 / e) 17/2005 / f) / g) *Magyar Közlöny* (Official Gazette), 2005/56 / h).

Keywords of the systematic thesaurus:

- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
- 4.7.2 **Institutions** – Judicial bodies – Procedure.
- 4.10.7 **Institutions** – Public finances – Taxation.
- 5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.
- 5.3.13.8 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right of access to the file.
- 5.3.13.19 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Equality of arms.
- 5.3.13.26 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to have adequate time and facilities for the preparation of the case.

Keywords of the alphabetical index:

Criminal procedure, costs / Disclosure, access to files, mandatory fee.

Headnotes:

Requiring the payment in advance by an accused of a mandatory fee for obtaining a copy of the important documents in his or her criminal case-file is unconstitutional. It is not enough to have regulations, which result in the waiving of that fee for the financially needy. It is a constitutional requirement that all accused in the criminal justice system have free and equal access to personal copies of the important documents in their own criminal case-file. Everyone, regardless of income or wealth, has a right to a fair trial and legal defence, which includes the obtaining without a fee the important documents in their own criminal case-file.

Summary:

Several applicants have asked for a constitutional review of the regulations of the Code of Criminal Procedure as well as the Act on Fee Regulation that require an accused to pay a fee in order to receive a copy of the important documents in their own criminal case-file. The amount of the fee is directly linked to the number of copied pages required.

The applicants first argument was that the regulations concerning that fee were unconstitutional in both form and content. According to the Constitution only statutes may regulate fundamental rights. The applicants asserted that those rules restricted constitutional rights and had been adopted by ministerial decree. Those regulations, they claimed, were not specifically derived from any particular statute and hence they were unconstitutional and should be struck down. The Court rejected that argument and concluded that the regulations were derived, though not specifically, from the Act on Fee Regulation and that there was a general connection between them, which was enough to satisfy the constitutional requirement.

The second, more significant, argument was that those provisions were unconstitutional in their content. The applicants argued that the fee regulations, which had the effect of a mandatory fee in exchange for the important documents in their own criminal case-file, violate two constitutionally protected rights of the accused: the right to a fair trial (Article 57.1) and the right to legal defence in criminal proceedings (Article 57.3). The mandatory fee must be paid either by the accused, the defence lawyer, or the legal

guardian in the event that the accused is a youth. If the fee cannot be paid, then a copy of the important documents in their own criminal case-file cannot be obtained and, hence, there is no opportunity to prepare a proper legal defence. Consequently, that would result in an unfair disadvantage to the accused and lead to an unfair trial.

Responding to those objections, the Court emphasised that in criminal cases, the important documents in their own criminal case-file are necessary in order to reasonably assess the legal situation of the accused and to be able to form an informed opinion about the case. The Court in its Decision no. 6/1998 [HUN-1998-1-003] determined that an effective legal defence can only be prepared if the defence is given the opportunity to take away personal copies of the important documents in their own criminal case-file in order to prepare an appropriate legal defence. To have access only to the original copies is not enough to be able to properly examine the documents and to prepare a proper defence.

Adequate time and facilities for the preparation of a defence are a necessary part of the constitutionally protected right to a legal defence. This reinforces the argument that it is unconstitutional to withhold copies of important documents, which are crucial to the preparation of a legal defence. For the financially needy, tying a mandatory fee to the opportunity to obtain the important documents in their own criminal case-file is the equivalent of withholding these documents. This results in the infringement of their constitutionally protected right to a legal defence.

Included, as part of the constitutionally protected right to a fair trial is the idea of "equality of arms". As between the parties, they must have access to similar legal tools and resources with which they can defend themselves. It is unfair to allow one side to have a personal copy of important documents free of charge, while the other side must pay a fee, that is to say surmount an obstacle in order to have the same resources at their fingertips. By putting up that extra obstacle with the knowledge that people who cannot afford to pay for these copies will not be able to obtain them, infringes on the equality of arms principle.

Article 70.I of the Constitution states that everyone, in accordance with his or her income and wealth, has a duty to contribute to public revenues. The government has a wide discretion to decide for which things public revenue is to be collected and used. The Court does not have jurisdiction to interfere with the specifics of how the government decides to collect and allocate its funds. Based on that alone, the decision to implement a fee for the photocopying

costs of the important documents in their own criminal case-file does not run counter to the Constitution, since the Court does not have jurisdiction to review the preferred method of public revenue collection. The Court may only review such regulations on the ground that they infringe on other constitutionally protected rights.

Fundamental rights, although protected by the Constitution are subject to regulation. Article 8.2 of the Constitution allows Parliament to make laws regulating fundamental rights but those laws may not constrain the essence of the rights. There is a two-part test for a valid regulation of a right: first, the restriction must be necessary to protect another constitutional right or to achieve another constitutional goal; and second, the benefit must be proportional to the restriction of the right.

According to the Court, the impugned fee regulations were not necessary to achieve the constitutional goal of Article 70.I. There is no infringement of Article 70.I if the government does not tie a fee to obtaining photocopies of the important documents in their own criminal case-file, as there are real alternatives that the government can implement in its collection of public funds. The fee regulations in question failed the first part of the test by restricting a right, without it being necessary to do so to promote another constitutional right or goal.

The Court found that each regulation individually, read on its own, did not amount to a rule of a mandatory fee payment and hence, did not violate the Constitution. However, when all the laws and regulations were read together, the outcome was that either an accused, a defence lawyer or the legal guardian in the event that the accused is a youth, would have to pay the fee regardless of their financial status if they wished to obtain a copy of the important documents in their own criminal case-file. Due to the complexity of those regulations, no one specific regulation or article of a regulation could be stuck down as unconstitutional. The Court therefore called upon the Parliament to consider the issues in its judgment and bring about modifications necessary to protect and safeguard the rights enshrined in the Constitution.

Languages:

Hungarian.



Ireland

Supreme Court

Important decisions

Identification: IRL-2005-1-001

a) Ireland / **b)** Supreme Court / **c)** / **d)** 16.02.2005 / **e)** 524/04 / **f)** In the matter of Article 26 of the Constitution & In the Matter of the Health (Amendment) (no. 2) Bill 2004 / **g)** / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

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

5.4.19 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

Keywords of the alphabetical index:

Medical fee, imposition, unlawful, right to recover / Public health, powers.

Headnotes:

Where a statutory measure abrogates a property right and the State seeks to justify it by reference to the interests of the common good or those of public policy involving matters of finance alone, such a measure, if capable of justification, can only be justifiable as an objective imperative for the purpose of avoiding an extreme financial crisis or a fundamental disequilibrium in public finances.

Summary:

Section 53.1 of the Health Act, 1970 requires health boards in Ireland to make in-patient services available without charge to elderly or long-stay in-patients. However, up until 2004 charges were imposed for such services in spite of the fact that there was no lawful authority to do so. In 2004 this became a

matter of political controversy and the government passed the Health (Amendment) (no. 2) Bill, 2004 which, in effect, proposed to retrospectively validate the unlawful charges. The Bill contained both retrospective and prospective provisions. Pursuant to Article 26 of the Constitution, the President referred the Bill to the Supreme Court for a decision as to whether any of its provisions were repugnant to the Constitution.

Section 1.a of the Bill amends Section 53 of the Health Act, 1970 in introducing both prospective and retrospective provisions. Section 53.2 allows the Minister for Health to make regulations for the imposition of charges in certain circumstances for in-patient services, insofar as they relate to the maintenance of a person in a home or hospital by a health board. Section 53.4 also confers on the Chief Executive Officer of health boards a discretion to reduce or waive a charge payable pursuant to such regulations where the full imposition of the charge would give rise to undue hardship in an individual case.

Section 53.5 purports to retrospectively validate the imposition and payment of charge which had been, prior to the introduction of the Bill, unlawful. However, this provision was qualified to some extent by Section 53.6 which states that Sub-section 5 shall not apply in the case of charges which are the subject of civil proceedings instituted on or before 14 December 2004, for the recovery of the relevant charge.

Finding the prospective provisions to be constitutional, the Court held that the real issue is whether the charges as envisaged could be said to infringe or unduly restrict the constitutional rights of those affected by these charges. The Court noted that it is for the *Oireachtas* in the first instance to determine the means and policies by which rights should be respected or vindicated. All the Court is concerned with is whether the charges would restrict access to the services in question to persons of limited means as to constitute an infringement or denial of their rights.

The Court also rejected the argument that, by allowing the Minister to impose charges by way of delegated legislation, the provisions of the Bill constituted an impermissible delegation of those law making powers which were reserved exclusively to the *Oireachtas* under Article 15.2.1 of the Constitution. It held that the discretion left to the Minister was limited by the maximum weekly charge he could impose and by the policy that the charges should not generally cause undue hardship.

Of the retrospective provisions the Court held that they abrogated the right of persons to recover monies for charges unlawfully imposed. The practice of imposing those charges was contrary to the express provisions of Section 53.1 of the Health Act, 1970, in which the *Oireachtas* had decreed the services in question should be provided without charge. The Court noted that, according to the text of Article 43 of the Constitution, the private ownership of external goods is a “natural right”. The property of persons of modest means must necessarily, in accordance with those principles, be deserving of particular protection, since any abridgements of the rights of such persons will normally be proportionately more severe in its effects.

The Court held that it would be straining the meaning of the reference to “the principles of social justice” in Article 43.2.1 to extend it to the expropriation of property solely in the financial interests of the State. The Court did not exclude the possibility that, in certain cases, the delimitation of property rights may be undertaken in the interests of general public policy. However, it was satisfied that these Articles could only be invoked in support of extinguishing the property rights of persons of modest means on the grounds of furthering State finances in extraordinary circumstances. The Court found that where these rights were enjoyed by the vulnerable elderly, statutory measures seeking to abrogate them could only be justified as an objective imperative for the purpose of avoiding an extreme financial crisis or a fundamental disequilibrium in public finances. As a result, the Court concluded that patients upon whom charges for in-patient services were unlawfully imposed from and after 1976 and who paid those charges were entitled, as of right, to recover them.

Languages:

English.



Italy Constitutional Court

Important decisions

Identification: ITA-2005-1-001

a) Italy / **b)** Constitutional Court / **c)** / **d)** 13.01.2005 / **e)** 45/2005 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 02.02.2005 / **h)**.

Keywords of the systematic thesaurus:

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

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

5.3.4.1 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity – Scientific and medical treatment and experiments.

Keywords of the alphabetical index:

Procreation, medically assisted / “Law constitutionally mandatory” / Law, abrogation.

Headnotes:

The request to put the whole of Law no. 40 of 2004 to an abrogative referendum concerned regulations which, in view of the subject matter in question, were “constitutionally necessary”. The request therefore had to be declared inadmissible.

Summary:

The Constitutional Court was asked to rule on the admissibility of a request for an abrogative referendum (Article 75 of the Constitution) relating to the entire text of Law no. 40 of 19 February 2004 (“Rules governing medically assisted procreation”).

The Court pointed out, first of all, that its judgment should not relate to any constitutional defects in the law in question but solely to the request for abrogative referendum. Whatever decision was ultimately adopted by the Court with regard to

admissibility would have no implications for the law's current compliance with the Constitution, nor the constitutionality of the regulatory system once the abrogative consequences of the referendum had taken effect.

In order to rule on the admissibility of the referendum request, the Court was required to verify whether, in each of the various cases, suppression of the regulations in force violated a constitutional provision. On the basis of its Judgment no. 16 of 1978, the Court confirmed that in addition to the laws which Article 75 of the Constitution excluded from the scope of abrogative referendums (tax or budget laws, amnesties, pardons, or ratification of international treaties), the referendum procedure could not be used in respect of ordinary laws whose substance was "constitutionally mandatory", i.e. laws which implemented constitutional precepts. Two types of law fell under this category: (i) ordinary laws whose provisions represented the only possible application of the constitutional rule – such that abrogation of a law of this type would result in a violation of the Constitution – and (ii) ordinary laws whose abrogation by referendum would mean that a constitutional principle or body established or provided for in the Constitution would be rendered ineffective. In its Judgment no. 49 of 2000, the Court stated that once "constitutionally necessary" laws (in the sense that they were essential in order to give effect to a fundamental right) had been incorporated into the legal system, they could be successively amended but not abrogated, as this would eliminate the protection they provided for: this would automatically entail an immediate violation of the constitutional rule the said laws had put into effect. The total abrogation of Law no. 40 of 2004 – which was the subject of the request, regulating the many aspects of medically assisted procreation, which until the enactment of that law was without any legislative framework, would lead to such a situation. The law set out regulations for a field which had developed considerably in recent years and which concerned numerous major interests of constitutional standing, between which an appropriate balance needed to be established by ordinary legislation in order for a minimum level of protection to be afforded.

Furthermore, these same requirements for establishing a balance and for affording protection had been confirmed at international level, in particular in certain provisions of the Oviedo Convention of 4 April 1997 (Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine) and the additional Protocol signed in Paris on 12 January 1998 (on the prohibition of cloning of human beings)

which became applicable in Italy with the enactment of Law no. 145 of 28 March 2001. It was also appropriate to refer to Article 3 of the Charter of Fundamental Rights of the European Union relating to free and informed consent of the person concerned, the prohibition of eugenic practices and the prohibition of the reproductive cloning of human beings.

The request to put Law no. 40 of 2004 in its entirety to an abrogative referendum therefore related to regulations which, in view of the above considerations, were "constitutionally necessary". Consequently, it must be declared inadmissible.

Supplementary information:

The Court has declared admissible four other requests for referendum, each of which concerned a number of provisions of Law no. 40 of 2004. In Judgment no. 46 of 2005 it gave its consent for a referendum seeking to increase the possibilities of medical research on embryos and stem cells, while maintaining the prohibition of the reproductive cloning of human beings. In Judgments nos. 47 and 48 of 2005, the Court gave its consent for referendums to abrogate, amongst other things, regulations preventing medically assisted procreation for purposes other than combating sterility, to introduce equality of rights of all persons concerned by the procedure, including the person conceived, to allow the formation of more than 3 embryos and authorise them to be frozen. Lastly, in Judgment no. 49 of 2005, the Court gave its consent for a referendum to abrogate the rule prohibiting recourse to heterologous assisted fertilisation. For none of the four proposals did a majority of the electorate take part in the referendums held on 13 and 14 May. The Law therefore remained in force in its original version.

Languages:

Italian.



Korea

Constitutional Court

Important decisions

Identification: KOR-2005-1-001

a) Korea / **b)** Constitutional Court / **c)** / **d)** 03.02.2005 / **e)** 2001Hun-Ka9 10 11 12 13 14 15, 2004Hun-Ka5 (consolidated) / **f)** Head of Family Case / **g)** 101 KCCG *Korean Constitutional Court Report* (Official Digest), 173 / **h)** CODICES (Korean).

Keywords of the systematic thesaurus:

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

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

5.3.33 **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:

Traditional culture / Family, head / Patriarchal marital system / Family, traditional, interpretation, compatibility with constitutional values.

Headnotes:

The ‘tradition’ or ‘traditional culture’ in the Preamble and Article 9 of the Constitution, which sets out “[T]he State shall strive to sustain and develop the heritage of traditional culture”, is a concept which should be understood within the framework of the historical context in accordance with the change of epochs. Thus, it should be interpreted on the basis of contemporary ideas and notions, considering the constitutional value system, the universal values of the world, justice, and humanism. Therefore, the ‘tradition’ or ‘traditional culture’ with regard to the family system should not infringe the dignity of the individual and the equality of the sexes. If any part of the traditional family system violates the dignity of the individual and the equality of the sexes guaranteed by Article 36.1 of the Constitution, then that part may not rely on Article 9 of the Constitution for its constitutional justification.

Summary:

1. Under the Korean Civil Code, a “*ho-ju*” is an individual who is the head or legal representative of a family. A male has priority over a female with regard to accession to the position of *ho-ju*. A woman is listed in the family register under her father (as *ho-ju*) until marriage, whereupon she is placed under her husband (as *ho-ju*). Children remain registered in their father’s family even when their mother has custody of them after divorce.

Some married women applied to the family registration office to have the title of *ho-ju* held by their husbands removed, and some divorced women applied to have their children re-registered under their own family. When their applications were refused by the family registration office, they filed a suit and argued that the provisions of the Civil Code regulating the *ho-ju* system violated Article 10 of the Constitution (which recognises an individual’s human dignity, human worth, and right to pursue happiness), Article 11.1 (which prohibits gender discrimination) and Article 36.1 (which guarantees the free pursuit of marriage and family life based on individual dignity and gender equality). Having accepted the petitioners’ petition for constitutional review, the courts made a reference to the Constitutional Court for a constitutional review of the provisions in question.

2. The Constitutional Court holds by a seven-to-two majority that the *ho-ju* system violates human dignity and gender equality.

The essential reasoning of the Court is as follows.

Although the family system reflects historical and social customs, it cannot prevail over the Constitution, the supreme norm of the state. Moreover, if family law is an obstacle to the realisation of constitutional ideology and causes the departure of a constitutional norm from reality, family law must be reshaped to conform to the spirit of the Constitution.

By declaring that the equality of the sexes in marriage is the foundation of the constitutional marital system, the Constitution decided that the traditional patriarchal marital system could not be accepted any longer. The equality of the sexes and the dignity of the individual are considered as the supreme norms of the martial and family system in the current Constitution.

Traditional culture cannot prevail over the Constitution, the supreme norm of the state. This is especially true where traditional culture, without

justifiable reasons, infringes the basic human rights guaranteed by the Constitution.

The *ho-ju* system discriminates against women through sexual stereotypes. It also imposes disadvantages on women without justifiable reasons as to the priority of succession of the *ho-ju* title, the formation of conjugal hierarchies and the legal status of children in the family.

The current *ho-ju* system causes great inconvenience and pain to many families by preventing them from arranging their legal relationships in such a way that is appropriate for their real family life and family welfare. Traditional ideologies and established social morals and customs such as ancestor worship, respect-for-age and filial piety, and family harmony cannot be exploited to justify the constitutionality of the current *ho-ju* system, since they can be fully preserved in cultural and ethical dimensions regardless of the existence of the *ho-ju* system. Therefore, the obvious discrimination against women in the *ho-ju* system cannot be tolerated in our constitutional system.

The *ho-ju* system is a unilateral regulation and enforcement of a special family relationship, which originates in the deep-rooted idea of the maintenance and succession of a male-centred lineage, ignoring the will and welfare of individual family members. The system does not respect the individual as a person with dignity, but considers individuals as mere instruments for the maintenance and succession of the family. It is not compatible with Article 36.1, which sets out that individual autonomy in marriage and family life should be respected.

The current family relationship is a democratic one, in which every member of the family is considered as a person with dignity and should be treated equally. The types of families have become significantly diverse, including single mother-centred families with the mother's own children and remarried couple-centred families with children from their previous marriages. The ratio of women who lead the family as head has substantially increased with the improvement of women's economic power and an increase in the divorce rate. It could be said that the *ho-ju* system is consistent with the traditional family system based on paternal bloodlines. However, there is no justification for the existence of the *ho-ju* system if that system is not compatible with the new social atmosphere and diverse family relationships, and may result in the distortion of the reality of the family.

3. The dissenting opinion includes the following main reasons.

The family law, which regulates marriage and family relations, inevitably reflects traditionalism and moralism; the interpretation of the constitutional provisions concerning marital and family relations needs careful consideration of the traditional aspects of family law. In particular, if traditional culture is assessed only in light of a unilateral factor such as mechanical equality, traditional family culture will be ignored and finally disappear. The current *ho-ju* system, as an institution for the composition and succession of the traditional paternal bloodline, is based on our tradition and the reality of the Korean society. The *ho-ju* system does not infringe the principle of equality because it does not amount to substantial discrimination against women. Although the *ho-ju* system seems to shape a social hierarchy in the family unilaterally, it is an inevitable outcome of the process of legislating family law. Family law also has additional mechanisms such as the voluntary formation of a branch family and the surrender of the right to be a *ho-ju* successor. These mechanisms provide adequate means to reduce the burdens of the *ho-ju* system so that the dignity of family members can be protected. Consequently, the *ho-ju* system does not violate Article 36.1 of the Constitution.

Cross-references:

- Decision of 08.09.1989 (88Hun-Ka6);
- Decision of 16.07.1997 (95Hun-Ka6);
- Decision of 27.04.2000 (98Hun-Ka16).

Languages:

Korean.



Latvia

Constitutional Court

Important decisions

Identification: LAT-2005-1-001

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 17.01.2005 / **e)** 2004-10-01 / **f)** On the Compliance of Sections 132.1.3 and 223.6 of the Civil Procedure Code with Article 92 of the Republic of Latvia Constitution (*Satversme*) / **g)** *Latvijas Vestnesis* (Official Gazette), no. 9(3167), 18.01.2005 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
- 4.7.14 **Institutions** – Judicial bodies – Arbitration.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
- 5.3.39 **Fundamental Rights** – Civil and political rights – Right to property.
- 5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Civil freedom, principle / Arbitration, procedure, fundamental rights and freedoms, guarantees.

Headnotes:

From the right to property guaranteed in the Latvian Constitution (*Satversme*) follows also the right to use it freely, notably when concluding civil agreements. This principle of civil freedom would be restricted if the parties did not have the possibility to agree on terms of the agreement they consider acceptable, including envisaging adjudication of eventual disputes in an arbitration court in order to take advantage of this particular procedure.

An agreement between parties providing for adjudication of disputes in arbitration court, as permitted by the Civil Procedure Code, does not

infringe on the right of access to a court provided by Article 92 of the Constitution.

Summary:

The Constitutional Section 132.1.3 and Section 223.6 of the Civil Procedure Code (hereinafter: “the impugned norms”) determine that a judge shall refuse to accept a statement of a claim and terminates proceedings in a matter if “the parties have, in accordance with procedures set out by law, agreed to transfer of the dispute for it to be adjudicated by an arbitration court”.

Court recalled that Arbitration courts do not belong to the system of judicial power, which has been determined in Chapter VI of the Latvian Constitution (*Satversme*) and in the Law “On Judicial Power”.

It follows from the content of the impugned norms that, when challenging their conformity with Article 92 of the Constitution, the applicant has considered them to be unconfirmable with concrete rights, guaranteed in the article, namely, the right of access to a court.

With the reference to his previous judgments the Constitutional Court points out, that the substantial and procedural aspects of the right to a fair court are inseparably connected: the fairness of the court process would be of no use if the accessibility to the court were not provided and, vice versa, accessibility to court would be unnecessary if the fairness of the process were not provided.

The Constitutional Court points out, that the right to a fair court, determined in Article 92 of the Constitution neither taken separately nor in the context with the international human rights norms, is not absolute and may be restricted.

The Constitutional Court holds that from the right to property, guaranteed in the Constitution, follows also the right to freely use it, for example, when concluding civil agreements. The impugned norms secure civil freedom as the agreement of the parties on the adjudication of the dispute at the arbitration court would not be possible in its traditional and internationally adopted interpretation, if the proceedings in the court of general jurisdiction, when reviewing the matter on its merit, would be allowed, even though the parties had agreed on adjudication of the dispute at an arbitration court.

The Constitutional Court thus established that the impugned norms have a legitimate aim, namely, it secures quick and effective review of matters,

lessens the work-load of the courts as well as provides several other advantages.

The Constitutional Court, when assessing the proportionality of the restriction of access to court, following from the impugned norms, points out, that the restriction itself is restricted. Regardless of the will of a person, the legislator has in certain cases and in a certain manner forbidden to restrict the rights, guaranteed in the Constitution.

In accordance with the general principle the state is not responsible for violations of the fundamental rights in arbitration court proceedings. However, the state has the obligation, first of all, to ensure measures of protection against the above violations of the procedural rights and, secondly, not to authorise the result of such proceedings of the arbitration court. In difference from the greatest number of states, in Latvia both the above obligations merge, as the law does not envisage the possibility to raise objection to the arbitrator or request abrogation of the arbitral award. Therefore the control of arbitration courts is concentrated on the stage of issuance of the writ of execution. One may doubt whether such a solution is optimal, as well as whether it is necessary to resign from the model of control of arbitration courts, which is well-known and well-accepted in the world, however, the state has extensive freedom of action in determining the regulation on the arbitration court procedure.

The Constitutional Court stresses that the impugned norms shall be read in conjunction with other norms of the Civil Procedure Code, which restrict the range of matters to be adjudicated by arbitration court, as well as envisage involvement of the court in solution of such disputes, which – in accordance with the agreement – are subject to arbitration.

The Constitutional Court finds that it is not possible to link the arbitration procedure with the possibility to adjudicate the particular case on its merits by a court of general jurisdiction, as the impugned norms prohibit it. Therefore there is no less encroaching alternative for reaching the identified legitimate aims. In the same way the Constitutional Court concluded that the extent of the restriction to address a court, determined by the impugned norms, is reduced by the provisions of the civil procedure and other norms. Therefore the impugned provisions are proportionate to the aim.

Simultaneously the Constitutional Court noticed several problems of the arbitration court procedure.

The Court declared Sections 132.1.3 and 223.6 of the Civil Procedure Code in conformity with Article 92 of the Constitution.

Supplementary information:

Following the Constitutional Court judgment, significant amendments to the Civil Procedure Code regarding arbitration courts were made.

Cross-references:

Previous decisions of the Constitutional Court in cases:

- no. 2000-03-01 of 30.08.2000, *Bulletin* 2000/3 [LAT-2000-3-004];
- no. 2001-08-01 of 17.01.2002, *Bulletin* 2002/1 [LAT-2002-1-001];
- no. 2001-10-01 of 05.03.2002;
- no. 2002-04-03 of 22.10.2002, *Bulletin* 2002/3 [LAT-2002-3-008];
- no. 2002-09-01 of 26.11.2002, *Bulletin* 2002/3 [LAT-2002-3-009];
- no. 2002-20-0103 of 23.04.2003, *Bulletin* 2003/1 [LAT-2003-1-005];
- no. 2003-04-01 of 27.06.2003, *Bulletin* 2003/2 [LAT-2003-2-009].

European Court of Human Rights:

- *Golder v. the United Kingdom*, 21.02.1975, *Special Bulletin ECHR* [ECH-1975-S-001]; Vol. 18, Series A of the Publications of the Court;
- *Deweere v. Belgium*, 27.02.1980, Series A, no. 35, *Special Bulletin ECHR* [ECH-1980-S-001];
- *Fayed v. United Kingdom* [1994], 21.09.1994, Series A, no. 294-B;
- *Albert and Le Compte v. Belgium*, 10.02.1983, Series A, no. 58; [ECH-1983-S-001];
- *De Wilde, Ooms and Versyp v. Belgium*, 18.06.1971, Series A, no. 12; *Special Bulletin ECHR* [ECH-1971-S-001];
- *Waite and Kennedy v. Germany* [GC], no. 26083/94, ECHR 1999-I; *Bulletin* 1999/1 [ECH-1999-1-005];
- *Océano Grupo Editorial SA v. Roció Murciano Quintero* [2000];
- *Delcourt v. Belgium*, 17.01.1970, Series A, no. 11, *Special Bulletin ECHR* [ECH-1970-S-001];
- *Piersack v. Belgium*, 01.10.1982, Series A, no. 53.

Languages:

Latvian, English (translation by the Court).

**Identification:** LAT-2005-1-002

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 26.01.2005 / **e)** 2004-17-01 / **f)** On the Compliance of the Norm “Use of Narcotic and Psychotropic Substances without a Physician’s Prescription”, Included in the First Part of Section 253² of the Republic of Latvia Criminal Law with Article 96 of the Republic of Latvia Constitution (*Satversme*) / **g)** *Latvijas Vestnesis* (Official Gazette), no. 16(3174), 28.01.2005 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
5.3.32 **Fundamental Rights** – Civil and political rights – Right to private life.

Keywords of the alphabetical index:

Drug, use, criminal liability.

Headnotes:

The determination of criminal liability for use of narcotic and psychotropic substances without a physician’s designation shall be regarded as a restriction to the right to private life. This particular restriction is proportionate and socially needed in a democracy.

This restriction is therefore in conformity with Article 96 of the Latvian Constitution in which is encompassed the right to private life.

Summary:

I. The impugned norm of the Criminal Law envisages criminal liability for “use of narcotic or psychotropic substances without a physician’s prescription”.

The applicant requests the Constitutional Court to assess the conformity of this norm with Article 96 of the Constitution (*Satversme*) and declare it invalid.

On 21 January 2003 the applicant was inflicted an administrative penalty – 30 lati – in accordance with Article 46 of the Latvian Administrative Misdemeanour Code for using narcotic and psychotropic substances without a physician’s prescription. On 29 January 2003 repeated use of narcotic and psychotropic substances without a physician’s prescription was established and criminal proceedings initiated. On 4 March 2004 the Court passed a guilty verdict, as established in the first part of Section 253² of the Criminal Code, and sentenced her to six months of deprivation of liberty.

The applicant maintains that the fundamental right to inviolability of private life, as set out in Article 96 of the Constitution, includes the right to use any of the intoxicating substances, which are accessible in the State. She acknowledges that in the interests of public morality the State has the right of regulating public use of intoxicating substances. Use of alcohol and tobacco is regulated by law, whereas the use of narcotic and psychotropic substances is prohibited. The applicant contends that for public use of narcotic and psychotropic substances the same responsibility should be established as for the use of alcohol and tobacco.

The complaint points out that the impugned norm is directed to addicts – users of narcotic and psychotropic substances. The applicant is of the opinion that drug addiction is an illness and the use of narcotic and psychotropic substances is the expression of illness and not a criminal activity.

II. The Court established that the determination of criminal liability for use of narcotic and psychotropic substances without a physician’s prescription shall be regarded as a restriction of the right to inviolability of private life. However the right to inviolability of private life may be restricted if the restriction has been determined by law, complies with the legitimate aim and is needed in a democratic society.

The restriction of the fundamental rights, included in the impugned norms, is determined by law.

The Court holds that far-reaching consequences of illicit distribution of narcotic and psychotropic substances will negatively influence not only the particular user of the substances but also the economic, political and cultural foundations of the society; and that the main legitimate aim for the restriction of the fundamental right to be assessed is public safety.

To establish whether the restriction of fundamental rights is needed in a democratic society, it shall be assessed if the restriction is socially necessary and is proportionate.

The Court stressed that in addition to dangerous after-effects on the health and life of the individual, narcotic and psychotropic substances may also seriously affect behavior of a person, brain operation and the general state of health. The Court does not agree with the viewpoint that narcomania concerns only the user of narcotic and psychotropic substances and therefore determination of criminal liability is inadmissible. As a matter of fact narcomania concerns the whole society. The addict causes especially hard suffering to his/her relatives.

Consequences of use of narcotic and psychotropic substances are much more dangerous than the consequences of use of alcohol and tobacco. Therefore the Court, not denying the dangerousness of use of other intoxication substances, holds that the viewpoint of the submitter, namely, that use of narcotic and psychotropic substances shall be regulated by the same norms, which regulate use of tobacco and alcohol, is groundless.

The Court established that the restriction of fundamental rights, determined in the impugned norm is proportionate and needed in a democratic society.

The Court has thus declared the norm, incorporated in the first part of Section 253² of the Criminal Law, "use of narcotic and psychotropic substances without a physician's prescription" as complying with Article 96 of the Constitution.

Languages:

Latvian, English (translation by the Court).



Identification: LAT-2005-1-003

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 15.02.2005 / **e)** 2004-19-01 / **f)** On the Compliance of Section 21.3 of the Civil Procedure Law with Articles 1 and 92 of the Republic of Latvia Constitution (*Satversme*) / **g)** *Latvijas Vestnesis* (Official Gazette), no. 30(3188), 22.02.2005 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
 3.16 **General Principles** – Proportionality.
 3.17 **General Principles** – Weighing of interests.
 3.19 **General Principles** – Margin of appreciation.
 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:

Recusal, judge, refusal, appeal / Procedure, economy, principle / Judge, recusal / Civil procedure.

Headnotes:

In cases of conflict between legal principles contained in the Constitution, these principles shall be assessed by taking into consideration the particular situation and circumstances of the case. Assuming that the regulation pertaining to the adjudication of the self disqualification of a judge (recusal) would serve the respect of the principle of court impartiality, this regulation first has to be distinguished from the contested norm and should nonetheless provide for the respect of the procedural economy. The regulation allowing for the removal application to be adjudged by the judge complies with Article 92 of the Constitution that encompasses the right to a fair trial.

Summary:

I. Section 21.3 of the Civil Procedure Law (hereinafter: "the impugned norm") determines: "in a matter adjudicated by a judge sitting alone, the removal application shall be adjudged by the judge himself/herself".

In accordance with Section 19.4 of the Civil Procedure Law, a participant in the matter may apply for removal of a judge if the judge has not recused himself/herself, stating the reasons for the recusal. The obligation of the recusal is established in paragraphs 2 and 3 of this Section, in its turn the first paragraph enumerates the cases when the judge shall recuse himself/herself if there are concrete circumstances not connected with the individual attitude of a judge. In accordance with paragraph four, a judge does not have the right to participate in the adjudicating of a matter if he/she "has a direct or indirect personal interest in the outcome of the matter or if there are other circumstances which create well-founded doubt as to his or her objectivity".

The applicant of the constitutional claim is the defending party in a civil matter, which is being adjudicated by the judge sitting alone. During the process of adjudication of the matter, the defendant had doubt about the objectivity of the judge and he applied for removal of the judge. The judge did not recuse herself on the basis of the impugned norm. The submitter holds that in such a way his right to a fair court, fixed in Article 92 of the Constitution (*Satversme*), has been violated.

II. The Constitutional Court reiterated that the contents of the human rights norms, incorporated in the Constitution, shall be interpreted as read together with the norms included in international human rights instruments. With reference to Article 6 ECHR, Article 14 of the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights, the Court pointed out that there is no doubt that the right to a fair court, guaranteed in Article 92 of the Constitution, includes the right to an impartial court.

The Court established that the institution of recusal is subordinated to the duty of a judge to abstain from the adjudication of a matter, but besides that, the concept of this legal institute is not logically connected with a particular procedure for its implementation. It is possible to secure court impartiality in several ways. Moreover, it is possible to do it without using the institution of recusal. Even non-acceptance of the application for recusal may serve as the basis for an appeal and thus the right of the person to impartial court is protected. This viewpoint is substantiated by an essential principle: the procedure for the adjudication of removal established in the impugned norms serves the procedural economy.

The Court stressed that according to Recommendation Rec (1995) 5 of the Council of Europe concerning the "Introduction and Improvement of the Functioning of Appeal Systems and Procedures in Civil and Commercial Cases", the states are requested to consider the possibility of "postponing the right to appeal in certain interlocutory matters to the main appeal in the substantive case".

The Court reiterated that procedural economy is an element of the contents of Article 92 of the Constitution. However, deciding from the context of the applicant's statement, one may conclude that it is more directed to the conflict between the principle of procedural economy and the principle of impartiality of the court. However, even then the viewpoint of the applicant on the mutual hierarchy of this principle is unfounded. The legal science acknowledges that in cases of conflict among legal principles, they shall be assessed by taking into consideration the particular situation and circumstances. Even assuming that a

regulation on the adjudication of the recusal, which would differ from the impugned norm, would advance the observation of the principle of court impartiality, one has to admit that the gain shall be proportionate to the interests of procedural economy.

The Constitutional Court does not deny that another procedure for the adjudication of applications for the recusal is possible, however, in accordance with Article 19.1 of the Constitutional Court Law, its duty is to assess the compliance of the impugned norm with fundamental rights determined in the Constitution, but not to substitute the freedom of action of the legislator with its viewpoint on a more rational solution.

The Court pointed out that in accordance with the case law of the European Court of Human Rights, the errors resulting from the decisions of the court of the first instance may be rectified by the appellate instance. The issue on the violation of the right to a fair court "shall be assessed by considering the proceedings as a whole including the decision of the appellate court" and taking into account its role in the proceedings. In accordance with the Civil Procedure Law the appellate instance adjudicates matters on the merits, therefore it may rectify any of the errors done by the court of the first instance.

The Court declared the Section 21.3 of the Civil Procedure Law as in conformity with Article 92 of the Constitution.

Cross-references:

Previous decisions of the Constitutional Court in cases:

- no. 2001-10-01 of 05.03.2002;
- no. 2001-17-0106 of 20.06.2002, *Bulletin* 2002/2 [LAT-2002-2-006];
- no. 2003-04-01 of 27.06.2003, *Bulletin* 2003/2 [LAT-2003-2-009];
- no. 2003-08-01 of 06.10.2003, *Bulletin* 2003/3 [LAT-2003-3-010];
- no. 2004-06-01 of 11.10.2004;
- no. 2004-10-01 of 17.01.2005, *Bulletin* 2005/1 [LAT-2005-1-001].

Judgments of other constitutional courts:

- Federal Constitutional Court of Germany, *BVerfGE* 90, 145 (182).

European Court of Human Rights:

- *Adolf v. Austria*, 1982, Series A, no. 49;

- *Edwards v. the United Kingdom*, 1992, Series A, no. 247-B;
- *De Cubber v. Belgium*, 1984, Series A, no. 86;
- *Helmers v. Sweden*, 1991, Series A, no. 212-A;
- *Ekbatani v. Sweden*, 1988, Series A, no. 134.

Languages:

Latvian, English (translation by the Court).



Identification: LAT-2005-1-004

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 07.03.2005 / **e)** 2004-15-0106 / **f)** On the Compliance with the Constitution of Articles 1.3.5, 2.2.2 and 7.1.2 of the Law "On the Status of Former USSR Citizens, who are not Citizens of Latvia or any Other State / **g)** *Latvijas Vestnesis* (Official Gazette), no. 40(3198), 09.03.2005 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

- 5.1.1 **Fundamental Rights** – General questions – Entitlement to rights.
- 5.3.8 **Fundamental Rights** – Civil and political rights – Right to citizenship or nationality.
- 5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.

Keywords of the alphabetical index:

State, continuity / Non-citizen, rights and guarantees / Citizen, former USSR, special status, loss / Stateless Person, Convention on status / Stateless person, rights.

Headnotes:

Latvian non-citizens cannot be compared with any other status of a physical entity, which has been determined in international legal acts, as the scope of rights, established for non-citizens, does not comply with any other status. Latvian non-citizens are to be regarded neither as citizens, nor aliens or stateless persons but as persons with "a specific legal status".

The status of a non-citizen is not and cannot be regarded as a type of Latvian citizenship. However, the rights and international liabilities determined for the

non-citizens testify that the legal ties of non-citizens with Latvia are, to a certain extent, recognized and mutual obligations and rights have been created on the basis of their specific legal status.

The opinion that Latvia had an obligation to automatically guarantee citizenship to those individuals and their descendants who had never been Latvian citizens before, but who entered the territory during the years of occupation, is not founded.

Article 98 of the Constitution establishes the rights of everybody to freely depart from Latvia, as well as the right of everyone having a Latvian passport to be protected by the State when abroad and to freely return to Latvia.

A deprivation of the status of a Latvian non-citizen due to receiving a permanent residence permit in a foreign state, or to permanent registering of the place of residence in a CIS Member State, is contrary to the principle of the prohibition of increasing the number of stateless persons, as neither receiving a permanent residence permit in a foreign state or a permanent registration in a CIS Member State establish for a person the same status as obtaining citizenship would provide.

Summary:

On 12 April 1995 the parliament (*Saeima*) passed the Law "On the Status of Former USSR Citizens, who are not Citizens of Latvia or any Other State" (hereinafter: "The Non-citizen Law"). The compliance of several norms of the Non-Citizen Law with the Latvian Constitution (*Satversme*) and international legal norms binding on Latvia are being assessed in the case.

The Court stressed that the adoption of the Non-Citizen Law in Latvia was determined by the historical and political situation in Latvia after the collapse of the USSR. The continuity of Latvia as an international legal subject created the legal basis for not automatically granting the status of the citizen to a certain group of persons. Latvia did not grant citizenship to persons who did not have it before occupation of Latvia, but accepted certain right of these persons *de facto*. The Court disagreed with the viewpoint that Latvia had an obligation to automatically guarantee citizenship to those individuals and their descendants who had never been citizens of Latvia and entered Latvia during the years of occupation.

The Court pointed out that there was the necessity to determine a specific status for those persons who had entered the territory of Latvia during the years of

occupation, lost their USSR citizenship and did not acquire any other citizenship. Granting of the status of a non-citizen to a certain group of persons was the result of a complicated political compromise. Besides, when adopting the Non-Citizen Law, Latvia had to observe also the international human rights standards which prohibit increasing the number of stateless persons in cases of state continuity.

The Court noticed that after the adoption of the Non-Citizen Law, a new category of persons – Latvian non-citizens emerged. This status was established as a temporary status, so that the person might obtain Latvian citizenship or choose another state with which to strengthen legal ties. Latvia created preconditions for persons, for whom the status of a non-citizen was determined by the Non-Citizen Law, to acquire Latvian citizenship. However, the decision whether to exercise this right or not is a personal one.

The Court stresses that status of a non-citizen is not and cannot be regarded as a type of Latvian citizenship. However, the rights and international liabilities determined for the non-citizens testify that the legal ties of non-citizens with Latvia are to a certain extent recognised and mutual obligations and rights have been created on the basis of the above. This situation results from Article 98 of the Constitution, which *inter alia* establishes that everyone having a Latvian passport shall be protected by the State and has the right to freely return to Latvia.

The Court established that rights, which Latvia has determined for its non-citizens, may influence immigration policy of other states with regard to the above persons since the other states take into consideration the fact that Latvia undertakes certain liabilities with regard to them, for example, guarantees diplomatic protection of the persons abroad, as well as guarantees the right to return to Latvia. Thus, the parliament, when amending the Non-Citizen Law, had to consider the potential international consequences of the amendment.

The Court stressed that it is necessary to analyze the compliance of the impugned norms with the rights following from Article 98 of the Constitution, namely the right of everybody to freely depart from Latvia as well as the right of everyone having a Latvian passport to protection by the State when abroad, and the right to freely return to Latvia. In the same way, it shall be assessed whether the impugned norms are in conformity with obligations for Latvia under Articles 2 and 3 Protocol 4 ECHR, Article 12 of the International Covenant on Civil and Political Rights as well as Article 8.1 of the Convention on Stateless Persons.

The Court established that Article 7.1.2 of the Non-Citizen Law, which shall be assessed as read in conjunction with Article 1.3.5 of the Non-Citizen Law, shall be considered as a restriction of the rights set out in Article 98 of the Constitution. These rights may be subject to restrictions, if the restrictions are provided for by the law, if they comply with the legitimate aim and, if they are necessary in a democratic society. The law makes restrictions, but a legitimate aim is lacking.

The Court concluded that Article 7.1.2 in its present wording potentially allows an increase of the number of stateless persons. This norm connects deprivation of the status of a non-citizen with receiving a permanent residence permit in a foreign state or with permanent registering of the place of residence in CIS Member State. Neither receiving a permanent residence permit in a foreign state or permanent registration in CIS Member State do establish for a person such a status that citizenship would provide. Thus Article 7.1.2 of the Non-Citizen Law shall be regarded as contradicting the principle of prohibition of increasing the number of stateless persons.

The Court declared Articles 1.1.5 and 7.1.2 of the Law “On the Status of Former USSR Citizens, who are not Citizens of Latvia or any Other State” as contradicting Article 98 of the Constitution and null and void as of 1 September 2005.

Cross-references:

Previous decisions of the Constitutional Court in cases:

- no. 2000-03-01 of 30.08.2000, *Bulletin* 2000/3 [LAT-2000-3-004];
- no. 2003-04-01 of 27.06.2003, *Bulletin* 2003/2 [LAT-2003-2-009];
- no. 2004-10-01 of 17.01.2005, *Bulletin* 2005/1 [LAT-2005-1-001].

European Court of Human Rights:

- *Napijalo v. Croatia*, 2003.

Languages:

Latvian, English (translation by the Court).



Luxembourg Constitutional Court

Luxembourgers are equal before the law, given that, under Article 368 of the Civil Code, children who have been fully adopted are considered to have the same status as legitimate children, who may be simply adopted in circumstances other than the two possibilities mentioned in Article 349 of the Civil Code?”

Important decisions

Identification: LUX-2005-1-001

a) Luxembourg / **b)** Constitutional Court / **c)** / **d)** 07.01.2005 / **e)** 25/05 / **f)** Article 349 of the Civil Code / **g)** *Mémorial, Recueil de législation* (Official Gazette), A no. 8 of 26.01.2005 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Adoption, child, conditions.

Headnotes:

Insofar as it allows for only two possibilities for the simple adoption of a child who has already been fully adopted, ie the death of one or both of the adoptive parents, Article 349 of the Civil Code is incompatible with Article 10bis of the Constitution, establishing the equality of citizens before the law, since it creates disproportion between the situation of fully adopted children and that of legitimate children, who can be adopted.

Summary:

In connection with the application by the child's father for simple adoption of child Y, who had already been fully adopted by spouses U and V, with whom she no longer had any contact, the Luxembourg District Court put the following preliminary question to the Constitutional Court:

“Insofar as it allows for only two possibilities for the simple adoption of a child who has already been fully adopted, is Article 349 of the Civil Code compatible with Article 10bis of the Constitution, which provides that

The Court held that in the case of a full, irrevocable adoption, breaking off any previous family ties and making the status of the adopted child equivalent to that of a legitimate child, the law was incompatible with Article 10bis of the Constitution because it recognised only the death of one or both of the adoptive parents as the sole exception to the statutory prohibition, without providing for other serious reasons – in this case the stability of the adoptive relationship – that might defeat the purpose of the prohibition and could justify a second adoption in the interests of the child.

It therefore held that Article 349 of the Civil Code was incompatible with Article 10bis of the Constitution.

Languages:

French.



Malta

Constitutional Court

Important decisions

Identification: MLT-2005-1-001

a) Malta / b) Constitutional Court / c) / d) 27.02.2004 / e) 20/2003 / f) Lanouar Bounab *proprio et nomine v. Attorney General et al* / g) / h) CODICES (Maltese).

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
- 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.
- 5.3.33 **Fundamental Rights** – Civil and political rights – Right to family life.

Keywords of the alphabetical index:

Child, best interest / Child, right of access / Family ties, during separation proceedings.

Headnotes:

There is family life notwithstanding that separation proceedings are pending. Furthermore, there is inevitably an interference with the family life of the parent where he is refused access to his son. There are circumstance where measures are necessary in a democratic society. Consideration of what is in the best interest of the child is of crucial importance. Depending on the nature and seriousness of the interests of the child, these may override those of the parent.

Summary:

The applicant, of Algerian origin and his Maltese wife, were going through separation proceedings. Custody of their only child was entrusted to the mother whereas

the father was granted access three times a week. On one of these occasions, the father abducted the child and left the country. Two months later the child was returned to Malta. Subsequently, the Court dealing with the separation proceedings refused the various requests made by the father to see his son.

The father filed a constitutional case and claimed that the Court's repeated failure to permit him to see his son, constituted a violation of his right to a fair trial as protected by Article 6.1 ECHR, and the right to respect for his private and family life (Article 8 ECHR).

The Court held that, the fact that the decision awarded by the Court was not as the applicant had wished it to be, did not in itself denote a violation of Article 6 ECHR. In the determination of civil rights and obligations, everybody is entitled to a fair hearing in front of an independent and impartial tribunal. The applicant had filed numerous requests for access in front of the Court hearing the separation case. No evidence was produced that the Court was not independent or impartial, or that the applicant was denied the opportunity to bring forward evidence and make submissions to support his arguments. The Court declared that there was no breach of Article 6 ECHR.

The applicant also complained that the Court's continued refusal to allow him to see his son represented a breach of his fundamental rights as protected by Article 8 ECHR. He claimed that this provision safeguards the special relationship which exists between the father and his son.

The First Hall of the Civil Court, in its Constitutional jurisdiction, confirmed that a family relationship existed between the father and the son, and the Court's refusal to grant access to the father represented an interference in this relationship. On the other hand, there were circumstances where interference is necessary in a democratic society. Interference with the applicants' family life, resulting from the refusal by the Court of the right of access to his son, was in accordance with the law and such control was necessary in a democratic society for the protection of the child's rights. In terms of Maltese law the Court was bound to give priority to the interests of the child. Applicant had ample opportunity to bring forward his arguments and evidence in front of the Court dealing with the separation proceedings. The Court concluded that it had no competence to consider whether it would have reached the same decision as the Court which refused the applicant access to his son. Therefore it dismissed applicant's complaint.

An appeal was filed in front of the Constitutional Court. As to Article 8 ECHR, applicant complained that the decision whereby the Court refused to grant him

visitation rights, was not just, balanced and based on a proportioned evaluation of the facts. The Court held that there was no doubt that the wife, husband and son qualified as a 'family'. This notwithstanding that separation proceedings were pending. For married couples and children born out of that marriage, the existence of a family relationship and genuine ties are presumed. There was no doubt that the Court's refusal to grant access constituted an interference in applicant's family life. In certain circumstances there is a conflict of interest between the rights and interests of the parents and of the children. The interests of the children are to prevail. However, for a Court to prohibit any form of contact between the father and his son, the measure must be proportionate to the necessity to protect the interests of the minor. Although the Court might have been concerned that the incident possibly might repeat itself or that contact between the father and the child could be psychologically harmful to the minor, the Court held that it was not satisfied that there were relevant and sufficient reasons to forbid the father from seeing his son. There was no proof that if the child spent time with his father he would suffer a psychological trauma. Furthermore, adequate measures could have been taken by the Court to ensure that the event does not repeat itself. Since the Advocate General failed to prove that this extreme measure was necessary in the best interests of the child, the Court upheld applicant's complaint that his right to a family life had been breached when prevented from seeing his son.

Languages:

Maltese.



Identification: MLT-2005-1-002

a) Malta / **b)** Constitutional Court / **c)** / **d)** 28.01.2005 / **e)** 328/1991 / **f)** Tarcisio Borg v. Parliamentary Secretary for the Environment and the Commissioner of Lands / **g)** / **h)** CODICES (Maltese).

Keywords of the systematic thesaurus:

3.17 **General Principles** – Weighing of interests.
 3.18 **General Principles** – General interest.
 5.3.39.1 **Fundamental Rights** – Civil and political rights – Right to property – Expropriation.

Keywords of the alphabetical index:

Expropriation, compensation / Expropriation, purpose / Judicial review / Land, restitution.

Headnotes:

In cases of expropriation, the State is obliged to prove that the property was expropriated in the public interest. Furthermore, a balance must be sought between the need to expropriate in the general interest of the community and the protection of an individual's fundamental right to the enjoyment of his possessions.

Summary:

Applicant owned property in St. Paul's Bay, Malta. The land was originally expropriated for the construction of a square and civic centre. The land was not used by the Government and in 1989 it was released back to the owner. Subsequently, in 1990 the Government expropriated a well which was underlying the land previously released. The well had been constructed by the Government.

Applicant contended that the well was not expropriated for a public purpose, and therefore the expropriation was null and void as it was in breach of Article 1 Protocol 1 ECHR.

The Constitutional Court held that:

- a. The power of the State to expropriate property is always subject to judicial review;
- b. The State has an obligation to prove that the property was expropriated in the public interest;
- c. The interest is private when it does not refer to the general interest of the community;
- d. A balance must be reached between the need to expropriate in the general interest of the community and the protection of an individual's fundamental rights. There must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions;
- e. The person deprived of his property must in principle obtain compensation reasonably related to its value, even though legitimate objectives of public interest may call for less than reimbursement of the full market value.

Evidence showed that no water was being stored in the well, and respondents failed to prove that the well had ever been used. Although the well had been constructed by the Government on property owned by

a third party, this did not in itself mean that the Government acquired an automatic right to expropriate the property without the expropriation being subject to judicial review. Respondents failed to prove the public purpose for such an expropriation, and the Court concluded that the evidence showed that the expropriation premeditated the conceding of an advantage to a private entrepreneur who had excavated under the property of third parties.

Therefore, the Constitutional Court confirmed that the expropriation was null and void.

Cross-references:

European Court of Human Rights:

- *Pincova and Pinc v. the Czech Republic*, 05.11.2002, *Reports of Judgments and Decisions* 2002-VIII.

Languages:

Maltese.



Identification: MLT-2005-1-003

a) Malta / **b)** Constitutional Court / **c)** / **d)** 15.2.5 / **e)** 519/1995 / **f)** Nazzareno Mercieca v. Hon. Prime Minister et al / **g)** / **h)** CODICES (Maltese).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
 5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Rules of evidence.
 5.3.13.19 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Equality of arms.
 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:

Magistrate, right to examine / Witness, examination by both parties / Defence, right.

Headnotes:

A defendant has the right to confront or cross-examine witness, although such a right is not absolute. Furthermore, a conviction should not rest solely or mainly on a disputed statement. There are circumstances where witnesses cannot be produced. However, any measures restricting the rights of the defence should be strictly necessary. Where a less restrictive measure can suffice then that measure should be applied.

Summary:

Applicant was accused and found guilty of voluntary homicide. He was condemned to twenty (20) years imprisonment. He claimed a breach to his fundamental right for a fair hearing in that a part of the transcript of a statement he made to the Inquiring Magistrate, was incorrect. According to the applicant the punctuation used by the Magistrate changed the implication of the whole sentence. He claimed that he was illiterate and had not read the transcript as written by the Magistrate. Applicant filed a request to summon the Magistrate as witness. His request was refused. He therefore claimed a breach of his right to a fair hearing and equality of arms.

The Court confirmed that all the evidence must in principle be produced in the presence of the accused at a public hearing with a view to an adversarial argument. What is essential is:

- a. The defendant's right to confront or cross-examine every prosecution witness. This right although important, is not absolute;
- b. A trial would be unfair if the conviction rested solely or mainly on the disputed statement;
- c. There are some cases where the impracticability of producing the witness at the trial might lead the Court to adopt a more flexible approach to Article 6.3.d ECHR, example where a witness has gone missing and is not traceable;
- d. Any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice than that measure should be applied.

Applicant was contesting the Magistrate's transcript of the statement made by the accused who at the time was still a suspect. During the criminal inquiry, the Magistrate although acting more as an investigator rather than an adjudicator, is nonetheless a judicial authority. The prevailing opinion is that the inquiring magistrate cannot be produced as a witness on something which is in the *procès-verbal*. This does not mean that it is not possible to have the *procès-*

verbal, for a valid reason at law, declared inadmissible as evidence. For example where it transpires that the Magistrate did not give a warning to the suspect that he has a right to remain silent and that anything he states could be used against him in a court of law.

Article 550 of the Criminal Code (Chapter 9 of the Laws of Malta) states:

“1. The *procès-verbal*, if regularly drawn up, shall be received as evidence in the trial of the cause, and it shall not be necessary to examine the witnesses, experts or other persons who took part in the inquest.

2. Nevertheless it shall be lawful for either of the parties to produce the persons mentioned in the *procès-verbal* in order that they may be heard *viva voce*”.

Therefore, both the prosecution and the accused can produce evidence which shows that what is stated in the *procès-verbal* is not correct. However, the fact that the inquiring magistrate cannot be produced as a witness does not in itself give rise to a lack of fair hearing. Whatever is stated in the *procès-verbal* compiled by the Inquiring Magistrate is subject to control and verification. However, the Court did not totally exclude the possibility that under remote circumstances where the Magistrate is the only witness that can be produced for purposes of control and verification, he is produced as a witness to ensure that justice is done.

From the evidence it did not transpire that during the compilation proceedings or when the accused filed his list of witnesses, the inquiring magistrate was ever mentioned as a witness. The matter was put in issue when defence lawyers were making their final submissions to the jurors. Furthermore, it was highly improbable that the Magistrate would remember such a fine detail, since approximately three years had lapsed since the accused released his statement to the Inquiring Magistrate.

Furthermore, the Court expressed the view that this incident was not the decisive factor which led the jurors to deliver a guilty verdict. There was no evidence which indicated that the jurors based their decision solely or principally on that part of the transcript being contested by the applicant. This matter had also been dealt with at length by the Court of Criminal Appeal, and the judgement delivered by the Criminal Court was confirmed.

Finally, the Constitutional Court held that a mistake which occurs during an investigation or a trial, does not automatically give rise to a breach to one's right

to a fair trial. There can be other remedies which can adequately rectify such a mistake, for example the right to appeal. For arguments sake even if one had to concede that a mistake was committed by the Magistrate while transcribing the statement made by the suspect, such a fact did not in itself give rise to a breach of Article 6 ECHR.

Applicant's request was rejected.

Cross-references:

- *Barbera, Messegue and Jabardo v. Spain* (1989) – 11 E.H.R.R. 360 at para. 78; 06.12.1988, Series A of the Publications of the Court, no. 146; *Special Bulletin Leading Cases* [ECH-1988-S-008];
- *Ludi v. Switzerland* (1993) – 15 E.H.R.R. 173, 15.06.1992, Series A of the Publications of the Court, no. 238; *Special Bulletin Leading Cases* [ECH-1992-S-004];
- *Artner v. Austria*, 28.08.1992, Series A of the Publications of the Court, no. 242-A;
- *Asch v. Austria* (1993) – 15 E.H.R.R. 597; 26.04.1991, Series A of the Publications of the Court, no. 203;
- *Van Mechelen and others v. the Netherlands* (1998) – 25 E.H.R.R. 647 at para. 59; 23.04.1997, *Reports* 1997-III.

Languages:

Maltese.



Moldova

Constitutional Court

Important decisions

Identification: MDA-2005-1-001

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 25.01.2005 / **e)** 3 / **f)** Constitutionality of certain provisions of Law no. 289-XV of 22 July 2004 on benefits for temporary inability to work and other social insurance benefits, and of certain provisions of the annex to Government Decision no. 416 of 26 April 2004 / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

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

5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.

Keywords of the alphabetical index:

Child, support / Allowance, amount, right / Insurance, social, state.

Headnotes:

Article 47.2 of the Constitution of Moldova provides that all citizens have the right to be insured against such adversities as: unemployment, sickness, disability, widowhood, old age or other situations where, due to causes beyond one's control, one loses the source or means of obtaining the necessities of life.

According to Article 15 of the Constitution, citizens of Moldova enjoy the rights and freedoms established by the Constitution and other laws and are also under the duties imposed by the Constitution and other laws. Article 58 of the Constitution provides that one of the citizens' fundamental duties is their contribution by way of taxes and duties to public expenditure.

The lump sum maternity grant, provided for by Article 17 of Law no. 289-XV, is a form of social protection. According to the legislation in force, the lump sum maternity grant is granted to: insured

persons from the budget of State social insurances and to uninsured persons from the State budget.

Summary:

The Ombudsman sought a ruling of the Constitutional Court on the constitutionality of Articles 5.1.e and 17 of the Law no. 289-XV of 22 July 2004 on benefits for temporary inability to work and other social insurance benefits. The applicant also sought an interpretation of points 2.a and 2.b of the Rules on the establishment and payment of child allowances, approved by Government Decision no. 1478 of 15 November 2002.

According to Article 5.1.e of Law no. 289-XV, persons insured under the public social insurance system enjoy the right to a lump sum maternity grant. Article 17 of above-mentioned Law provides that every insured person has the right to a lump sum maternity grant of a minimum of 500 lei (MDL) for every child born alive.

According to the Ombudsman, the provisions of the Law and of the Rules violated Articles 15, 16, 50.1 and 54 of the Constitution, as well as Articles 1 and 25 of the Universal Declaration of Human Rights and Articles 2 and 4 of the Convention on the Rights of the Child. In his opinion, the amount of the lump sum maternity grant had to be equal, regardless of whether or not the parents were insured.

The right to social insurance benefits, being a fundamentally social right, is limited to the right of social protection. It is exercised through the public social insurance system, which provides for allowances, assistance, pensions and benefits to be granted to insured persons in the event of the loss of the ability to work.

According to Law no. 489-XIV, natural and legal persons are under an obligation to contribute to the public insurance system; the exercise of rights relating to social insurances depends on the fulfilment of that obligation.

The right to social insurance benefits is realised by way of a public system of social insurance into which a person pays contributions in order to insure himself or herself against certain risks. The social insurance benefits are paid from the budget of State social insurances. The revenue of that budget comes from social insurance contributions by natural and legal persons participating in the public system.

Law on Social Assistance no. 547-XV of 25 December 2003 sets out that according to the

principle of social assistance, persons who are not covered by social insurance have the right to have social assistance benefits and services paid out from the State budget of the relevant year.

Article 17 of Law no. 289-XV sets out that the amount of the lump sum maternity grant is established in the Law on the Budget of State Social Insurances.

According to Law no. 383-XV of 18 November 2004 on the Budget of State Social Insurances, for the year 2005 the lump sum maternity grant of 500 lei (MDL) is granted to insured and uninsured persons for every child born alive.

Annex no. 1 to Law no. 383-XV transfers financial resources into the fund for the protection of families with children: for insured persons – from the budget of State social insurances, for uninsured persons – from the State budget.

The amendments to the Rules on the establishment and payment of child allowances, implemented by the Government Decision no. 416, challenged in the application, set out that the payment of the lump sum maternity grant would begin on 1 January 2004. Law no. 289-XV increased, in comparison with 2004, the amount of the lump sum maternity grant to at least 500 lei for every child born alive, and also stated that as of 2005 the amount of the lump sum maternity benefit would be established annually in the Law of the Budget of State Social Insurances (Article 17).

Law no. 383-XV on the Budget of State Social Insurances for 2005 provides for the lump sum maternity grant to be increased for insured and uninsured persons. Consequently, as of 1 January 2005, the impugned provisions of the Rules were no longer applicable. That being so, the Ombudsman's application was deprived of its object. The Court discontinued the proceedings for the review of the constitutionality of points 2.a and 2.b of the Rules on establishing and payment of child allowances, as the ground of unconstitutionality had been resolved.

The Court declared constitutional Articles 5.1.3 and 17 of the Law on benefits for temporary inability to work and other social insurance benefits.

Languages:

Romanian, Russian.



Identification: MDA-2005-1-002

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 29.03.2005 / **e)** 7 / **f)** Preliminary objection as to the unconstitutionality of certain provisions of Law no. 1286-XV of 25 July 2002 on the status of refugees / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.4 General Principles – Separation of powers.
5.1.1.3.1 Fundamental Rights – General questions – Entitlement to rights – Foreigners – Refugees and applicants for refugee status.
5.2 Fundamental Rights – Equality.
5.3.13.3 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
5.3.13.4 Fundamental Rights – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Double degree of jurisdiction.

Keywords of the alphabetical index:

Refugee, status denied / Asylum, request, refusal / Council for Refugees, decision, appeal.

Headnotes:

Legislating on the appellate courts to which an appeal may be brought against a decision rejecting an asylum seeker's request for asylum, the legislator laid down that the decision of the director of the competent authority may be challenged before the Council for Refugees (Article 32.1). The Council's decision may be challenged before the Court of Appeal (Article 32.2), which is competent to examine appeals by asylum seekers and gives a verdict on the legality of the decision of the Council for Refugees (Article 33.1).

By using the word "appeal" in Articles 13.2 and 32.1 and the word "last appeal" in Article 32.2, and stipulating in Article 33.1 that an appeal to the Court of Appeal is the last appeal in that legal matter, the legislator assigned to a public authority the functions of a court of law, thereby creating a new mechanism which is not provided for by the Constitution.

The right to legal protection supposes the existence of safeguards allowing for its realisation; the exclusion of the possibility to introduce an appeal against a legal decision of a public authority limits the individual right to legal protection.

Summary:

The Supreme Court of Justice sought a ruling from the Constitutional Court on a preliminary objection as to the unconstitutionality of certain provisions of Law no. 1286-XV of 25 July 2002 on the status of refugees.

The applicant in the original case considered that Articles 13.2, 32.1 and 32.2, Articles 33.1, 33.2, and 33.3 were contrary to the constitutional provisions of Article 6 on the separation of powers in the State, to Article 114 on the administration of justice exclusively by courts of law, to Article 115 on courts that administer justice, to Article 119 on the possibility of lodging an appeal against sentences pronounced in courts of law. It was argued that the Council for Refugees was therefore not in a position to examine the appeal and its decision could not be irrevocable, for the reason that an appeal could be examined and determined by the courts of law exclusively. Being a body of the public authority, the Council for Refugees could not have the functions of a court of law assigned to it. The applicant in the original case also emphasised that the legislator did not provide for an appeal against the decision of the Court of Appeal.

The Plenum of the Supreme Court of Justice considered the application on the preliminary objection well founded. It also raised the issue of a violation of the constitutional provisions of Article 16 on the equality of citizens before the law and public authorities, of the constitutional provisions of Article 20 on free access to justice and of the constitutional provisions of Article 53 on the right of persons whose rights have been prejudiced by a public authority.

The Constitutional Court recalled that according to Article 4 of the Constitution, the constitutional provisions concerning human rights and freedoms are interpreted and applied in accordance with the Universal Declaration of Human Rights and the international covenants and treaties to which the Republic of Moldova is a party. In case of a lack of accordance between Moldova's laws and the international covenants and treaties concerning human fundamental rights to which the Republic of Moldova is a party, priority shall be given to the international regulations.

The legal regime of refugees is dealt with under Article 19.1 of the Constitution. It stipulates that foreigners and stateless persons have the same rights and duties as the citizens of the Republic of Moldova, with exceptions established by law. Article 19.3 provides expressly that the right to asylum shall be granted and withdrawn under the law

and in compliance with the international treaties to which the Republic of Moldova is a party.

According to Article 14 of the Universal Declaration of Human Rights, the right to asylum is a fundamental human right: every person has the right to seek and get asylum in other countries.

According to Articles 114 and 115 of the Constitution, justice shall be administered in the name of the law, by courts of law only: by the Supreme Court of Justice, courts of appeal and other courts; the structure of the courts of law, their areas of competence, shall be established by organic law.

According to Law no. 1286-XV, the Main Directorate for Refugees of the Migration Department is the competent authority for settling problems concerning asylum; its director has the right to grant, to withdraw and to annul the status of refugee (Article 12).

That Law provides for the Council for Refugees to be set up by Order of the Director-General of the Migration Department and made up of representatives of interested Ministries and Departments, a representative of the United Nations High Commissioner for Refugees (UNHCR) and at least one representative for non-governmental organisations competent for refugee problems. In Article 13.2 of that Law, the legislator assigned to the Council for Refugees the task of examining appeals brought against the rejection of a request for refugee status.

The Constitutional Court expressed its opinion on the use of words "justice" and "legal power". It stated that the decisions by bodies that do not have the competence of legal bodies on questions concerning administrative relations do not amount to justice.

The Constitutional Court emphasised that the exercise of the individual constitutional right of remedy for prejudices to rights caused by a public authority is governed by the constitutional principles of universality, equality (Articles 15 and 16) and free access to justice.

Article 33.1 of Law no. 1286-XV provides that a court of law shall examine an appeal brought by an asylum seeker and shall render a decision with reasons on the legality of the decision issued by the Council of Refugees. By adopting that article, the legislator deprived an asylum seeker of the possibility of applying to a court of first instance for a remedy for a right violated by a public authority.

By laying down in Articles 33.2 and 33.3 of Law no. 1286-XV that the decision of the court of law as to the constitutionality or unconstitutionality of the

decision of the Council for Refugees is final and irrevocable, the legislator deprived persons of the main part of the appeal mechanism – the last appeal.

Consequently, the provisions of Articles 33.1, 33.2, 33.3 of Law no. 1286-XV violate the constitutional provisions of Articles 16, 20, 53.1 and 119.

Considering that the meaning of the words “appeal” of Articles 13.2 and 32.1 and “(last) appeal” of Article 32.2 correlate directly with the word “(last) appeal” of Article 33.1, the Court declared those articles unconstitutional, as they violate the provisions of Articles 16, 114, 115 and 119 of the Constitution.

The Court also declared unconstitutional the use of the terms “in appeal” of Article 13.2, “appeal” of Article 32.1, “(last) appeal” of Article 32.2 and the provisions of Articles 33.1, 33.2 and 33.3 of Law no. 1286-XV of 25 July 2002 on the status of refugees.

Languages:

Romanian, Russian.



Identification: MDA-2005-1-003

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 21.04.2005 / **e)** 12 / **f)** Constitutionality of certain legal and normative provisions on public property and its delimitation / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.4 **General Principles** – Separation of powers.
 3.13 **General Principles** – Legality.
 3.18 **General Principles** – General interest.
 4.8 **Institutions** – Federalism, regionalism and local self-government.
 5.1.1.5.2 **Fundamental Rights** – General questions – Entitlement to rights – Legal persons – Public law.
 5.3.39 **Fundamental Rights** – Civil and political rights – Right to property.
 5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Local self-government, land, ownership / Law, organic.

Headnotes:

In accordance with the Constitution, Moldova is a State governed by the rule of law, where the legislative, the executive and the judicial powers are separate and co-operate in order to ensure the unity of legislative regulations throughout the country. These fundamental principles are based on constitutional organic laws and ordinary laws adopted by the Parliament, and the enforcement of laws is based on the adoption of decisions by the Government (Articles 1.3, 6, 66.c and 102.2 of the Constitution).

The prerogatives of public authorities in Moldova differ from one another on the basis of their fields of activity and the key principles governing their activity.

Organic laws are legislative acts which develop constitutional norms and apply in the fields expressly provided for by the Constitution or in other important fields (Article 9.1 of the Constitution). They regulate the organisation of the local administration, the territory, as well as the organisation of the general regime governing local self-government and the general legal regime governing property (Articles 9, 72.3.f, 72.3.i, 126.2.a and 127 of the Constitution).

Summary:

A member of parliament, Ms. Lidia Guțu, brought an application to the Constitutional Court challenging the constitutionality of certain legal and normative provisions concerning public property and its delimitation.

The applicant claimed that the legal provisions and the relevant government decision limited the right to public property of the administrative-territorial units. Those provisions and that decision infringed Articles 3, 4, 6 and 9.1-3 of the European Charter of Local Self – Government; Articles 1, 6, 8, 20, 26, 102, 109, 112, 126 and 127 of the Constitution; Articles 3, 4, 5, 6, 9, 81, 82, 83, 84 and 88 of Law no. 123-XV of 18 March 2003 “On local public administration”; Articles 21, 22 and 23 of the Water Code; Articles 1, 3, 8, 10 and 11 of Law no. 523-XIV of 16 July 1999 on the public property of administrative-territorial units; and other legislative acts.

In carrying out a review of the constitutionality of a legal norm, the Constitutional Court takes into

account the general principles laid down by the Constitution, in particular, Article 7 of the Constitution, which provides that every law or legal act that contravenes the Constitution is deprived of legal power.

Law no. 981-XIV, which is an ordinary law, lays down the method to be used for the delimitation of public lands of the State and of public lands of administrative-territorial units. According to Article 1 of the Law, lands may become public property on the basis of:

- a national interest – under this legal regime, the property belongs to the State (State public property); or
- a local interest – under this legal regime, the property belongs to the village, the commune, the town, the municipality, the district or the self-government unit of Găgăuzia (the public property of administrative-territorial units).

Taking into account the fact that the method to be used for the limitation of public lands is laid down exclusively by ordinary Law no. 981-XIV, the Court considered that Law to be the basic act in establishing the fundamental conditions and legal relations concerning the State and public property in lands in Moldova.

That being so, in adopting ordinary Law no. 981-XIV the Parliament clearly attempted to regulate by ordinary law the legal relations in the domain of real property, whose special legal regime forms a part of the general legal regime governing property. From a formal point of view, Law no. 981-XIV contravenes Article 72.3.i of the Constitution, which provides that an organic law is to regulate the general legal regime governing property.

The Court held that certain provisions of Law no. 981-XIV were unconstitutional. Thus, Article 2.3 of Law on the settlement by the Government of disputes on the delimitation of land contravenes Articles 20 and 114 of the Constitution, which stipulates that justice shall be administered in the name of the law, by courts of law only, and that no law may restrict free access to justice.

Law no. 981-XIV is also contrary to basic principles on local public administration, established in Article 109 of the Constitution and developed in the Land Code. Thus, the Land Code, being of a higher legal rank than the ordinary law, provides in Articles 9 and 10 that the issue of establishing the area of land belonging to the district, municipality, village (commune) remaining in the property of State, falls

under the competence of councils of administrative-territorial units. Those councils also have the competence to withdraw the right to property over lands under the conditions established by the law.

Given that the constitutionality of Government Decisions nos. 837/2001, 1679/2002, 959/2003, 1181/2003 and 375/2004 depends on the constitutionality of Law no. 981-XIV, the Court declared those Government Decisions unconstitutional.

The Constitutional Court held that Government Decision no. 1679 of 24 December 2002 on the delimitation of public lands in the county of Orhei was contrary to Article 110.1 of the Constitution, on the ground that the administrative-territorial organisation of Moldova did not recognise the category “county”.

Certain pieces of land from the water fund with an insignificant area, varying between 0,46 and 2-3 ha (*Anenii Noi, Cahul, Călărași, Edineț, Florești, Leova, Glodeni, Orhei* and others), were assigned to the public property of the State in accordance with the Government Decisions nos. 959/2003 and 1679/2002. The notes of the Government, Ministry of Agriculture and Food and State Land Registry, presented to the Court at its request, did not contain conclusive data showing that from an economic, ecological, historical/cultural or state security point of view, the pieces of land in question were of strategic importance for the State.

The Court declared unconstitutional the expression “whose hydro-technical constructions fall under the responsibility of mayors” of Article 23 of the Water Code, as amended by in Law no. 446-XV of 13 November 2003.

According to Article 23 of the Water Code, the public property of administrative-territorial units includes “aquatic objects” lying within the boundaries of the administrative-territorial unit itself, whose hydro-technical constructions fall under the responsibility of mayors, which are not the public property of the State, and which do not constitute an object of private property.

It is worth noting that, according to Article 13 of the Water Code, a natural or artificial aquatic object is unique and indivisible: it includes the water, the land situated under the water, water protection zones including riverside areas and hydro-technical constructions (dams, dykes).

A analysis of the text of Article 23 of the Water Code shows that an aquatic object, whose hydro-technical constructions do not fall under the responsibility of

mayors, is either the public property of State or the property of natural and legal persons. Neither Article 22 on aquatic objects as public property of the State, nor Article 24 on aquatic objects as private property, both being articles of the Water Code establishing the basis of the right of property, subordinate the right to property over an aquatic object to its being found to fall under the responsibility of the owner.

Thus, the Constitutional Court considered that the expression “whose hydro-technical constructions fall under the responsibility of mayors” of Article 23 of the Water Code as amended by Law no. 446-XV of 13 November 2003 restricts the right of administrative-territorial units to property. This right is provided for in Article 127 of the Constitution, which states that natural resources, including waters used for the benefit of the public at large, constitute the exclusive province of public property, belonging either to the State or to the administrative-territorial units.

Regarding the above-mentioned considerations, the Court declared unconstitutional the legal and normative provisions on public property and its delimitation.

Languages:

Romanian, Russian.



Netherlands Supreme Court

Important decisions

Identification: NED-2005-1-001

a) Netherlands / b) Supreme Court / c) First division / d) 24.09.2004 / e) R03/122HR / f) / g) / h) *Nederlandse Jurisprudentie*, 2005/16; CODICES (Dutch).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Adoption, statutory requirements / Adoption, grandparent.

Headnotes:

Article 8 ECHR confers a right to protection of the family life existing between parents and their adopted child. However, it does not confer the right to adopt a child without complying with the statutory requirements governing adoption. After all, the European Convention on Human Rights does not guarantee the right to adoption.

Summary:

A grandmother applied to adopt her minor grandchild whom she had raised and cared for from birth.

Article 1:228.1, chapeau and (b) of the Civil Code, which states that a grandparent may not adopt his/her grandchild, stands in the way of the application. Correctly, the Court of Appeal did not consider itself at liberty to set aside this explicit and well-considered statutory provision on the basis of the exceptional circumstances of the case at hand. Equally correctly, the Court of Appeal held that the statutory provision was not incompatible with Article 8 ECHR.

Languages:

Dutch.



Poland

Constitutional Tribunal

Statistical data

1 January 2005 – 30 April 2005

Decisions by type:

- Final judgments: 34
- Cases discontinued: 15 (8 fully, 7 partially discontinued)

Decisions by procedure:

- Abstract review *ex post facto*: 17 judgments, 4 cases discontinued (2 fully, 2 partially)
- Questions of law referred by a court: 8 judgments, 2 cases discontinued (1 fully, 1 partially)
- Constitutional complaints: 9 judgments, 9 cases discontinued (5 fully, 4 partially)

Important decisions

Identification: POL-2005-1-001

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 10.01.2005 / **e)** K 31/03 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2005, no. 11, item 87 / **h)** CODICES (English, Polish).

Keywords of the systematic thesaurus:

3.5 **General Principles** – Social State.
 3.19 **General Principles** – Margin of appreciation.
 3.25 **General Principles** – Market economy.
 4.14 **Institutions** – Activities and duties assigned to the State by the Constitution.
 5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.
 5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.
 5.4.5 **Fundamental Rights** – Economic, social and cultural rights – Freedom to work for remuneration.

Keywords of the alphabetical index:

Salary, minimum, differentiation, criteria /
 Employment, length / Programme norm.

Headnotes:

Equality before the law in labour relations does not imply identical rights and duties for all employees. Labour law must shape the situation of each individual employee differently with regard to the work executed by them and their personal characteristics. In particular, there are no constitutional prerequisites that would generally exclude the possibility to differentiate the minimum remuneration amount.

The differentiation of the minimum remuneration amount on the basis of the length of employment does not contravene the principle of equality. The existence of this criterion fulfils a significant role in the sphere of labour relations (the length of employment influences a number of entitlements as well as the level of numerous employee's benefits) and is not coincidental. The challenged regulation constitutes a solution dictated by the particular situation in the labour market. It may encourage employers to create new jobs. The discussed criterion primarily takes into account the fact that persons lacking professional experience have less chance to be employed than persons with a certain length of employment; the possibility to remunerate in accordance with "competitive" conditions increases these chances.

Summary:

Article 65.4 of the Constitution requires statutory specification of the minimum level of remuneration for work, or of the manner for determining such a level. The legislator adopted a provision of the latter type in the Minimum Remuneration for Work Act 2002 (hereinafter "the 2002 Act"). In principle, the minimum remuneration level for work is negotiated annually within the Tripartite Commission for Socio-Economic Issues (a forum of representatives of government, trade unions and employers' organisations). At the moment that the present judgment was delivered, the minimum wage amounted to 849 Polish *złoty* (from 1 January 2005), i.e. about 200 €. Article 6.1 of the 2002 Act contains a prohibition on determining the remuneration of a person employed on a monthly full time basis at a level below that of the minimum wage. Article 6.2, challenged in the present case, envisages an exception with respect to employees having a short length of employment. Until the end of 2005, the remuneration of an employee in their first year of employment may not be lower than 80% of the minimum remuneration level whereas, in the second year of employment, it may not be lower than 90% of this amount.

The National Commission of *Solidarność* alleged that the aforementioned provision infringes the principle of equality (Article 32.1 of the Constitution). In the applicant's view, the differentiation of minimum

remuneration depending on the length of employment is not based on a relevant criterion. The applicant also alleged that the challenged provision infringes the principle of social justice (Article 2 of the Constitution), since it differentiates civil rights at their minimum level.

The Tribunal ruled that the challenged provision conforms to Articles 2 and 32.1 of the Constitution (social justice and equality).

Article 65.5 of the Constitution obliges public authorities to pursue policies aiming at full, productive employment by means of implementing programmes to counter-act unemployment, including the organisation and supporting of professional advice and training, as well as public works and intervention works. A corollary of that obligation is an individual's right to, at least, a minimum level of fulfilment of this obligation. Concomitantly, the cited constitutional provision has features of a so-called programme norm, i.e. a norm which, having indicated a certain goal, allows public authority organs some freedom as regards the choice of means intended to realise this goal. The methods of counter-acting unemployment are, whilst insufficiently stipulated in this provision, nevertheless obligatory in nature, in the sense that public authorities are obliged to apply them first when unemployment occurs.

In a market economy system, public authorities may not create new jobs (beyond the public sector) independently, for the purpose of limiting unemployment. In pursuing "a policy aiming at full, productive employment" (Article 65.5 of the Constitution), they must make use of measures placed at their disposal by the Constitution. The authority to determine the minimum wage falls within these measures (Article 65.4).

Pursuant to the principle of equality (Article 32.1 of the Constitution), all entities characterised to an equal degree by a certain feature should be treated equally, without favourable or discriminatory differentiation. However, the principle of equality allows for the differential treatment of similar entities provided that three cumulative conditions are met. Such differentiation must, firstly, be rationally justified, i.e. it must remain directly connected with the aim and principal content of the provisions containing the reviewed norm. Secondly, the importance of the problem to be remedied by differentiating the situation of similar entities must remain in appropriate proportion to the importance of interests that will be infringed in consequence of the unequal treatment of norm's addressees. Thirdly, differentiation of similar entities must be based on constitutional values, principles or norms.

Differentiation of the minimum remuneration corresponds to the requirements of social justice, since it takes into account the interests of persons seeking first employment. It creates a chance to obtain a job, albeit with a relatively low income.

In the light of criteria formulated by acts of international law (International Covenant on Economic, Social and Cultural Rights, European Social Charter and Convention no.131 of the International Labour Organisation), the minimum remuneration level stipulated on the basis of the 2002 Act deviates from the real needs of employees and their families, failing, therefore, to fulfil the requirement of a fair minimum wage. That issue does not, however, constitute a subject of the Constitutional Tribunal's assessment in the present case.

Cross-references:

- Judgment K 2/97 of 22.12.1997, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1997, no. 5-6, item 72; *Bulletin* 1998/1 [POL-1998-1-002];
- Judgment K 22/01 of 23.10.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 7, item 215;
- Judgment K 34/02 of 14.04.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003/A, no. 4, item 30;
- Judgment K 54/02 of 24.02.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 2, item 10.

Languages:

Polish, English (summary).



Identification: POL-2005-1-002

a) Poland / b) Constitutional Tribunal / c) / d) 12.01.2005 / e) K 24/04 / f) / g) *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2005, no. 11, item 89; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005/A, no. 1, item 3 / h) CODICES (English, Polish).

Keywords of the systematic thesaurus:

- 3.21 **General Principles** – Equality.
- 4.5.1 **Institutions** – Legislative bodies – Structure.
- 4.5.6.5 **Institutions** – Legislative bodies – Law-making procedure – Relations between houses.
- 4.5.7 **Institutions** – Legislative bodies – Relations with the executive bodies.
- 4.17.4 **Institutions** – European Union – Legislative procedure.

Keywords of the alphabetical index:

Government, position on an EU legislative proposal / Parliament, committee, opinion, obligation to seek / Constitution, interpretation in a manner favourable to European integration.

Headnotes:

The Constitution contains no provisions which directly regulate the role of the two chambers of the Parliament (*Sejm*, the lower chamber and *Senate*, the upper chamber) in the process of adopting EU law. The constitutional norms must thus be interpreted in such a way so as to ensure that the influence of Polish State organs on the adoption of EU law is incorporated into the existing framework of the Polish system of government. Such an approach also conforms to the principle of interpreting the Constitution in a manner favourable towards European integration.

The *Sejm*'s control over Council of Ministers' activity (Article 95.2 of the Constitution) is permissible solely insofar as specified by provisions of the Constitution or statute. The instruments of such control encompass, primarily: the vote of no-confidence (Articles 158 and 159 of the Constitution); the possibility to appoint a *Sejm* investigative committee (Article 111 of the Constitution); interpellations and Deputies' questions (Article 115.1 of the Constitution); questions on current affairs (Article 115.2 of the Constitution); and the right to review implementation of the Budget Act and to approve, or disapprove, financial accounts (Article 226 of the Constitution).

The competences and nature of the Senate stem directly from the principle of representation and, indirectly, from the principle of sovereignty of the Polish People (Article 4 of the Constitution).

As long as the constitutional legislator wishes to maintain a bi-cameral Parliament, both chambers should be guaranteed equal participation in activities concerning the shaping of Poland's position in the field of adopting EU law.

Summary:

According to EU law, the definition of organs within a Member State which shall determine the country's position with respect to EU legislative proposals, and the procedure for adopting such a position, remain within the domain of domestic law. Polish legal norms concerning these matters are contained in the Act on Co-operation of the Council of Ministers with the *Sejm* and Senate on Matters Connected to Membership of the Republic of Poland in the European Union of 2004 (hereinafter "the 2004 Act"). The 2004 Act imposes an obligation on the Polish government (Council of Ministers) to present various types of documents and legislative proposals, connected with Poland's membership of the EU, to the *Sejm* and Senate, or in some cases to their subsidiary organs. According to Article 9.1 of the 2004 Act, prior to the consideration of a legislative proposal by the Council of the EU, the Polish Council of Ministers is obliged to seek the "opinion of an organ authorised by the *Sejm's* rules of procedure" (European Affairs Committee) concerning the intended position of the Polish Council of Ministers as regards that proposal. Nevertheless, the Polish Council of Ministers is authorised to refrain from seeking the opinion of the appropriate *Sejm* organ due to "organisation of the activities of EU organs", with the exception of matters in which the Council of the EU takes is required to act unanimously, and matters "resulting in a significant burden on the State budget". It must be stressed that Article 9 concerns the stage of activity of drafting an EU legislative proposal when the Polish Council of Ministers has already adopted the position it intends to present at the Council of the EU forum; the opinion of the *Sejm* Committee, which does not bind the Polish Council of Ministers, refers, therefore, to a government position which is already "prepared".

A group of Senators challenged Article 9.1 of the 2004 Act before the Constitutional Tribunal, arguing that its failure to provide for the participation of an appropriate Senate organ, in the process of pronouncing an opinion on the government's position, infringes the principle that legislative power is exercised by both parliamentary chambers (Articles 10.2 and 95.1 of the Constitution).

The Tribunal ruled that the challenged provision, insofar as it omits the obligation to seek the opinion of an organ authorised by the Senate's rules of procedure, does not conform to Articles 10.2 and 95.1 of the Constitution (exercising legislative power by the *Sejm* and Senate).

The legislative competences specified in the Constitution should now be construed in a manner which takes account of the principally new

conditions for the adoption of legislation. Since legislation adopted by EU organs will be operative within Poland's territory, in part directly and in part following the adoption of implementing legislation by the Polish Parliament, the expression of opinions by the latter with respect to EU legislative proposals becomes a significant form of the Polish Parliament's joint participation in the adoption of EU law. The pronouncement of such opinions allows the domestic legislature to exert some influence on the process of the Union's development as a whole. Concomitantly, the participation of national parliaments in the process of adopting EU law constitutes a factor strengthening the credibility and democratic mandate of the Union's organs.

The fundamental reason for refusing to grant the Senate the right to pronounce an opinion on EU-related matters was the fear that the Senate would exercise control over the government in a manner which is constitutionally reserved for the *Sejm*. However, the Polish Parliament's co-decision procedure in respect of issues connected to the shaping Poland's negotiating position does not fall within the exercise of control (Article 95.2 of the Constitution) but, rather, within executing the legislative function (Articles 10.2 and 95.1 of the Constitution).

Dissenting opinions:

Judge Jerzy Ciemniewski: The challenged provision does not regulate the competences of the *Sejm* and Senate as constitutional State organs, but refers to the activities of their subsidiary organs, i.e. the authorised committees. Accordingly, Articles 10.2 and 95.1 of the Constitution may not represent the bases of constitutional review of this provision.

The pronouncement of opinions on legislative proposals does not fall within the scope of exercising legislative power, since it is not authoritative in nature. Pronouncing opinions which cause no legal effects and do not even have in their background any explicitly specified political consequences, may not be recognised as a realisation of State authority in the constitutional-legal sense.

Judge Ewa Łętowska: The Tribunal did not derive a norm from the Constitution such as would require granting the Senate competences mirroring those of the *Sejm*, following the example of the legislative competences. The Tribunal correctly identifies the existence of a constitutional lacuna. Accordingly, there exists no basis upon which to declare the unconstitutionality of the reviewed provision.

The competence concerned in the present case is not a clearly legislative competence. The challenged provision concerns an opinion regarding how the government should behave (Parliament's control function) in the procedure of adopting Community law (the legislative function). However, the two indicated constitutional bases of review concern the participation of both chambers in the process of directly adopting Polish law.

Judge Janusz Niemcewicz: The legislative function consists in adopting legal acts of statutory rank and the control function consists in acquiring information regarding the activity of the government and the administration subordinate thereto, as well as forwarding opinions and suggestions to the government. The examined competence relates to acquiring information about a position already adopted by the Council of Ministers and to the possible pronouncement of an opinion on this matter and, accordingly, it falls within the control function.

Cross-references:

- Judgment K 18/04 of 11.05.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005/A, no. 5, item 49.

Languages:

Polish, English (summary).



Identification: POL-2005-1-003

a) Poland / b) Constitutional Tribunal / c) / d) 31.01.2005 / e) P 9/04 / f) / g) *Dziennik Ustaw Rzeczypospolitej* (Official Gazette), 2005, no. 25, item 214; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005/A, no. 1, item 9 / h) CODICES (English, Polish).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.
- 3.26 **General Principles** – Principles of Community law.
- 4.10.7 **Institutions** – Public finances – Taxation.

5.3.16 **Fundamental Rights** – Civil and political rights – Principle of the application of the more lenient law.

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

Keywords of the alphabetical index:

Good, imported / Customs, offence, decriminalisation / European Union, customs area / European Union, Charter of Fundamental Rights.

Headnotes:

The principle of the application of the more lenient law within criminal law (*lex retro agit in mitius, lex mitior retro agit*), construed in international law as an individual right (Article 15.1 of the International Covenant on Civil and Political Rights), may also be recognised as a general principle of Community law (Article II-109 of the Charter of Fundamental Rights of the European Union). On the basis of the Polish Constitution, the discussed principle may primarily be derived from the rule of law principle (Article 2 of the Constitution) – either directly or by reference to international legal regulations by which Poland remains bound.

The principle of the application of the more lenient law does not, however, stem from Article 42.1 of the Constitution, expressing a prohibition on the imposition of penalties whenever the statute operative at the time the offence was committed did not envisage this (*nullum crimen sine lege*).

When Poland became a member of the EU, certain activities were decriminalised which were hitherto subject to penalty as customs offences or petty offences. The legislator, however, did not quash these provisions, since such decriminalisation applies only in respect of transactions within the customs area of the EU.

Summary:

“Fiscal offences and petty offences regarding customs obligations and the principles of external goods and services traffic” (the so-called customs offences and petty offences) are contained in the Fiscal Penal Code 1999 (hereinafter: “FPC”). The FPC provisions also institute criminal sanctions for infringement of requirements and prohibitions concerning foreign transactions contained in provisions located outside the FPC. Further to Poland's accession to the EU (on 1 May 2004), the regulation of foreign transactions by provisions located outside the FPC, but protected by sanctions contained within the FPC, was subject to amendment.

Poland's adherence to the EU customs area signifies, for example, that many activities concerning the import of goods to Poland from other EU Member States are currently not subject to restrictions, infringement of which constituted a customs offence prior to the accession.

In May 2003, Mr F. imported a vehicle to Poland from an EU Member State, taking advantage of a customs exemption on the basis of a temporary customs clearance. The latter required such an importer to take the vehicle abroad anew or to declare to the customs authorities a change of the so-called customs designation of this vehicle (and pay the appropriate customs duty). Mr F. did not fulfil either of these conditions. Accordingly, he was accused of having committed the customs offence. Had Mr F. imported the vehicle following Poland's accession to the EU, the discussed restrictions and the criminal sanction related thereto would simply not have applied.

The District Court in B. issued judgment in Mr F.'s case on the basis of provisions operative prior to Poland's accession to the EU. This was required by Article 15a of the Introductory Provisions to the FPC Act, demanding the application of "hitherto provisions" to customs offences committed prior to Poland's membership of the EU. This provision was introduced by Article 22 as amended in 2004, challenged in this case, which entered into force on 1 May 2004. The District Court found the accused guilty of committing the offence with which he was charged. Mr F. appealed against that judgment to the Regional Court in Toruń. This court had doubts as to whether the aforementioned inter-temporal regulation conformed to various provisions of the Constitution and the International Covenant on Civil and Political Rights. Accordingly, the Court referred a question of law to the Constitutional Tribunal.

The Tribunal ruled that the challenged provision does not conform to Article 2 of the Constitution (rule of law), read in conjunction with the third sentence of Article 15.1 of the International Covenant on Civil and Political Rights (retroactivity of a more lenient criminal statute), and conforms to Article 42.1 of the Constitution (*nullum crimen sine lege*).

Cross-references:

- Judgment P 2/99 of 06.07.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 5, item 103, *Bulletin* 1999/2 [POL-1999-2-024];
- Judgment SK 44/03 of 25.05.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 5, item 46.

Languages:

Polish, English (summary).



Identification: POL-2005-1-004

a) Poland / b) Constitutional Tribunal / c) / d) 23.02.2005 / e) Ts 35/04 / f) / g) *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005/B, no. 1, item 26 / h) CODICES (English, Polish).

Keywords of the systematic thesaurus:

- 1.2.1.6 **Constitutional Justice** – Types of claim – Claim by a public body – Local self-government body.
- 1.4.9.1 **Constitutional Justice** – Procedure – Parties – *Locus standi*.
- 4.8.4.1 **Institutions** – Federalism, regionalism and local self-government – Basic principles – Autonomy.
- 5.1.1.5.2 **Fundamental Rights** – General questions – Entitlement to rights – Legal persons – Public law.

Keywords of the alphabetical index:

Constitutional complaint, admissibility / Municipality, constitutional complaint.

Headnotes:

Constitutional rights and freedoms are addressed above all to natural persons. The constitutional expression of this assumption is contained in Article 30 of the Constitution, which provides that the dignity of the person constitutes the source of rights and freedoms and that these rights and freedoms have a (primary character) vis-à-vis law created by the State. Article 30 of the Constitution has essential significance when interpreting the notion "everyone" within Article 79.1 of the Constitution (right to lodge a constitutional complaint).

The rights of communes encompassed by Article 165 of the Constitution, i.e. ownership and other property rights as well as judicial protection of the self-governing nature of local self-government units, do not fall within the notion of "constitutional rights and freedoms" within the meaning of Article 79.1 of the Constitution.

There is no similarity between the legal situation of legal persons performing public duties and the legal situation of natural and private legal persons, which would justify including the former within the scope of application of the constitutional right to equal treatment by public authorities (Article 32.1 of the Constitution).

As regards matters within a commune's scope of activity, the constitutive organs of a commune may only appear before the Constitutional Tribunal in respect of applications regarding the abstract review procedure (Article 191.1.3 of the Constitution, read in conjunction with Article 191.2 of the Constitution), as opposed to constitutional complaint procedure.

Summary:

The constitutional complaint constitutes a special mechanism for initiating review of the constitutionality of legal provisions. The right to lodge such a complaint is vested in "everyone" whose constitutional rights or freedoms were infringed by a final decision in their individual case, issued on the grounds of a provision which, in the complainant's opinion, fails to conform to constitutional guarantees of rights and freedoms (Article 79.1 of the Constitution). The aforementioned constitutional provision is contained in Chapter II of the Constitution governing rights, freedoms and duties of persons and citizens. The Constitutional Tribunal's jurisprudence indicates that a constitutional complaint may be lodged not only by a natural person but also, under certain conditions, by a private legal person. The discussed problem is different as regards the *locus standi* of public legal persons established on the basis of decisions adopted by the legislator or other State authorities and fulfilling tasks of a public-legal nature. This refers in particular to communes and other units of local self-government.

In the present case, a constitutional complaint was lodged by the Capital City of Warsaw (hereinafter: "applicant"), represented by its President. Warsaw has a specific legal status, since it is a commune having the status of a city and possessing the rights of a district. The City challenged legal provisions of the Administrative Procedure Code pursuant to which the City was deprived of a possibility to appeal against a decision on compensation for issuing an administrative decision that was subsequently declared invalid, or to challenge such a decision before the courts, since such procedural rights were vested only in a party to the proceedings; the City did not appear as a party to the proceedings but rather as the administrative authority (first-instance organ). Constitutional complaint was chosen as the mechanism for this challenge, as opposed to the procedure for initiating the abstract review of norms (Article 191.1.3 of the Constitution,

read in conjunction with Article 191.2 of the Constitution). The applicant submitted that challenged provisions failed to conform to Article 32.1 of the Constitution (equality), Article 78 of the Constitution (right to appeal against first-instance decisions) and Article 165.2 of the Constitution (judicial protection of the self-governing, i.e. autonomous, nature of local self-government units). The first and second of the aforementioned provisions are contained in Chapter II of the Constitution (rights, freedoms and duties of persons and citizens); the third provision is contained in Chapter VII (local self-government). Within the preliminary consideration procedure, the Tribunal refused to proceed further with the complaint. The Tribunal emphasised that the fundamental objective of a constitutional complaint is the protection of rights vested in an individual (a natural person) against acts of organs of public authority. The complainant challenged the aforementioned procedural decision (pursuant to Article 36.4 of the Constitutional Tribunal Act), arguing that its situation, as a legal person within proceedings regarding compensation to be paid for unlawful acts committed by its organs, is analogous to the situation of a natural person participating as a party to administrative proceedings.

The Tribunal refused to admit the challenge against the preceding procedural decision, refusing to proceed further with the constitutional complaint.

Constitutional rights and freedoms define the position of the individual vis-à-vis public authorities. They are particularly intended to prevent public authorities from excessively interfering with an individual's situation.

Legal persons may be subjects of constitutional rights and freedoms to a limited degree. Certain of these rights and freedoms may not, by virtue of their substance, be vested in legal persons. As regards other constitutional subjective rights, a legal person (or an entity which is not endowed with legal personality) may be the subject of such rights to the extent that this facilitates fuller enjoyment thereof by natural persons (vesting legal persons with constitutional rights has a derivative character in relation to the individuals' rights).

Local self-government participates in the exercise of public authority by performing public duties (Article 16.2 of the Constitution). The performance of public duties occurs when communes (i.e. basic units of local self-government) operate, through their organs, in the sphere of public power (*imperium*) and when they operate in the sphere of proprietary power, in civil-legal transactions (*dominium*). By endowing local self-government units with legal personality, and guaranteeing the right of ownership and protection by the courts, Article 165 of the Constitution ensures the proper performance of public duties. The rights of an

individual are, however, based upon the dignity and freedom of the individual; therefore, an individual may freely enjoy his/her rights, within legally-defined limits, whereas a commune exercises its rights for the purpose of realising public duties.

The judicial protection of communes (Article 165.2 of the Constitution) is intended to guarantee the proper performance of public duties, whereas the right to court (Articles 77.2 and 45.1 of the Constitution) is one of the means for protecting an individual's constitutional rights and freedoms. A similar differentiation exists in respect of protecting, on the one hand, the ownership right of communes (Article 165.1 of the Constitution) and, on the other hand, an individual's right to ownership (Article 64.1 of the Constitution).

Conditioning the application of Article 79.1 of the Constitution solely upon the applicant's possession of legal personality would lead to the conclusion that the State Treasury may also refer a constitutional complaint. Such an assumption would signify that the State may lodge a constitutional complaint against itself. Likewise, permitting a commune's constitutional complaint to be reviewed on its merits could lead to the settlement of disputes between organs of public authority within the constitutional complaint procedure.

Cross-references:

- Judgment K 40/97 of 24.03.1998, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 2, item 12, *Bulletin* 1998/1 [POL-1998-1-006];
- Judgment K 5/01 of 29.05.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 4, item 87;
- Procedural decision Tw 2/03 of 25.03.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003/B, no. 2, item 82;
- Judgment K 14/03 of 7.01.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 1, item 1;
- Procedural decision Tw 9/03 of 10.03.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/B, no. 1, item 4;
- Judgment SK 7/03 of 04.04.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005/A, no. 4.

Languages:

Polish, English (summary).



Identification: POL-2005-1-005

a) Poland / b) Constitutional Tribunal / c) / d) 27.04.2005 / e) P 1/05 / f) / g) *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2005, no. 77, item 680 / h) CODICES (English, Polish).

Keywords of the systematic thesaurus:

1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
 2.2.2.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources – The Constitution and other sources of domestic law.
 3.16 **General Principles** – Proportionality.
 3.26.1 **General Principles** – Principles of Community law – Fundamental principles of the Common Market.
 5.1.1.1 **Fundamental Rights** – General questions – Entitlement to rights – Nationals.

Keywords of the alphabetical index:

Extradition, national, prohibition / European Arrest Warrant, constitutionality.

Headnotes:

Constitutional notions have an autonomous nature in relation to acts of lower rank. The meaning of terms contained in ordinary statutes may not determine the interpretation of constitutional provisions. It is constitutional norms that dictate the manner and direction of interpreting statutory provisions.

Whilst the obligation to implement secondary EU legislation has its basis in Article 9 of the Constitution (Poland's obligation to respect international law), the fact that a domestic statute was enacted for the purpose of implementing secondary EU law does not *per se* guarantee the substantive conformity of this statute with the Constitution.

The prohibition on extradition (Article 55.1 of the Constitution) expresses the right for Polish citizens to be held criminally liable before a Polish court. Surrendering a citizen to another EU Member State, on the basis of a European Arrest Warrant (EAW), would entirely preclude enjoyment of this right and would infringe its essence, which is impermissible in light of Article 31.3 of the Constitution establishing the principle of proportionality. Therefore, the prohibition on extraditing Polish citizens is absolute in nature and the personal right of these citizens on this basis may not be subject to any limitations.

Given the content of Article 9 of the Constitution, and the obligations stemming from Poland's membership

of the EU, an amendment of the currently operative law is thus inevitable, enabling a full and constitutionally compatible implementation of the Framework Decision. An appropriate amendment of Article 55.1 of the Constitution may not be excluded so that this provision will envisage an exception to the prohibition on extraditing Polish citizens as to permit their surrender to other Member States of the EU on the basis of an EAW.

Summary:

On 13 June 2002, the Council of the EU issued a Framework Decision on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA; hereinafter: Framework Decision). The European Arrest Warrant is “a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order” (Article 1.1 of the Framework Decision). In principle, the obligation to execute an EAW also exists when the person to whom the EAW relates is a citizen of a State to whom the warrant was directed. A divergence of opinions arose within judicial circles regarding Poland’s ability to execute an EAW against its own citizens, given the prohibition on “extraditing” Polish citizens (Article 55.1 of the Constitution). Alongside opinions that an amendment of the Constitution was required, other commentators suggested that the “surrendering” of a citizen on the basis of an EAW is a concept distinct from the “extradition” within international law, which is mirrored (in their opinion) in Article 55.1 of the Constitution. The Polish legislator decided to transpose the Framework Decision by way of amendment to the Criminal Procedure Code 1997 (CPC), without any accompanying alteration of the Constitution. The legislator created a terminological distinction between “extradition” and “surrendering” of a person on the basis of an EAW. No provision of the Code expressly states that the surrendering of a person from Polish territory, on the basis of an EAW, may also apply to a Polish citizen. Such a conclusion stems from the CPC provision specifying the compulsory prerequisites for refusing to execute an EAW, which fails to envisage that the possession of Polish citizenship by the person to whom the warrant relates could constitute a basis for refusal to execute such a warrant.

Proceedings before the Tribunal were initiated by the Regional Court for Gdańsk, which considered the issuance of a decision on surrendering a Polish citizen on the basis of an EAW, for the purpose of conducting a criminal prosecution against her in the Kingdom of the Netherlands.

The basic function of the Constitutional Tribunal is to review the conformity of normative acts with the Constitution. The Tribunal is not relieved of this obligation where the allegation of unconstitutionality concerns a statute implementing EU law.

Article 31.3 of the Constitution, concerning the limitation of an individual’s constitutional rights and freedoms, does not refer directly to the application of the delay of the loss of binding force of an unconstitutional provision (envisaged in Article 190.3 of the Constitution). Accordingly, it is also permissible for the Tribunal to apply that regulation for reasons other than the values enumerated in Article 31.3 (security and public order, protection of the natural environment, health or public morals, or the freedoms and rights of other persons), even where it is inevitable that this leads to the temporary maintenance in force of provisions limiting constitutional rights and freedoms.

The Tribunal ruled that Article 607t § 1 of the CPC, insofar as it permits the surrendering of a Polish citizen to another EU Member State on the basis of the EAW, does not conform to Article 55.1 of the Constitution. Furthermore, the Tribunal ruled that the loss of binding force of the challenged provision shall be delayed for 18 months following the day on which this judgment was published in the Journal of Laws.

It would only be possible to consider the “surrendering” of a person prosecuted on the basis of an EAW as an institution distinct from “extradition”, within the meaning of Article 55.1 of the Constitution, where the essence of each of these institutions was different. The essence of extradition lies in the transfer of a prosecuted or sentenced person for the purpose of conducting a criminal prosecution against them or executing a penalty previously imposed upon them. Therefore, the surrendering of a person on the basis of an EAW for the purpose of conducting a criminal prosecution against them or executing an imposed custodial sentence or another measure consisting in the deprivation of liberty, on the territory of another Member State, must be viewed as a form of extradition.

When Poland became a Member State of the EU, Polish citizens became citizens of the EU. That justifies the overturning, by means of an appropriate amendment to Article 55.1 of the Constitution, of the prohibition on extraditing Polish citizens to EU Member States. However, it does not constitute a sufficient prerequisite for concluding that such overturning has already occurred, by virtue of a dynamic interpretation of this provision. The Constitution links a certain set of individual rights and obligations with the possession of Polish citizenship. In consequence, the possession of Polish citizenship

must constitute a significant criterion when assessing an individual's legal status – concerning both the obligations of the State vis-à-vis the citizen and the obligations of the citizen vis-à-vis the State, coupled with the former (*cf.* Articles 82 and 85 of the Constitution). Furthermore, the surrender procedure on the basis of an EAW is not so much a consequence of introducing the institution of “citizenship of the Union” but rather an answer to the right of EU Member States’ citizens to move freely and reside within the territory of another Member State.

Taking into account the complexity and more stringent requirements (also regarding the relevant time periods) governing the procedure for amending the law, as well as the fact that Poland's obligation to implement the Framework Decision only exists from the date of Poland's accession to the EU (from 1 May 2004), the loss of binding force of the unconstitutional provision shall be delayed.

If, as a consequence of the present judgment, an amendment of the Constitution is introduced, it will be necessary, in order to ensure the compatibility of domestic law with EU law, to re-introduce legal provisions concerning the EAW which were found unconstitutional on the grounds of the hitherto constitutional provision.

The EAW has crucial significance for the functioning of the administration of justice and, primarily, for improving security. The absence of appropriate legislative actions will not only amount to an infringement of the constitutional obligation for Poland to observe binding international law, but could also lead to serious consequences on the basis of EU law.

Cross-references:

- Judgment P 5/99 of 14.03.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 2, item 60; *Bulletin* 2000/1, [POL-2000-1-009];
- Judgment K 21/99 of 10.05.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 2, item 109; *Bulletin* 2000/2, [POL-2000-2-013];
- Judgment K 27/00 of 07.02.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 2, item 29;
- Judgment K 18/04 of 11.05.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005/A, no. 5, item 49.

Languages:

Polish, English (summary).



Identification: POL-2005-1-006

a) Poland / b) Constitutional Tribunal / c) / d) 11.05.2005 / e) K 18/04 / f) / g) *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2005, no. 86, item 744; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 5A, item 49 / h) CODICES (English, Polish, German).

Keywords of the systematic thesaurus:

- 1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
- 1.3.4.14 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between Community and member states.
- 1.3.5.1 **Constitutional Justice** – Jurisdiction – The subject of review – International treaties.
- 1.3.5.2.1 **Constitutional Justice** – Jurisdiction – The subject of review – Community law – Primary legislation.
- 1.3.5.2.2 **Constitutional Justice** – Jurisdiction – The subject of review – Community law – Secondary legislation.
- 2.1.1.1.1 **Sources of Constitutional Law** – Categories – Written rules – National rules – Constitution.
- 2.1.1.3 **Sources of Constitutional Law** – Categories – Written rules – Community law.
- 2.1.3.2.2 **Sources of Constitutional Law** – Categories – Case-law – International case-law – Court of Justice of the European Communities.
- 2.2.1.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and constitutions.
- 2.2.1.2 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and legislative acts.
- 2.2.1.6 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law.
- 2.3 **Sources of Constitutional Law** – Techniques of review.
- 3.1 **General Principles** – Sovereignty.
- 3.4 **General Principles** – Separation of powers.
- 3.9 **General Principles** – Rule of law.

- 3.16 **General Principles** – Proportionality.
 3.26.3 **General Principles** – Principles of Community law – Genuine co-operation between the institutions and the member states.
 4.7.6 **Institutions** – Judicial bodies – Relations with bodies of international jurisdiction.
 4.9.3 **Institutions** – Elections and instruments of direct democracy – Electoral system.
 4.16.1 **Institutions** – International relations – Transfer of powers to international institutions.
 4.17.2 **Institutions** – European Union – Distribution of powers between Community and member states.
 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.
 5.3.41.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.
 5.3.41.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

European Union, subsidiarity, duty to respect / Law, domestic, interpretation sympathetic to European law, limits / European Union, supranational character / European Union, accession, constitutional basis / Community law, Constitution, conflict, consequences / European Communities, powers, limits / European Union, powers, limits / Court of Justice of the European Communities, duty to respect national legal systems.

Headnotes:

The accession of Poland to the European Union (EU) did not undermine the supremacy of the Constitution over the legal order as a whole within the field of sovereignty of the Republic of Poland. The norms of the Constitution, this being the supreme act which is an expression of the Nation's will, would not lose their binding force or change their content by the mere fact of an irreconcilable inconsistency between these norms and any Community provision. In such a situation, the autonomous decision as regards the appropriate manner of resolving that inconsistency, including the expediency of a revision of the Constitution, belongs to the Polish constitutional legislator.

The process of European integration, connected with the delegation of competences in relation to certain matters to Community (Union) organs, has its basis in the Constitution. The mechanism for Poland's accession to the EU finds its express grounds in constitutional regulations and the validity and efficacy of the accession are dependent upon fulfilment of the constitutional elements of the integration procedure, including the procedure for delegating competences.

Article 90.1 of the Constitution authorises the delegation of competences of State organs only "in relation to certain matters". This implies a prohibition on the delegation of all competences of a State authority organ or competences determining its substantial scope of activity, or competences concerning the entirety of matters within a certain field.

Neither Article 90.1 nor Article 91.3 of the Constitution authorise delegation to an international organisation of the competence to issue legal acts or to take decisions contrary to the Constitution, being the "supreme law of the Republic of Poland". At the same time, these provisions do not authorise the delegation of competences to such an extent that it would signify the inability of the Republic of Poland to continue functioning as a sovereign and democratic State.

Given its supreme legal force, the Constitution enjoys precedence of binding force and precedence of application within the territory of Poland. The precedence over statutes of the application of international agreements which were ratified on the basis of a statutory authorisation or consent granted (in accordance with Article 90.3 of the Constitution) via the procedure of a nationwide referendum (Article 91.2 of the Constitution) in no way signifies an analogous precedence of these agreements over the Constitution.

The existence of the relative autonomy of both, national and Community, legal orders in no way signifies an absence of interaction between them. Furthermore, it does not exclude the possibility of a collision between regulations of Community law and the Constitution. Such a collision would occur in the event that an irreconcilable inconsistency appeared between a constitutional norm and a Community norm, such as could not be eliminated by means of applying an interpretation which respects the mutual autonomy of European law and national law. Such a collision may in no event be resolved by assuming the supremacy of a Community norm over a constitutional norm. Furthermore, it may not lead to the situation whereby a constitutional norm loses its binding force and is substituted by a Community norm, nor may it lead to an application of the constitutional norm restricted to areas beyond the scope of Community law regulation. In such an event the Nation as the sovereign, or a State authority organ authorised by the Constitution to represent the Nation, would need to decide on: amending the Constitution; or causing modifications within Community provisions; or, ultimately, on Poland's withdrawal from the EU.

The principle of interpreting domestic law in a manner “sympathetic to European law” has its limits. In no event may it lead to results which contradict the explicit wording of constitutional norms or which are irreconcilable with the minimum guarantee functions realised by the Constitution. In particular, the norms of the Constitution within the field of individual rights and freedoms indicate a minimum and unsurpassable threshold which may not be lowered or questioned as a result of the introduction of Community provisions.

The Communities and the EU function, in accordance with the founding treaties, on the basis of, and within the limits of, the powers conferred upon them by the Member States. Consequently, the Communities and their institutions may only operate within the scope envisaged by the provisions of the Treaties. The Member States maintain the right to assess whether or not, in issuing particular legal provisions, the Community (European Union) legislative organs acted within the delegated competences and in accordance with the principles of subsidiarity and proportionality. Should the adoption of provisions infringe these frameworks, the principle of the precedence of Community law fails to apply with respect to such provisions.

The Court of Justice of the European Communities (ECJ) is the primary, but not the sole, depository of powers as regards application of the Treaties within the legal system of the Communities and Union. The interpretation of Community law performed by the ECJ should fall within the scope of functions and competences delegated to the Communities by its Member States. It should also remain in correlation with the principle of subsidiarity. Furthermore, this interpretation should be based upon the assumption of mutual loyalty between the Community-Union institutions and the Member States. This assumption brings with it a duty for the ECJ to be sympathetically disposed towards the national legal systems and a duty for the Member States to show the highest standard of respect for Community norms.

Summary:

The Treaty concerning the accession of 10 States, including Poland, to the European Union (hereinafter: the Accession Treaty) was signed on 16 April 2003, in Athens. On 7 and 8 June 2003 a referendum was held in Poland (within the procedure provided for by Article 90.3 of the Constitution) in accordance with which the Polish President ratified the Accession Treaty. The Treaty is accompanied by the “Act concerning the conditions of accession of the Republic of Poland and the adjustments to the Treaties on which the European Union is founded” and the “Final Act”, constituting integral parts of the

Treaty. The initiators of the proceedings before the Constitutional Tribunal were three groups of Deputies from the *Sejm* (the lower chamber of the Polish Parliament). In challenging the conditions of accession the applicants focused their critique on the following provisions: Articles 1.1 and 1.3 of the Accession Treaty, Article 2 of the Act concerning the conditions of accession, Articles 8, 12, 13.1, 19.1, 33, 105, 190, 191, 202, 203, 234, 249, 308 EC, Article 6.2 EU and Article 17 of the Charter of Fundamental Rights. In justifying the allegations, the applicants referred to the Polish Constitution’s Preamble (in particular the part concerning the “sovereign and democratic determination of Homeland’s fate” by the Nation, and the independence of Poland) as well as to numerous constitutional provisions, in particular, principles of the sovereignty of the Polish People (Article 4 of the Constitution) and the supremacy of the Constitution within the Polish legal system (Article 8.1 of the Constitution).

The Tribunal ruled that all challenged provisions either conform to or are not inconsistent with the constitutional provisions indicated by the applicants. The term “is not inconsistent with” signifies that, in the Tribunal’s opinion, the constitutional provision cited by the applicant does not constitute an adequate basis upon which to review the challenged legal provision, given the absence of any significant conjunction between their contents. As regards three allegations (referring to Article 17 of the Charter of Fundamental Rights, to the prohibition of extradition of Polish citizens, *cf.* Article 55.1 of the Constitution, and concerning the inconsistency of the Accession Treaty with the Constitution in its entirety), the Tribunal discontinued the proceedings, given that it would be inadmissible to pronounce judgment on these questions.

It is insufficiently justified to assert that the Communities and the EU are “supranational organisations” – a category that the Polish Constitution, referring solely to an “international organisation”, fails to envisage. The Accession Treaty was concluded between the existing Member States of the Communities and the EU and applicant States, including Poland. It has the features of an international agreement, within the meaning of Article 90.1 of the Constitution. The Member States remain sovereign entities – parties to the founding treaties. They also, independently and in accordance with their constitutions, ratify concluded treaties and have the right to denounce them according to the Vienna Convention on the Law of Treaties 1969. The expression “supranational organisation” is not mentioned in the Accession Treaty, or in the Acts constituting an integral part thereof or any provisions of secondary Community law.

The supremacy of the Constitution is accompanied by the requirement to respect and be sympathetically disposed towards appropriately drafted regulations of international law binding upon Poland (Article 9 of the Constitution). Accordingly, the Constitution assumes that, within the territory of Poland, – in addition to norms adopted by the national legislator – there operate provisions created outside the framework of national legislative organs.

The principle that judges of the courts and Constitutional Tribunal are subject to the norms of the Constitution (Articles 178.1 and 195.1 of the Constitution) also encompasses the duty to apply Community law binding upon Poland. Such a duty arises as a result of the ratification, in compliance with the Constitution and on the basis thereof, of international agreements concluded with the Member States of the Communities and the EU, which constitute a part of international law binding upon Poland (Article 9 of the Constitution). The ECJ's competence to declare a binding interpretation of Community law, particularly via the procedure for delivering preliminary rulings (Article 234 EC), constitutes an element of the aforementioned agreements.

The application of Article 234 EC neither constitutes a threat to the Constitutional Tribunal's competences (Article 188 of the Constitution), nor does it narrow them. If the Constitutional Tribunal decided to request a preliminary ruling concerning the validity or content of Community law, the Tribunal would undertake this within the framework for exercising its adjudicative competences and only where, in accordance with the Constitution, the Tribunal ought to apply Community law.

The direct review of the conformity with the Constitution of particular decisions of the ECJ, as well as the "permanent jurisprudential line" derived from these decisions, does not fall within the Constitutional Tribunal's scope of jurisdiction (Article 188 of the Constitution).

The rule of law principle (Article 2 of the Constitution) refers to the functioning of States and not necessarily to international organisations. This concerns, in particular, the concept of separation and balance of powers: the legislature, executive and judiciary (Article 10 of the Constitution).

The formal requirements for adopting Polish law, as specified in the Polish Constitution, are not directly applicable to the adoption of Community law.

The scope of activity of the Polish legislative power is limited to the territory of Poland. Accordingly, Article 308 EC may not be reviewed from the perspective of its conformity with Article 95.1 of the

Constitution (legislative power in Poland shall be exercised by the *Sejm* and Senate).

Article 31.3 of the Constitution (proportionality) is addressed to the Polish legislator. It is, therefore, unjustified to transfer the requirements stemming from this provision directly to the field of issuing norms of secondary Community law (Article 249 EC). This does not, however, preclude the possibility of reviewing legal provisions, including Community Regulations, insofar as they are in force within the territory of Poland, from the perspective of observing the requirements laid down in Article 31.3 of the Constitution.

The right to vote and to stand as a candidate at local elections vested in EU citizens who, although not holding Polish citizenship, are resident in Poland (Article 19.1 EC), does not constitute a threat to the Republic of Poland as a common good of all Polish citizens (Article 1 of the Constitution) nor to its national independence. The local self-governing community participates in exercising public authority of a local nature, and decisions or initiatives regarding the State as a whole may not be adopted within local self-government (*cf.* Article 16 of the Constitution). Furthermore, the EC Treaty provision under discussion does not infringe Article 62.1 of the Constitution, which guarantees Polish citizens the right to elect, *inter alia*, their representatives to organs of local self-government. This constitutional right is not of an exclusive character, in the sense that, should the Constitution grant it directly to Polish citizens, it might not also be vested in the citizens of other States.

Cross-references:

- Judgment K 11/03 of 27.05.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003/A, no. 5, item 43;
- Judgment K 15/04 of 31.05.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 5, item 47, *Bulletin* 2004/2 [POL-2004-2-018];
- Judgment K 24/04 of 12.01.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 1A, item 3;
- Judgment P 1/05 of 27.04.2005, *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2005, no. 77, item 680, *Bulletin* 2005/1 [POL-2005-1-005].

Languages:

Polish, English, German (summary).



Portugal

Constitutional Court

Statistical data

1 January 2005 – 30 April 2005

Total: 231 judgments, of which:

- Abstract *ex post facto* review: 1 judgment
- Appeals: 184 judgments
- Complaints: 40 judgments
- Electoral matters: 4 judgments
- Incompatible activities by holders of political office: 2 judgments

Important decisions

Identification: POR-2005-1-001

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 05.01.2005 / **e)** 5/05 / **f)** / **g)** *Diário da República* (Official Gazette), 75 (Series II), 18.03.2005, 6234-6241 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Liability, civil servants / Liability, state, basis.

Headnotes:

As per the civil liability of the state and other public bodies for acts or omissions amounting to a violation of rights, freedoms or guarantees or causing prejudice to others, ordinary legislation may be introduced to adjust the rules governing civil servants' and other state employees' exclusive liability in order to limit external liability to fraudulent conduct, provided victims continue to be protected by virtue of provisions whereby the public body is directly liable

and able to take internal action for indemnity against the civil servant or other state employee whose conduct has caused the damage.

The interpretation (in connection with acts carried out in the performance of public administrative duties in such a way as to infringe human rights) according to which the civil liability of members of public bodies/public servants may not be engaged jointly with that of the state for acts which are merely improper or negligent neither violates Article 22 of the Constitution (which governs only the liability of public bodies) nor goes beyond the limits set by Article 271.1 of the Constitution (which provides that civil servants and other state/public employees are civilly liable, criminally responsible and accountable in disciplinary proceedings for acts or omissions in the performance of their duties as a result of which citizens' legally protected rights or interests are violated, and that legal action or prosecution may not at any stage be subject to the prior approval of a higher authority).

Summary:

The case relates to an action for civil non-contractual liability brought to obtain compensation from two doctors and a hospital for shortcomings in the medical care provided before and after the delivery of a child, as a result of which the child was born with serious cerebral palsy. The doctors were acquitted by the trial judge, who ruled that civil servants and other state/public employees were civilly liable in respect of third parties only if they had acted beyond their authority or fraudulently in the performance of their duties.

The question of unconstitutionality related only to the interpretation according to which victims could not bring an action against civil servants or other state/public employees if they had acted merely negligently, but not fraudulently, in the performance of their duties. In other words, the only issue that had to be resolved was whether the victims could bring an action against civil servants or other state/public employees who acted negligently in the performance of their duties.

The interpretation of the rule in question – according to which it is not possible to bring an action against civil servants and other state/public employees in order to establish liability for an action attributed to such civil servants or employees on grounds of mere negligence and not fraud on their part – was not held to be unconstitutional by the Constitutional Court.

Supplementary information:

The Constitutional Court has not often been called on to rule on this constitutional issue. It has dealt with it previously only in Judgment 236/2004, in which it ruled that the fact that the civil liability of civil servants and other state employees for acts carried out in the performance of their duties was limited to fraudulent acts was not unconstitutional.

Languages:

Portuguese.

*Identification:* POR-2005-1-002

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 23.02.2005 / **e)** 96/05 / **f)** / **g)** *Diário da República* (Official Gazette), 63 (Series II), 31.03.2005, 5050-5055 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.22 **General Principles** – Prohibition of arbitrariness.
 4.8.6.1.1 **Institutions** – Federalism, regionalism and local self-government – Institutional aspects – Deliberative assembly – Status of members.
 5.2.1.2.2 **Fundamental Rights** – Equality – Scope of application – Employment – In public law.

Keywords of the alphabetical index:

Deputy, local council, office / Deputy, local council, remuneration / Work, part-time, payment.

Headnotes:

The principle of equality (Article 13 of the Constitution) is based on the equal social dignity of all citizens. Its three components are as follows:

- a. the prohibition of arbitrariness;
- b. the prohibition of discrimination;
- c. the duty to differentiate as a means of offsetting inequality of opportunity.

According to constitutional case-law, the principle of equality is infringed where the law deals differently with situations that are basically the same, although differences in treatment are allowed if there are genuine grounds for them. In addition, the prohibition of arbitrariness calls for differential treatment proportionate to the circumstances in respect of situations in which the facts are different.

In practice, it is the principle of equality that prohibits equal treatment of different situations. This principle is particularly important because it implies that equal treatment of genuinely different situations is constitutionally unacceptable. However, it needs to be determined whether the equal remuneration of a local elected representative working for the municipal authority full time but not exclusively (combining municipal duties with other paid work) and of a local elected representative working for the municipal authority part time infringes the principle of equality. For this purpose, reference has to be made to the aspect of the principle of equality which relies on there being genuine substantive equality between the two situations, i.e. that of a local elected representative working full time but not exclusively for the municipal authority (under the aforementioned conditions) and that of a part-time local elected representative. If the Court rules that there is equality in terms of status between the two, it will then have to relate the situation to the fact that, as far as pay is concerned, this equality in terms of status is not matched by an equitable situation in terms of other aspects, including the different working hours under the full- and part-time arrangements. On the other hand, if the Court finds that the conditions governing the two arrangements – which concern not just pay but other quite different aspects – are not structurally identical, then it will have to declare the rule in question constitutional.

The criteria set by Article 59.1.a of the Constitution are important when the principle of equality is put into practice with regard to payment for work. It is through these that the principle of “equal pay for equal work” is established. Pay must take account of the “quantity, nature and quality” of work and must hence be commensurate with the quantity of work (i.e. its length and intensity), the nature of the activity (i.e. how difficult, arduous or dangerous it is) and the quality of the work done (i.e. whether it meets requirements in terms of knowledge, skill and proficiency).

The complexity of the status of local elected representatives is such that it is impossible to make a direct “linear comparison” focusing only on the rules applying to the performance of their duties and their pay. Instead, the status of local elected

representatives working full time and part time has to be looked at as a whole in order to determine whether the two are treated in an equal manner, in such a way as to infringe the principle of equality.

Summary:

The provision in question governs the system of payment for local elected representatives performing their duties full time but not devoting themselves entirely to their municipal duties. According to this provision, these local representatives receive 50% of the basic pay awarded to local elected representatives working full time and opting to perform solely their municipal duties (or engaging only in unpaid other activities). The Constitutional Court was asked to give its opinion on whether the rules on pay applying to municipal councillors working full time and opting to combine their municipal duties with a profession or private activity were compatible with the principle of equal pay. The ground for the argument that these rules were unconstitutional was that the law awarded the same pay to representatives performing their municipal duties full time and those working for the municipality only part time: this equal treatment of (and equal pay for) differing situations was alleged to infringe the principle of equality.

However, in view of the fact that, in the present case, it was compensation for the performance of public duties and, what was more, for the exercise of elected public office that was involved, not pay for work, it was questionable whether Article 59.1.a of the Constitution could legitimately be regarded as the main substantive criterion for the assessment of the case. In view of the fact that the principle of “equal pay for equal work” was an extension of the principle of equality enshrined in Article 13 of the Constitution, and given that it was debatable whether the rules of the Constitution concerning workers could be “automatically” applied to persons holding elected public office, it was considered that the standard by which the Court should be deciding on the constitutionality of the law in question was, on the face of it, Article 13.1 of the Constitution alone.

From at least one viewpoint, relying on the principle of equal pay for equal work could prove problematic as the “work” required of a part-time municipal councillor did not seem to be “equal”, at least in terms of quantity, to that required of a full-time councillor. On the other hand, what was “equal” was their salary, as was the quantity (or number of hours) of “work” required of a municipal councillor performing his or her duties exclusively for the municipality and that required of a municipal councillor who combined his or her municipal duties with other activities under a full-time working arrangement. However, it was not

clear that the principle of equal pay for equal work provided any statutory means of justifying the full application of the converse rule (i.e. different pay for different work), at least in an area such as elected public office, in which performance of duties could not be assessed under the same conditions as those obtaining in working life in general, particularly when it came to defining the concept of “work”, in which the time factor or, to be more specific, the number of working hours came to the fore. Besides, even in the specific field of “ordinary” work, it was not enough to consider the quantity of work done on its own: it was also necessary to take account of the quality and the nature of the work carried out. In view of the fact that what was at issue was the performance of political duties in the broadest sense, it was therefore uncertain whether the constitutional parameters applying to workers’ rights could be applied without appropriate adjustments because, in the atypical area of the performance of municipal duties, the “work” element was complex and somewhat nebulous. As a result it was inadvisable to rely on the constitutional rule in Article 59.1.a of the Constitution.

In the light of Article 13.1 of the Constitution, it was necessary, therefore, to determine whether local councillors who performed their municipal duties full time but combined them with other paid activities – and hence received only 50% of the pay to which they would normally be entitled – suffered discrimination in comparison with municipal councillors who received exactly the same pay but worked part time.

In several respects, the rules on local elected representatives revealed differences in the legal treatment of the actual situations of a local councillor performing his or her municipal duties full time (even where he or she did not do so exclusively but combined these duties with other paid activities) and of a part-time local councillor – and that, apart from the relationship between working hours and pay. When these rules were looked at as a whole, there were other factors which allowed a distinction to be made between the legal situation of a local councillor working for the municipal authority full time (although not working exclusively for it, as described above) and one working for it part time.

In short, it could not legitimately be maintained that the situation of municipal councillors working for the municipal council full time but not exclusively differed in only one respect from that of part-time councillors, i.e. the fact that the former had to work twice the number of hours worked by the latter, as the law itself identified various other differing aspects in the rules governing these arrangements. There was reason to consider that the difference in the status of these

municipal councillors was not confined to their pay, but was reflected in a very broad and complex series of rights. Accordingly, it was argued that the relative positions of municipal councillors covered by these differing working arrangements could not be assessed solely in the light of their pay. It was for precisely this reason that it was wrong to compare the status of municipal councillors working for the municipality full time with that of councillors working only part time solely with reference to the pay they received.

Consequently, regardless of the issue of the justification for the equal pay in question, the situation of municipal councillors performing their duties full time and combining these with other activities could not be compared with that of municipal councillors working part time in the light of pay alone, with the sole intention of concluding that the fact that they received equal pay infringed the principle of equality. Accordingly, the argument that the rules in question were substantively unconstitutional had to be rejected.

Languages:

Portuguese.



Identification: POR-2005-1-003

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 31.03.2005 / **e)** 174/05 / **f)** / **g)** *Diário da República* (Official Gazette), 88 (Series II), 06.05.2005, 7210-7215 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.
 3.19 **General Principles** – Margin of appreciation.
 5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.
 5.3.39.1 **Fundamental Rights** – Civil and political rights – Right to property – Expropriation.

Keywords of the alphabetical index:

Slaughter, compulsory / Bovine spongiform encephalopathy / Compensation, fair / Compensation, amount, basis.

Headnotes:

The constitutional concept of “fair compensation” is based on three tenets:

- a. it is prohibited to award purely nominal, derisory or symbolic compensation;
- b. due regard for the principle of equal sharing of expenses;
- c. the public interest in compulsory purchase taking into consideration.

According to the first two aspects, the concept of fair compensation implies that criteria leading to the award of purely nominal, derisory or symbolic compensation must be rejected as unconstitutional and that fair compensation inevitably implies due regard for the principle of the equality of citizens vis-à-vis public expenses. In cases of compulsory purchase of property for public-interest purposes (Article 62.2 of the Constitution), the fair compensation referred to in the article in question should not therefore be calculated on the basis of the actual or tangible market value but instead on a “statutorily defined market value” or a “normal or usual value”. The requirement therefore is that the value of the property in question be calculated according to a combination of its market price and a scale of “standard” values.

Article 62.2 of the Constitution stipulates that compensation awarded for compulsory purchase must be fair but contains no directly, objectively applicable criteria for calculating amounts of compensation nor any indication as to the ways or means of assessing the prejudice resulting from the compulsory purchase. There is a legal loophole here, which was left by the Constitution to the legislature. Nonetheless, the expression “fair compensation” cannot be regarded as empty words. It is actually a very meaningful expression, capable of placing substantial limits on the ordinary legislature power of discretion.

Summary:

The Constitutional Court reviewed the constitutionality of a joint Minister of Finance and the Minister of Agriculture decree setting the rules for the compensation of livestock owners whose animals were compulsorily slaughtered and disposed of (following a diagnosis of BSE, bovine spongiform encephalopathy) and to whom compensation was to be awarded for sanitary slaughter, along with an amount equivalent to the market value of the animals.

The Constitutional Court did not rule that the provisions of the joint decree issued by the Minister of Finance and the Minister of Agriculture on the amount of compensation payable to owners whose animals had been slaughtered as a result of measures to eradicate bovine spongiform encephalopathy were unconstitutional as it did not consider that any of the criteria deriving from its case-law for determining “fair compensation” were called into question by the application of the conditions for compensation for the compulsory slaughter of animals set out in the provisions in question.

In view of the market price of meat, the total compensation decided on was not therefore nominal, derisory or symbolic. It was higher than the sum which would have resulted from a value calculated on the basis of the price at which the meat from the slaughtered animals could otherwise have been sold; it also ensured that the expenses were fairly distributed, in that all taxpayers had to share the cost of eliminating the hazard detected on the applicant's cattle farm, and protected the public interest, both by eliminating the risk (given that all the animals on farms on which infected cattle had been detected were slaughtered and not just those that were contaminated) and by ensuring compensation higher than the market value so as to prevent farmers from being tempted to hide infected animals.

Furthermore, for the purposes of determining compensation according to the value of the slaughtered animals – which, on a cattle farm, would be primarily destined for slaughter – it was not unreasonable for the law to take account of the type of animals involved when calculating their value – an approach which was also justified by the wide variety of situations to be compensated for. This did not, however, mean that “each specific circumstance” pertaining to each animal or herd of animals had to be assessed and taken into account.

The issue was not therefore the actual amount of compensation decided in the specific case under consideration. “Fair compensation” was a statutory criterion and could, in certain cases, be lower than the market value, whereas the compensation awarded had actually been set just above the market value (or a particular market value: the sale price per kilogramme). Firstly, the criteria which had to be taken into consideration under the rules in the impugned decree produced values which were close, according to forecasts, to those that the market would have yielded under current conditions, and ruled out the danger of a major depreciation caused by the existence of a disease that could be passed on to human beings. Secondly, the factors to be taken into consideration provided a means of distinguishing the

various uses to which the cattle were to be put and took account of the value of the meat from the animals on the basis of an average, which was then corrected by an amount of compensation awarded according to the quality of the potential and anticipated use of each of the nine different categories of animals defined. The sums awarded should also be viewed as compensation for lost profits.

Languages:

Portuguese.



Identification: POR-2005-1-004

a) Portugal / **b)** Constitutional Court / **c)** First Chamber / **d)** 10.05.2005 / **e)** 247/05 / **f)** / **g)** See www.tribunalconstitucional.pt / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.12 **General Principles** – Clarity and precision of legal provisions.
 3.17 **General Principles** – Weighing of interests.
 5.1.1.4.1 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Minors.
 5.2.2.11 **Fundamental Rights** – Equality – Criteria of distinction – Sexual orientation.
 5.3.43 **Fundamental Rights** – Civil and political rights – Right to self fulfilment.

Keywords of the alphabetical index:

Sexual abuse of minors / Homosexuality / Crime, elements.

Headnotes:

Sex crimes are regarded as crimes against persons, i.e. against the strictly personal value of freedom of sexual choice. They are no longer viewed as crimes against the values, interests or ethical and social principles of community life. A distinction is also made between offences against sexual freedom and infringements of the right to sexual self-determination – a distinction that is aimed specifically at allowing protection to be extended because of the victim's age where the victim is a child or, in any case, a minor

who has reached a certain age. The legal interest protected is also that of sexual freedom and self-determination; it is associated in particular with the legal right of minors to the free development of their sexual identities, which is offset against the varying degrees of development of their personalities. This counterbalancing process is reflected in the differing levels of protection of minors' sexual freedom and self-determination according to their age, i.e. 14 or under, 14 to 16 or 14 to 18.

A comparison of Articles 174 and 175 of the Criminal Code shows that both provisions were introduced to protect the legal right to sexual self-determination for minors aged 14 to 16 through the punishment of serious sexual acts likely to affect the free development of their sexual identity. The offences created thereby are an exception to the principle that the carrying out of sexual acts will only damage the overall sexual development of children under 14 and that once minors have reached the age of 14, they are free to choose their sexual relations. While from the victim's viewpoint, it is the right to self-determination which justifies these provisions, from the perpetrator's viewpoint, it is the (conflicting) right to the free expression of his or her sexuality, which is restricted in the name of respect for the rights of minors aged 14 to 16.

The rights to personal identity and to the development of one's personality (Article 26.1 of the Constitution) required by respect for human dignity (Article 1 of the Constitution) are reflected by the right of citizens to self-fulfilment as individuals, which includes the right to sexual self-determination, particularly in the form of the right to a sex life according to the choice of each of those enjoying these rights. With regard to these rights, the Constitution expressly guarantees the right to "legal protection against any form of discrimination". This means that these rights cannot be restricted in different ways according to the different factors which make up their content – in this case the sexual orientation of the person enjoying these rights.

Since Article 175 of the Criminal Code attaches no significance to the abuse of the victim's inexperience – unlike Article 174 – it introduces a difference in legal treatment based on sexual orientation (homosexual) and with no other rational grounds, thereby undermining the protection afforded by the principle of equality enshrined in Article 13.2 of the Constitution.

Summary:

The issue at stake was the constitutionality of Article 175 of the Criminal Code, under which a citizen had been convicted of two offences of

homosexual acts with adolescents and sentenced to two years and six months' imprisonment.

Reference was made to the principle of equality because of an alleged difference in the treatment of homosexual and heterosexual relations. However, the question which the Constitutional Court was required to decide was only whether Article 175 violated Article 13 of the Constitution (principle of equality) and Article 26.1 of the Constitution (other personal rights) in so far as it punished the conduct which it covered (homosexual relations) even where no advantage had been taken of the minor's inexperience, whereas Article 174 of the Code punished the conduct which it covered (heterosexual relations) only where advantage had been taken of the minor's inexperience.

The fact that it had been made a criminal offence for an adult to engage in serious homosexual acts with a minor of 14 to 16 years of age or to prompt a minor to commit such acts with another person showed that these laws had been drafted on the assumption that, even where no advantage was being taken of the minor's inexperience, carrying out such acts could interfere with the free development of his or her personality, particularly one of its key features, namely sexual orientation. This meant that the harmonious sexual development of minors had to be secured, particularly where adults were engaging in serious homosexual acts with minors who had reached a certain age, given that experiences of this kind could cause trauma and serious damage to a young person's psychological, intellectual and social development. What was at stake was the protection of legal interests falling within the ambit of the Constitution, i.e. sexual self-determination and, in more general terms, the free development of personality.

Abuse of the minor's inexperience, which was referred to in Article 174 but not in Article 175 of the Criminal Code, meant exploiting (or taking advantage of) the victim's lack of sexual experience and hence relying on less resistance on the victim's part to the serious sexual acts described in the article, causing damage to the adolescent's free sexual development, particularly his or her sexual orientation. Consequently, when the legislation was drafted it had been accepted that circumstances could vary and either that the minor aged 14 to 16 was already sexually active or that he or she had no sexual experience but no advantage had been taken of his or her inexperience. In such cases no threat was posed to the free development of the minor's sexual identity and this had been the justification for pinpointing the typical feature of taking advantage of the minor's inexperience.

The law had been based on the presupposition that homosexual acts between adults and 14 to 16 year-old minors interfered with the free development of the minor's personality, based on the understanding that in this type of offence, it was only the homosexual nature of the acts which was of any significance. However, the parameters of normality and abnormality could not be used, under Articles 13.2 and 26.1 of the Constitution, to justify any difference in legal treatment. It was precisely when dealing with situations which were associated with minority categories or sociologically disadvantaged sectors of the population that the constitutional principle of equality really came into its own, permanently or partly guaranteeing different people's rights and their right to be different.

In conclusion, the Court found that the provision of Article 175 of the Criminal Code under which homosexual acts committed with adolescents were punished even where the perpetrator had not taken advantage of the victim's inexperience was unconstitutional because it violated Articles 13.2 and 26.1 of the Constitution.

Supplementary information:

The judgment refers, *inter alia*, to the repeal, on 31 May 1994, of § 175 (*Homosexuelle Handlungen*) and the amendment to § 182 of the German Criminal Code and the repeal, on 14 August 2002, of § 209 of the Austrian Criminal Code, which punished homosexual acts between men of 19 years of age and over and consenting adolescents aged 14 to 18, followed by the introduction of the current § 207b, including provisions which make no distinction between heterosexual, homosexual or lesbian acts.

It also refers to the case-law of the Commission and the European Court of Human Rights in the cases of *L. and V. v. Austria*, *Sutherland v. the United Kingdom* and *S.L. v. Austria* (§ 39).

Languages:

Portuguese.



Romania

Constitutional Court

Important decisions

Identification: ROM-2005-1-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 20.04.2005 / **e)** 217/2005 / **f)** Decision on referrals regarding unconstitutionality of the provisions of Articles 2.2, 17.1.b and 17.4, 18.3, 30.1, 31.1, 32 and 36 of the law governing the free movement of Romanian citizens abroad / **g)** *Monitorul Oficial al României* (Official Gazette), 417/18.05.2005 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

5.2.2.7 **Fundamental Rights** – Equality – Criteria of distinction – Age.

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

Keywords of the alphabetical index:

Freedom of movement / Married female minor, legal status.

Headnotes:

A married female minor acquires the status of a major, with full legal capacity, and may exercise the fundamental right to free movement, with no restrictions or limitations.

Summary:

In an application made under Article 146.a of the Constitution, the People's advocate asked the Constitutional Court to rule that Articles 2.2, 17.1.b and 17.4 and 28.1 of the law governing the free movement of Romanian citizens abroad were unconstitutional, claiming that these texts were contrary to Articles 16.1, 25.1, 26.1, 48.1 and 53 of the Constitution.

Also pursuant to Article 146.a of the Constitution, the President of Romania applied to the Constitutional Court concerning the unconstitutionality of Articles 2.2, 18.3, 30.1, 31.1, 32 and 36 of the said law with regard to Articles 16, 25 and 53 of the Constitution.

Objections of unconstitutionality were also raised over non-compliance with Article 2.2 Protocol 4 ECHR and Article 16 of the International covenant on civil and political rights.

The challenged provisions of the law governing the free movement of Romanian citizens abroad set out the conditions under which Romanian citizens may travel abroad.

An initial claim of unconstitutionality points out that the challenged provisions establish one distinct legal status regarding freedom of movement for majors aged 18 years and over, and another for married female minors, who have become majors through marriage.

In this respect, the Court held that, under the legal provisions concerning the institution of legal capacity and the restrictions they place on the age of majority, as a rule a physical individual becomes a major upon reaching the age of 18 years, and, exceptionally, a female minor who marries at the age of 16 or, with court approval, at 15, becomes a major on the date of completion of the marriage.

Accordingly, a female minor, married in these legal conditions, acquires the status of a major, so that the principle of equality enshrined by Article 16.1 of the Constitution is not violated. The legislative act challenged does not cover the legal concepts of “minors” and “married female minor”. Consequently, an individual aged 18 years and over and a woman married at the age of 16 or 15 years respectively are in identical situations of having the status of a physical individual with full legal capacity.

Further criticism focused on the legal rules governing the movement of Romanian citizens with reference to the notion of “Romanian citizen aged 18 years or over” in the light of Articles 16.1, 25.1, 53, 26.2 and 48.1 of the Constitution, Article 2.2 Protocol 1 ECHR and Article 16 of the International covenant on civil and political rights.

In this regard, the Court held that the text of the law laying down the conditions in which Romanian citizens aged 18 years and over were authorised to leave the country was unconstitutional, because it excluded married female minors from the category of physical individuals having full legal capacity although the fact of marrying made them majors. This infringes the principle of equality of citizens before the law, with no privilege or discrimination, enshrined by Article 16.1 of the Constitution. Moreover, where spouses are concerned, the Constitution institutes a special guarantee of equality via Article 48.1, which provides that “the family is founded on marriage by free consent between spouses, on their equality [...]”. The restriction

of the exercise of rights by a female minor who has married constitutes inequality of legal status vis-à-vis the spouse, which has no objective or rational justification in Article 53 of the Constitution concerning the restriction of certain rights or freedoms.

The constitutional guarantee of equality between spouses means that the woman must enjoy the same legal treatment as that applicable to her husband, regarding the exercise of the fundamental right to free movement provided for in Article 25.1 and that of the individual right to freely decide on one's actions provided for in Article 26.2 of the Constitution, and not have to exercise those rights in conditions determined by the status of minor.

The text of the law is also in breach of Article 16 of the International covenant on civil and political rights, because it does not recognise the full legal capacity acquired as a result of marriage, as well as of Article 2.2 Protocol 4 ECHR bestowing on all individuals the freedom of movement outside their own country.

Article 36 of the law setting out the conditions in which the public authorities may issue an identity card to a Romanian citizen aged 18 years and over who has returned to Romania, as well as the obligation of a citizen domiciled abroad who “has been sent back under a readmission agreement” or expelled from the territory of the State of domicile, infringes Articles 25, 16 and 53 of the Constitution.

These provisions institute different legal treatment applicable to majors that has no objective or rational justification, as a woman not yet aged 18 but who has become a major through marriage may not exercise her constitutional right to free movement, which violates Article 16 of the Constitution providing a constitutional guarantee of equality of spouses before the law, and Article 1.3 under which “[...] the rights and freedoms of citizens, free development of personality, justice [...] represent supreme values [...]”. Those supreme values are guaranteed by Article 26.1, which stipulates that public authorities shall respect and protect family life, and by Article 48.1 enshrining the principle that the family is founded *inter alia* on equality between the spouses.

Languages:

Romanian.



Slovakia

Constitutional Court

Statistical data

1 January 2005 – 30 April 2005

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 12
- Decisions on the merits by the panels of the Court: 185
- Number of other decisions by the plenum: 4
- Number of other decisions by the panels: 268

Important decisions

Identification: SVK-2005-1-001

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 10.01.2005 / **e)** PL. ÚS 49/03 / **f)** / **g)** *Zbierka zákonov Slovenskej republiky* (Official Gazette), 125/2005; *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
 3.10 **General Principles** – Certainty of the law.
 3.11 **General Principles** – Vested and/or acquired rights.
 5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.

Keywords of the alphabetical index:

Bailiff, office, requirements / Law, retroactive effect.

Headnotes:

The provisions of the Code of Execution (enforcement of court judgments), which, after the most recent amendments, regulate anew and retroactively the moral integrity of bailiffs and which impose again and without an adequate transitional period certain educational requirements for carrying out the tasks of the office of bailiff contradict the principle of the

democratic state governed by the rule of law, as set out by Article 1.1 of the Constitution of the Slovak Republic.

Summary:

The applicants – the Prosecutor General of the Slovak Republic and a group of 32 Members of the National Council of the Slovak Republic (MPs) (in individual applications heard by the Constitutional Court in joint proceedings) challenged the conformity of the above-mentioned provisions of the Code of Execution with the Constitution of the Slovak Republic and the Additional Protocol to the Convention on Human Rights and Fundamental Freedoms.

The applicants objected that the most recent amendments to the Code of Execution did not adequately protect the rights legally acquired in the past by bailiffs. Those amendments, they argued, discriminated against bailiffs in comparison to some other groups, restricted their fundamental right to property and the right to the free choice and practice of a profession. The applicants argued that the transitional provisions adopted (those requiring bailiffs to be newly qualified within a stated period) violated the principle of legal certainty and the prohibition on the retroactivity of legal regulations.

The Constitutional Court partly agreed with the applicants' applications and declared which provisions it considered contradictory to the Constitution of the Slovak Republic; the other parts of the applications were rejected.

The Constitutional Court of the Slovak Republic declared that those provisions of the Code of Execution that amended the content of the concept "moral integrity" – significant for carrying out the tasks of the office of bailiff – contradicted the Constitution. The Court also found that it was contradictory to the Constitution for bailiffs appointed in the past to have to meet that criterion too. Another provision set out new terms for the necessary educational requirements for carrying out the tasks of the office of bailiff. The Constitutional Court of the Slovak Republic considered that provision incompatible with the principle of the democratic state governed by the rule of law, entrenched in the Constitution of Slovakia.

Judge J. Babjak delivered a dissenting opinion.

Languages:

Slovak.



Slovenia

Constitutional Court

Statistical data

1 January 2005 – 30 April 2005

The Constitutional Court held 23 sessions (13 plenary and 10 in chambers) during this period. There were 372 unresolved cases in the field of the protection of constitutionality and legality (denoted U- in the Constitutional Court Register) and 808 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 January 2005). The Constitutional Court accepted 151 new U- and 399 Up- new cases in the period covered by this report.

In the same period, the Constitutional Court decided:

- 91 cases (U-) in the field of the protection of constitutionality and legality, in which the Plenary Court made:
 - 28 decisions and
 - 63 rulings;
- 42 cases (U-) cases joined to the above-mentioned for joint treatment and adjudication.

Accordingly the total number of U- cases resolved was 133.

In the same period, the Constitutional Court resolved 228 (Up-) cases in the field of the protection of human rights and fundamental freedoms (16 decisions issued by the Plenary Court, 212 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, all decisions and rulings are published and submitted to users:

- in an official annual collection (Slovenian full text versions, including dissenting/concurring opinions, and English abstracts);
- in the *Pravna Praksa* (Legal Practice Journal) (Slovenian abstracts, with the full-text version of the dissenting/concurring opinions);
- since 1 January 1987 via the on-line STAIRS database (Slovenian and English full text versions);
- since June 1999 on CD-ROM (complete Slovenian full text versions from 1990 onwards, combined with appropriate links to the text of the Slovenian Constitution, Slovenian Constitutional Court Act, Rules of Procedure of the Constitutional Court and the European Convention for the Protection of Human Rights and Fundamental Freedoms – Slovenian translation);
- since September 1998 in the database and/or Bulletin of the Association of Constitutional Courts using the French language (A.C.C.P.U.F.);
- since August 1995 on the Internet, full text in Slovenian as well as in English <http://www.us-rs.si>;
- 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-2005-1-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 17.02.2005 / **e)** U-I-217/02 / **f)** / **g)** *Uradni list RS* (Official Gazette RS), 24/05 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian).

Keywords of the systematic thesaurus:

- 1.3.1.1 **Constitutional Justice** – Jurisdiction – Scope of review – Extension.
 - 3.3.2 **General Principles** – Democracy – Direct democracy.
 - 3.9 **General Principles** – Rule of law.
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3.12 **General Principles** – Clarity and precision of legal provisions.

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

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

4.9.9.4 **Institutions** – Elections and instruments of direct democracy – Voting procedures – Identity checks on voters.

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

5.3.41.3 **Fundamental Rights** – Civil and political rights – Electoral rights – Freedom of voting.

Keywords of the alphabetical index:

Referendum, initiative, procedure / Election, vote, right, citizens residing abroad.

Headnotes:

The Constitutional Court held that the unconstitutionality of certain provisions of Section 2 of Chapter II of the Referendum and People's Initiative Act (RPIA), in the part relating to preliminary procedures, in particular, Articles 13.3, 13.5 and 18, led to such an inconsistency of the entire regulation of preliminary procedures that the striking out of only certain provisions or the mere declaration of the unconstitutionality of gaps in the law was not possible. The striking out of the whole section regulating preliminary referendums was necessary.

The Constitutional Court held that Article 13.3 of the RPIA did not regulate with sufficient precision and clarity the powers of the President of the National Assembly, the legal position of an initiator, and the judicial protection against decisions of the President of the National Assembly. Filling the gap in the law by *mutatis mutandis* application of the Rules of Procedure of the National Assembly did not on its own suffice. The powers of the President of the National Assembly regarding the filing of an initiative and judicial protection against his or her decisions would still be insufficiently regulated, thereby necessitating the adoption of a special regulation.

The Constitutional Court also held the RPIA to be inconsistent with Article 38 of the Constitution (protection of personal data), as the personal data of voters who support an initiative to lodge a request for calling a referendum should not be part of documents used in the subsequent referendum procedure or the protection of that personal data should be ensured in some other manner.

The Constitutional Court did not find a constitutionally admissible, i.e. legitimate, aim in the statutory regulation setting out that voters who cannot personally come to an administrative division due to illness, medical treatment or disability cannot support a request for calling a referendum. The manner in which voters support such a request should be more precisely determined and should not depend on instructions and directions given by the competent authority or the minister.

The Constitutional Court found the impugned regulation to be inconsistent with Article 44 (participation in the management of public affairs) in conjunction with Article 90.3 of the Constitution (legislative referendum), since there was no substantiated reason for limiting the constitutional right to support a request for calling a referendum of those voters who do not permanently reside in Slovenia, and are entered in the electoral register of citizens who do not permanently reside in Slovenia.

Furthermore, the Constitutional Court did not find a sound reason in support of the regulation laying down that Slovenian citizens, temporarily residing abroad or who are abroad during the time signatures are collected to support a request for calling a referendum, and who for that reason cannot give their personal support before the authority in charge of the electoral register, cannot exercise their right to a referendum in a preliminary procedure. The Constitutional Court therefore held that the impugned regulation was inconsistent with Article 44, in conjunction with Article 90.3 of the Constitution.

In accordance with the requirement that the statutory regulation of a referendum must ensure an effective exercise of the right to a referendum, the Constitutional Court held that the regulation in Article 18 of the RPIA was incomplete and thus inconsistent with the principle of determinacy of legal norms, as one of the principles of a state governed by the rule of law laid down by Article 2 of the Constitution. The Act should contain at least the crucial rules concerning the manner of submitting referendum questions, in particular, in cases where a referendum question proposes how a certain issue should be regulated.

The RPIA should contain provisions preventing a referendum from being called where repeated initiatives make it possible to establish the existence of unconstitutional intentions on the part of the persons submitting those initiatives.

Summary:

The Constitutional Court considered a petition for the review of the constitutionality of Article 13.3 and 13.5 of the Referendum and People's Initiative Act (hereinafter RPIA). These two provisions determined the form and contents of an initiative for calling a referendum, the manner in which initiators must inform the President of the National Assembly of such an initiative, and the form of the support (signatures) that may be given by people to such an initiative.

The petitioners argued that the preliminary phase of the procedure for calling a referendum was vague. They also pointed out the inadequate regulation of powers vested in the President of the National Assembly regarding an initiative once it has been filed, as well as the possible abuse of personal data contained in the list of voters whose signatures appear in support of an initiative to file a request for calling a referendum. The petitioners further raised the issue of whether Slovenian citizens who permanently reside abroad should also be granted the right to participate in the procedure of the collection of signatures to support a request calling a referendum, and not only the right to vote at the referendum.

The Constitutional Court did not limit itself to only reviewing the impugned provisions, but also addressed (by applying the principle of linking issues, which it has authority to do under Article 30 of the Constitutional Court Act) the issue of the constitutionality of other RPIA provisions. It found that other RPIA provisions were mutually connected with the impugned provisions in such a manner that the mere finding of the unconstitutionality of the impugned provisions could entail the inconsistency of the Act as a whole, which could entail its inconsistency with Article 2 of the Constitution (the principle of a state governed by the rule of law). Therefore, the Constitutional Court extended its review of the RPIA to those provisions which were connected with the carrying out of the preliminary procedure, that procedure being a preliminary phase of the procedure for calling a preliminary legislative referendum (i.e. referendum which may be carried out before a law formally takes effect).

The Constitutional Court decided to strike out the entire Section 2 of Chapter II of the RPIA, in the part relating to a preliminary legislative referendum. However, it postponed the entering into effect of its decision for one year, thus giving the National Assembly time to amend the unconstitutional part of RPIA. After the expiry of that time limit, the unconstitutional part of RPIA would be automatically "erased" from the legal system of Slovenia.

Among the reasons for its decision, the Constitutional Court held that the unconstitutionality of certain provisions of Section 2 of Chapter II of the RPIA, in the part relating to preliminary procedures, in particular Articles 13.3, 13.5 and 18, led to the inconsistency of the entire regulation of preliminary procedures. More specifically, the Constitutional Court established that Article 13.3 of the RPIA did not regulate with sufficient precision and clarity the powers of the President of the National Assembly, the legal position of an initiator, and judicial protection against decisions of the President of the National Assembly in such matters.

Supplementary information:

Legal norms referred to:

- Articles 2, 38, 44 and 90 of the Constitution (URS);
- Article 43 of the Constitutional Court Act (CCA).

Languages:

Slovenian, English (translation by the Court).



South Africa Constitutional Court

Important decisions

Identification: RSA-2005-1-001

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 21.02.2005 / **e)** CCT 12/2004 / **f)** Richard Gordon Volks NO v. Ethel Robinson and Others / **g)** <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT20-04> / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Maintenance, obligation / Maintenance, statutory / Cohabitation, surviving partner, maintenance.

Headnotes:

It is fair to differentiate between survivors of marriage and survivors of heterosexual cohabitation relationship. It is a constitutional and an international obligation to protect the right to marry and the institution of marriage. Marriage is a matter of choice. Dignity is an underlying consideration in the determination of unfairness.

Summary:

Mrs Robinson was in a permanent life partnership with a man from 1985 until his death in 2001. After his death she submitted a maintenance claim against his estate in terms of the Maintenance of Surviving Spouses Act 27 of 1990 (the Act). Mr Volks, the executor of the estate, refused her claim because she was not a “survivor” entitled to maintenance in terms of the Act, which only included “spouses”. She launched proceedings in the High Court and successfully challenged the definition of the term “survivor” in the Act. The claim was upheld because

her relationship with the deceased was a “monogamous permanent partnership” substantially similar to a marriage. The exclusion of permanent life partners was found to be in violation of the rights to equality and dignity and therefore unconstitutional. The Court read in words to cure the under-inclusiveness of the Act. The matter came to the Constitutional Court.

Skweyiya J for the majority held that the purpose of the Act is to extend an invariable consequence of marriage beyond the death of a spouse so as to deal with the vulnerability caused by the cessation of maintenance obligations upon death. The distinction between married and unmarried people cannot be said to be unfair when considered in the larger context of the rights and obligations uniquely attached to marriage. Whilst there is a reciprocal duty of support between married persons, the law imposes no such duty upon unmarried persons. To extend the provisions of the Act to the estate of a deceased person who was not obliged during his or her lifetime to maintain his or her partner would amount to imposing a duty after death where none existed during his or her lifetime. Thus the differentiation in relation to the provision of maintenance in terms of the Act does not amount to unfair discrimination; neither does it violate the dignity of surviving partners of life partnerships.

In a separate concurring judgment, Ngcobo J found that, although the challenged provisions of the Act discriminate against the survivors of heterosexual permanent life partnerships, such discrimination is not unfair. Although the Constitution contains no express provision protecting the right to marry, it nevertheless recognises the institution of marriage. This constitutional recognition of marriage is consistent with South Africa’s obligations under international and regional human rights instruments.

People involved in a relationship may choose not to marry because they do not wish to accept the legal consequences of marriage. To impose the legal consequences of a marriage on them would be to undermine the right to marry freely and the nature of the agreement inherent in marriage. The judge concluded that the challenged provisions do not unfairly discriminate against heterosexual couples involved in a permanent life partnership and accordingly the provisions are not unconstitutional.

Sachs J, dissenting, held that where a woman has given her all for the family and the father of her children, it is not only socially but legally unfair to leave her without means of subsistence just because she had no marriage certificate. The critical question is whether there is a family relationship of such

proximity and intensity between an intimate life-partnership survivor and the deceased as to render it unfair to deny her the right to claim maintenance after his death. The pre-democratic statute must be interpreted in the light of new constitutional values which recognise the diverse ways in which families have been constituted in our country. Looked at from the wider perspective of family law rather than within the rigid confines of matrimonial law, the Act discriminates unfairly in respect of parties that freely and seriously commit themselves to a life of interdependence marked by express or tacit undertakings to provide each other with emotional and material support. This also applies in respect of relationships that produce dependency for the party who, in material terms at least, is the more vulnerable one and who, in all probability, has been unable to insist that the deceased formally marry her. What matters is the nature of the relationship and the condition of need of the survivor, particularly when that need arises because of her position in the family.

Mokgoro and O'Regan JJ, dissenting, stated that where relationships that serve a similar social function to marriage are not regulated in the same way as marriage, discrimination on the ground of marital status arises. They noted that some forms of cohabitation relationships, including the relationship between the respondent and the deceased, do serve a similar social function to marriage. As Section 2.1 of the Act only makes provision for maintenance for surviving spouses and not for cohabitants, it constitutes discrimination on the grounds of marital status. In concluding that such discrimination is unfair, they noted that cohabiting couples have been stigmatised in the past. The discriminatory provision thus leaves all survivors of a cohabitation relationship without any protection even where they have entered into reciprocal duties of support during the relationship and they are financially vulnerable on the death of their partner. They stated that the unfair discrimination is not justifiable because the purpose of the Act can be achieved without excluding surviving partners of cohabitation relationships and in light of the common law rule prohibiting a contractual arrangement between partners to regulate their affairs posthumously. They accordingly found the provisions unconstitutional to the extent that the definition of "spouse" does not include surviving partners of a permanent heterosexual life partnership terminated by death where partners have undertaken a reciprocal duty of support and in circumstances where the surviving partner has not received an equitable share in the deceased partner's estate. They propose the suspension of this order for a period of two years to enable the Legislature to rectify the constitutional defect.

Cross-references:

- *Satchwell v. President of the Republic of South Africa and Another*, 2002 (6) SA 1 (CC), 2002 (9) BCLR 986 (CC);
- *Investigating Directorate: Serious Economic Offences and Others v. Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v. Smit NO and Others*, 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 (CC), *Bulletin* 2000/2 [RSA-2000-2-011];
- *Fraser v. Children's Court, Pretoria North, and Others*, 1997 (2) S SA 261 (CC), 1997 (2) BCLR 153 (CC).

Languages:

English.



Identification: RSA-2005-1-002

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 11.03.2005 / **e)** CCT 27/2004 / **f)** The Affordable Medicines Trust and Others v. The Minister of Health and Another / **g)** <http://www.constitutional.court.org.za/uhtbin/hyperion-image/J-CCT20-04> / **h)** CODICES (English).

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.
- 3.13 **General Principles** – Legality.
- 3.19 **General Principles** – Margin of appreciation.
- 4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.
- 5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.

Keywords of the alphabetical index:

Profession, freedom to exercise, regulation / Drug, pharmaceutical, conditioning and dispensing, licence.

Headnotes:

Discretion has an important role to play in decision making. Delegation of power must not be so broad or vague that the authority to whom power is delegated is unable to determine the nature and scope of the powers conferred. There must be some constraints on the exercise of power that will generally appear from the provisions and objectives of the empowering statute.

The exercise of all legislative power is subject to two constitutional constraints:

- a. there must be a rational connection between the legislation and the achievement of a legitimate government purpose; and
- b. legislation must not infringe fundamental rights in the Bill of Rights.

The exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality, which is part of that law.

The legislature may not regulate the right to choose a profession to the same degree that it regulates the right to practise a profession.

Summary:

The applicants, representing the interests of medical practitioners, brought a constitutional challenge against a scheme introduced by government requiring medical practitioners who dispense medicine to obtain a licence. They objected on three grounds. First, they contended that Section 22C.1.a of the Medicines and Related Substances Act 101 of 1965 (the Act), in as far as it allows the Director-General to issue licences to medical practitioners on the prescribed conditions, is unconstitutional. They argued that the section is overbroad and vague because it gives the Director-General wide, unlimited and uncircumscribed arbitrary legislative powers. They claimed that it is therefore in breach of the principle of legality.

Second, they argued that regulation 18, which allows the Director-General to link a licence to compound and dispense medicines to specific premises, is not authorised by Sections 22C.1.a and 35 of the Act. The Minister of Health thus exceeded her powers when making regulation 18 and thereby breached the principle of legality. Alternatively, they claimed that linking a licence to compound and dispense medicines to premises falls outside the purview of Section 22 of the Constitution, which allows the practice of a profession to be regulated by law.

Third, sub-regulations 18.3, 18.5, 18.6 and 18.7 were attacked for vagueness as they do not have an objectively ascertainable meaning. Sub-regulations 18.3 and 18.5 read together create a framework for refusing a licence where there is a pharmacy in the vicinity of the premises from which an applicant for a licence intends dispensing medicines. It was argued that this is also an infringement of the principle of legality.

The respondents submitted that the existence of a licensing scheme is essential to the governmental objective of increasing access to medicines that are safe for consumption by the public. They contended that the previous licensing scheme was not adequately regulated and there were no standards to ensure compliance with good dispensing practices. They argued that the licensing scheme is therefore rationally related to the governmental objective and is authorised by the Act.

Justice Ngcobo, for a unanimous court, found that Section 22C.1.a confers wide discretionary powers on the Director-General to determine conditions upon which a licence may be issued, and that the statutory framework provides sufficient guidance for the exercise of those powers. These powers include the power to make regulations with regard to any matter for the purposes of ensuring the safety, quality and efficacy of medicines. He concluded that linking the licence to dispense medicines to particular premises is rationally connected to the government's objective of increasing access to medicines that are safe for consumption. The challenge to Section 22C.1.a was dismissed because the regulation at issue relates to the practice of the medical profession and not the right to choose a profession. It regulates practice in a manner that will not negatively affect the choice of a profession.

Moreover, he found that in making regulations that link the licence to compound and dispense medicines to specific premises, the Minister had not exceeded her powers under the Act.

He noted that the doctrine of vagueness is founded on the rule of law which is a foundational value of our constitutional democracy. While it requires that law must be written in a clear and accessible manner, it does not require absolute certainty of laws. What is required is reasonable certainty and not perfect lucidity.

The judge proceeded to consider sub-regulations 18.3, 18.5, 18.6, and 18.7 and found only sub-regulation 18.5 to unconstitutional. He held that sub-regulation 18.5 sets out factors which the Director-General must take into account in considering an application for a licence, is clear and

unambiguous and accordingly, not vague. The problem, according to him, lies elsewhere. The manifest purpose of the sub-regulation is to protect pharmacies against competition from medical practitioners and to limit the rights of medical practitioners to dispense medicines within a close geographical proximity to pharmacies. This purpose, the judge held, is not discernible from the Medicines Act and nothing in the Act empowers the Minister to develop such a policy through regulations. The judge concluded that on these grounds the sub-regulation must fail. It is not authorised by the empowering Act and is therefore unconstitutional. The Minister exceeded her powers and the appropriate remedy is to strike down the specific effecting provision.

Cross-references:

- *Pharmaceuticals Manufacturers Association of South Africa in re: Ex parte President of the Republic of South Africa and Others*, 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC), *Bulletin* 2000/1 [RSA-2000-1-003];
- *New National Party of South Africa v. Government of the Republic of South Africa and Others*, 1999 (3) SA 1 (CC), 1999 (5) BCLR 489 (CC), *Bulletin* 1999/1 [RSA-1999-1-003];
- *State v. Lawrence; State v. Negal; State v. Solberg*, 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC), *Bulletin* 1997/3 [RSA-1997-3-010].

Languages:

English.



Identification: RSA-2005-1-003

a) South Africa / b) Constitutional Court / c) / d) 13.05.2005 / e) CCT 20/04 / f) President of the Republic of South Africa and Another v. Modderklip Boerdery (Pty) Ltd and Others / g) <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT20-04> / h) CODICES (English).

Keywords of the systematic thesaurus:

1.6.6.1 **Constitutional Justice** – Effects – Execution – Body responsible for supervising execution.

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

3.18 **General Principles** – General interest.

4.7.16.1 **Institutions** – Judicial bodies – Liability – Liability of the State.

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

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

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

Keywords of the alphabetical index:

Fundamental right, state, duty to guarantee the execution / Land, ownership, protection / Occupier, unlawful, eviction.

Headnotes:

The state's duty, in certain circumstances, goes further than the mere provision of mechanisms with which to enforce rights. The state is also obliged to ensure that court orders are complied with in terms of the rule of law. The state has an obligation, in certain circumstances, to take steps to ensure that the constitutional right to an effective remedy is realised.

Summary:

After Modderklip Boerdery (Pty) Ltd was given notice by the Benoni City Council to institute eviction proceedings against the approximately 400 people who were occupying its farm unlawfully, Modderklip responded that it regarded eviction to be the state's responsibility. It added that it would assist the City Council to the extent necessary. After the Council took no steps, Modderklip instituted and succeeded with criminal charges against the unlawful occupiers. Those occupiers convicted, however, were given warnings by court and returned to the farm. Modderklip also offered to sell the farm to the Council and it sought help from various other organs of state. Nothing came from any of these initiatives. Meanwhile the number of unlawful occupants grew to about 40,000 people.

Modderklip instituted proceedings for an eviction order. The order was granted but never complied with because to implement it the sheriff, who had to engage a security company to help her, required a deposit of an amount which exceeded the value of the property. The police refused to enforce the eviction order because it regarded the matter as private civil dispute between Modderklip and the occupiers. Moreover, they did not know where the occupiers would go without occupying land elsewhere.

Finding itself with an order it could not enforce, Modderklip approached the Pretoria High Court. The Court ruled in favour of Modderklip and used a structural interdict requiring the state to present a comprehensive plan to the Court and indicating the steps it would take to implement the order. The state appealed to the Supreme Court of Appeal, which required the state to pay compensation to Modderklip for the loss occasioned by the unlawful occupiers. The compensation was to be computed in terms of the Expropriation Act.

Before the Constitutional Court, the state argued that as Modderklip's rights had been breached by private individuals, there was no breach by the state. Langa ACJ, in a unanimous judgment, held that the state's obligation goes further than the mere provision of mechanisms and institutions with which to enforce rights. The state has the obligation to take reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law. It was unreasonable of the state to stand by and do nothing when Modderklip found it impossible to evict the unlawful occupiers. Land invasions of this scale threaten far more than the private rights of a single owner and have the potential to have serious implications for stability and public peace. They should always be discouraged.

Langa ACJ found that in this case an obligation rested on the state to take reasonable steps to ensure that Modderklip was provided with effective relief. It could have expropriated the property in question or provided other land. The failure of the state to do anything amounted to a breach of Modderklip's constitutional right to an effective remedy as required by the rule of law and the Constitution. The Court agreed with the Supreme Court of Appeal that an appropriate remedy is one that requires the state to pay compensation to Modderklip for the unlawful occupation of its property in violation of its rights. The compensation ensures that the occupiers will have accommodation until suitable alternatives are found and it relieves the state of the task of having to immediately find such alternatives.

Cross-references:

- *Fose v. Minister of Safety and Security* 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC);
- *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (1) BCLR 1169 (CC), *Bulletin* 2000/3 [RSA-2000-3-015];
- *Chief Lesapo v. North West Agricultural Bank and Another* 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420;

- *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC).

Languages:

English.



Identification: RSA-2005-1-004

a) South Africa / b) Constitutional Court / c) / d) 25.05.2005 / e) CCT 45/04 / f) Sibiya and Others v. The Director of Public Prosecutions (Johannesburg High Court) and Others / g) <http://www.constitutional-court.org.za/uhtbin/hyperion-image/J-CCT45-04> / h) CODICES (English).

Keywords of the systematic thesaurus:

1.3.3 **Constitutional Justice** – Jurisdiction – Advisory powers.
 3.4 **General Principles** – Separation of powers.
 4.4.1.3 **Institutions** – Head of State – Powers – Relations with judicial bodies.
 4.7.4.1.6.1 **Institutions** – Judicial bodies – Organisation – Members – Status – Incompatibilities.
 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.

Keywords of the alphabetical index:

Death penalty, abolition / Sentence, alternative form / Sentence, commuting.

Headnotes:

This case concerns the statutory procedure enacted to provide for sentences of the death penalty to be substituted by other sentences after the Constitutional Court declared the death penalty to be unconstitutional in 1995. In terms of Section 1.1-1.5 of the Criminal Law Amendment Act 105 of 1997, this procedure allows for the empowerment of the President to impose a fresh sentence on a convicted person on the advice of a judge in cases where all appeal and review remedies have been exhausted. This does not amount to a violation of the fair trial rights as encompassed under Section 35.3 of the Constitution. According to the Constitutional Court

judgment, the state may not execute any person already sentenced to death under any of the provisions declared to be invalid by the Court. All people who had been sentenced to death were to remain in custody under the sentences imposed on them, until such sentences have been set aside in accordance with law and substituted by lawful punishments. There is no absolute bar to judges performing administrative tasks. The question in each case is whether the administrative task is so far from judicial function and so closely wound up with the executive function that it is incompatible with judicial office.

Summary:

Aaron Sibiya, Purpose Khumalo, Petrus Geldenhuys and David Nkuna (the applicants) were all sentenced to death by various divisions of the High Court prior to the 1995 Constitutional Court decision, *S. v. Makwanyane and Another*, declaring the death sentence to be unconstitutional.

As a result of the decision in *S. v. Makwanyane*, Section 1 of the Criminal Law Amendment Act 105 of 1997 (the Act) was promulgated. This section seeks to provide a procedure for the substitution of all sentences of death imposed but not executed before the Makwanyane decision. In cases where all appeal and review remedies have been exhausted, the President is empowered to impose a fresh sentence on the advice of the judge who heard the initial case. The President has no power to impose a sentence other than that recommended by the judge.

The applicants applied to the Witwatersrand Local Division of the High Court in February 2002 for their release as well as an order declaring Section 1 of the Act unconstitutional. The High Court refused to grant the order, but declared Section 1.1-1.5 of the Act unconstitutional on the basis that it violated the right to a fair trial as envisaged in the Constitution. It also set aside the Presidential substitution in respect of one of the applicants.

Yacoob J, writing for a unanimous court, held that there was no need to comply with the fair trial rights contained in the Constitution as those affected by the legislation in question had already had the benefit of a fair trial in which they had been tried, convicted, and sentenced, and had also exercised their right to appeal. He held further that there is nothing wrong with a judge deciding what a sentence should be or with the President thereafter formally imposing the sentence decided on by the said judge. Yacoob J went on to say that there is nothing unconstitutional about the challenged Act but observed that the process for the substitution of the death sentence had

been unsatisfactory and had taken far too long. Accordingly the state was ordered to take all the necessary steps to replace all death sentences as soon as possible and to report to the Constitutional Court before 15 August 2005, providing details of the steps taken, the result of these steps and the steps still to be taken in relation to each person still on death row since the decision in *Makwanyane* was handed down.

Cross-references:

- *S. v. Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC); *Bulletin* 1995/3 [RSA-1995-3-002];
- *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC);
- *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others* 1999 (2) SA 14 (CC), 1999 (2) BCLR 175 (CC);
- *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others* 2000 (1) SA 1 (CC), 1999 (10) BCLR 1059 (CC); *Bulletin* 1999/3 [RSA-1999-3-008];
- *South African Association of Personal Injury Lawyers v. Heath and Others* 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC); *Bulletin* 2000/3 [RSA-2000-3-017].

Languages:

English.



Identification: RSA-2005-1-005

a) South Africa / b) Constitutional Court / c) / d) 27.05.2005 / e) CCT 42/2004 / f) Laugh It Off Promotions CC v. South African Breweries International (Finance) B.V. t/a Sabmark International / g) <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT42-04> / h) CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

5.4.12 **Fundamental Rights** – Economic, social and cultural rights – Right to intellectual property.

5.4.22 **Fundamental Rights** – Economic, social and cultural rights – Artistic freedom.

Keywords of the alphabetical index:

Trademark, close reproduction, economic harm / Detriment, serious / Anti-dilution rules.

Headnotes:

Intellectual property, like other property, does not enjoy special status under the Constitution. The legitimate purpose of anti-dilution rules is to preserve trade and commercial interests of owners of trademarks which have a reputation. Trademark dilution occurs in two ways: by blurring or by tarnishment. Anti-dilution rules should be interpreted so as not unduly to limit freedom of expression. Freedom of expression is a vital incidence of dignity, equal worth and freedom.

Summary:

Sabmark International (the respondent), which licences trademarks to SAB Ltd, discovered that Laugh It Off Promotions CC (the applicant) was producing and selling T-shirts that lampooned its trade mark. One of the applicant's such T-shirts bore a print that was markedly similar to that of the respondent's CARLING BLACK LABEL trade marks. The words "Black Label" on the respondent's registered trade marks were replaced with "Black Labour"; the respondent's "Carling Beer" was substituted with "White Guilt"; and where written "America's lusty lively beer" and "enjoyed by men around the world", the applicant had printed "Africa's lusty lively exploitation since 1652" and "No regard given worldwide", respectively.

The applicant applied to this court for leave to appeal against the judgement of the Supreme Court of Appeal, which confirmed the Cape High Court order. The interdict was granted in terms of Section 34.1.c of the Trade Marks Act 194 of 1993 (the Act) because the applicant's use of the mark would be likely to take unfair advantage of, or cause detriment to, the repute of the trade marks. The applicant contended that the mark on its T-shirts either criticises the way SAB

markets its beer by targeting black workers, or generally criticises the exploitation of blacks by whites and that the right to freedom of expression protects both these messages. An interpretation of the anti-dilution provision that gives adequate effect to this right does not allow the respondent to obtain an interdict, except where it has shown that it is likely to suffer economic harm.

The respondent opposed the application on the basis that the right to freedom of expression does not protect the applicant's use of the CARLING BLACK LABEL marks and does not need to prove the likelihood of economic harm to obtain an interdict.

The Freedom of Expression Institute, which was admitted as *amicus curiae*, argued that the protection of the trademark must be interpreted in the light of the constitutional right to freedom of expression and allow parody as an instance of "fair use" that does not violate the anti-dilution provision.

Writing for the Court Moseneke J found that the respondent failed to prove the applicant's infringement of its trade marks. This was because the likelihood of taking advantage of, or being detrimental to, the distinctive character or repute of the marks had not been established. The rights of persons to express themselves cannot be lightly limited: the harm to the trade mark holder has to be material, this being one of the internal limitations of Section 34.1.c.

An interpretation of the section that conforms to the Constitution and the kind of society it envisions requires one relying on the protection of the Act to show a real likelihood of economic harm. This is because the aim of the section is to protect the trademark's selling power rather than its dignity. It cannot therefore be inferred from a mere observation of the two marks that there is a likelihood of economic harm. This must be shown by adducing evidence to this end. To allow otherwise would be to permit a near-monopoly on the part of the trademark holder. This is impermissible in a democracy such as ours.

The Court was of the view that it is not necessary to decide the question of parody in this case because no likelihood of economic harm had been shown. However, it noted that our Constitution does not exclude, or afford special protection to, any forms of expression other than those falling under Section 16.2. Hence, all speech is protected and must be appropriately balanced against other rights, of which the right to property (including intellectual property) is one. Placing the onus on the trademark holder to adduce evidence to prove the likelihood of substantial economic harm as a result of the applicant's expressive conduct is an appropriate

balance of these rights. In this case the applicant is not selling another beer in competition with the respondent but is rather involved in the sale of “an abstract brand criticism” for which T-shirts are merely a choice of medium. Such expressive conduct is acceptable in terms of our Constitution and in light of the respondent’s failure to establish likelihood of economic harm, not an infringement of the Act.

Leave to appeal was thus granted and the order of the Supreme Court of Appeal set aside.

Concurring in the judgment, Sachs J was of the view the respondent’s case fails not only because of lack of evidence. Parody is central to the challenge to the cultural hegemony exercised by brands in contemporary society. The issue is not whether the Court thinks the lampoons on the T-shirts are funny, but whether the applicant should be free to issue the challenge. In his view, the expression of humour is not only permissible, but necessary for the health of democracy.

Cross-references:

- *Bata Ltd v. Face Fashions CC and Another* 2001 (1) SA 844 (SCA);
- *Triomed (Pty) Ltd v. Beecham Group p/c and Others* 2001 (2) SA 522 (T);
- *Klimax Manufacturing Ltd v. Van Rensburg* [2004] 2 *All South African Reports* 301(O);
- *National Brands Ltd v. Blue Lion Manufacturing (Pty) Ltd* 2001 (3) SA 563 (SCA).

Languages:

English.



Identification: RSA-2005-1-006

a) South Africa / b) Constitutional Court / c) / d) 13.06.2005 / e) CCT 52/2004 / f) N.K. v. The Minister of Safety and Security / g) <http://www.constitutional.court.org.za/uhtbin/hyperion-image/J-CCT52-04> / h) CODICES (English).

Keywords of the systematic thesaurus:

4.7.16.1 **Institutions** – Judicial bodies – Liability – Liability of the State.

4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.

4.14 **Institutions** – Activities and duties assigned to the State by the Constitution.

5.3.12 **Fundamental Rights** – Civil and political rights – Security of the person.

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

Keywords of the alphabetical index:

Assault, sexual / Citizen’s confidence in the state / State, duty to guarantee the protection of fundamental rights and freedoms / Police, officer, deviation from duty.

Headnotes:

The State has a constitutional duty to ensure the safety and security of the public. This duty is effected on behalf of the State by members of the police service. The State is therefore vicariously liable for delicts committed by members of the police during the course and scope of their employment against members of the public even though the delicts may be antithetical to the duties of the police.

Summary:

The applicant sought to recover damages in delict from the Minister of Safety and Security for the harm she suffered as a result of being raped and assaulted by three uniformed and on-duty police sergeants. They were subsequently convicted for rape and kidnapping, and sentenced to life imprisonment by the Johannesburg High Court.

The applicant argued that as the employer of the police officers, the Minister is vicariously liable for the delict committed against her.

The main issue in the case was whether the Minister was liable to pay damages for the actions of the policemen against the applicant.

O’Regan J, writing for a unanimous court, held that the Minister was liable for the conduct of the policemen. She reviewed the existing common-law principles of vicarious liability and the approach taken

to vicarious liability in certain other jurisdictions. She then concluded that although it was clear that the policemen's conduct constituted a clear deviation from their duty, there was a sufficiently close relationship between their employment and the wrongful conduct. Three factors lead to the conclusion that the Minister was liable:

- First, the fact that the policemen bore a statutory and constitutional duty to prevent crime and protect the members of the public – a duty which also rests on their employer (the Minister).
- Secondly, the fact that the applicant accepted an offer of assistance from the policemen in circumstances in which she needed assistance, it was their duty to supply it and it was reasonable of her to accept assistance.
- Thirdly, the fact that the wrongful conduct of the policemen coincided with their failure to perform their duties to protect the applicant.

The judgment emphasises that the Constitution mandates members of the police to protect community members and that for this mandate to be performed efficiently, reasonable trust must be placed in members of the police service by members of the public.

O'Regan J accordingly held that in these circumstances the Minister was liable to pay damages to the applicant for the wrongful conduct of the policemen and referred the matter back to the High Court for the amount of damages to be determined by that Court.

Cross-references:

- *Feldman v. Mall* 1945 Appellate Division 733;
- *Minister of Police v. Rabie* 1986 (1) SA 117 (A);
- *Carmichele v. Minister of Safety and Security and Another* 2001 (4) SA, 2001 (10) BCLR 995, *Bulletin* 2001/2 [RSA-2001-2-010];
- *S. v. Thebus and Another* 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100.

Languages:

English.



Sweden

Supreme Administrative Court

Important decisions

Identification: SWE-2005-1-001

a) Sweden / **b)** Supreme Administrative Court / **c)** Grand Chamber / **d)** 04.02.2005 / **e)** 3841-04 / **f)** / **g)** *Regeringsrättens Årsbok* / **h)** CODICES (Swedish).

Keywords of the systematic thesaurus:

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

5.3.13.14 **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, participation in a law-making procedure.

Headnotes:

A prior responsibility for producing a legislative proposal based on political considerations cannot be considered to cast doubt on the judicial impartiality of a person called on to determine a dispute over the application of the same legislation.

Summary:

Company L filed an application, concerning a gambling licence, with the Government and maintained that the Swedish legislation on lotteries with its ban on promotion of gambling organised abroad was incompatible with Community Law. The application was however rejected.

The case was then brought to the Supreme Administrative Court (*Regeringsrätten*) where the company requested an oral hearing. The Court, composed of five judges, decided that the case should be handled without an oral hearing.

The company then voiced doubts as to the impartiality of the Court and argued that three of its five members, namely Justices X, Y and Z, had previously been involved in the subject of the dispute in their former positions at the Ministry of Finance and at the Court of Justice of the European Communities and were therefore biased in that respect. The company also referred to Article 6 ECHR.

The complaint of the lack of impartiality was then handled by the Court with another set of judges, who stated essentially as follows. Objective impartiality within the meaning of the Convention implies that an objective observer has no reasonable doubts as to the impartiality of the Court. However, it is not easy to draw definite conclusions from the case-law of the European Court of Human Rights in this respect. What one might gather from the case-law is that where a judge has previously been involved in the subject of the dispute, the question of impartiality must be assessed in view of his position and function at that time (see the judgments of the European Court of Human Rights, *Procola v. Luxemburg* and *Kleyn and others v. the Netherlands*).

Justice X was a former Director-General for Legal and Administrative Affairs at the Ministry of Finance. During his employment, the Government laid a government bill containing proposals for amending the legislation on lotteries. The Government found that the proposals met the conditions set by Community Law. Decisions on government bills are to be taken by the Government. The Government Offices process government business and assist the Government and the ministers. The ministers head the work of ministries. Directors-General for Legal Affairs at the ministries have special responsibility for the drafting of proposals for laws and regulations and ensuring that the principles of legality, consistency and uniformity are observed in the conduct of government business. They are also responsible for the final examination of the proposals.

The Court pointed out that the Government decisions on government bills are political decisions. A Director-General for Legal Affairs, who is not a political appointee, thus has no vital influence on the content of bills. Therefore, bills do not reflect his personal opinions. The Court held that the responsibility for producing government bills based on political considerations is not sufficient to cast doubt on judicial impartiality when determining a dispute over the application of that legislation.

Consequently, the Court considered that Justice X was not biased with respect to the subject of the present dispute. Furthermore, the Court found that

there were no indications that Justices Y and Z were biased. The Court thus rejected the arguments regarding lack of impartiality.

Cross-references:

European Court of Human Rights:

- Case of *Procola v. Luxemburg*, 28.09.1995, Series A, no. 326;
- Case of *Kleyn and others v. the Netherlands*, 06.05.2003, *Reports of Judgments and Decisions* 2003-VI; *Bulletin* 2003/2 [ECH-2003-2-005].

Languages:

Swedish.



Switzerland

Federal Court

Important decisions

Identification: SUI-2005-1-001

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 07.07.2004 and 13.10.2004 / **e)** 1P.8/2004, 1P.347/2003 and 1P.7/2004 / **f)** G. and K. v. Department of justice, police and public health, Government and Administrative Court of Grisons canton / **g)** *Arrêts du Tribunal fédéral suisse* (Official Digest), 130 I 369 and 130 I 388 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

- 3.13 **General Principles** – Legality.
- 3.16 **General Principles** – Proportionality.
- 3.18 **General Principles** – General interest.
- 5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.
- 5.3.13.1.4 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Litigious administrative proceedings.
- 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Effective remedy.
- 5.3.13.4 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Double degree of jurisdiction.
- 5.3.19 **Fundamental Rights** – Civil and political rights – Freedom of opinion.
- 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.

Keywords of the alphabetical index:

Police, general clause on policing / Journalist / Police, physical acts.

Headnotes:

Challengeable physical acts of the police and right to judicial review of physical acts of the police; refusing a journalist entry to Davos during the World Economic

Forum 2001. Articles 10.2 (individual freedom), 16 (freedom of opinion and information), 17 (freedom of the media) and 36 (restriction of fundamental rights) of the Federal Constitution. Articles 6.1, 10.1 and 13 ECHR.

For the journalist concerned, the police refusal of entry to Davos in connection with the World Economic Forum 2001 was an infringement of individual freedom as well as freedom of opinion, information and the media.

Right to an effective remedy, within the meaning of Article 13 ECHR, exercised vis-à-vis the government, in connection with the physical acts of the police.

Assessment of the restriction of fundamental rights arising from the orders of the police, these being: application of the General clause on policing; public interest; proportionality.

The Constitution does not guarantee any right to judicial review in connection with an infringement of fundamental rights resulting from physical acts of the police in blocking access to Davos to a journalist during the World Economic Forum 2001.

In the case at point, the physical acts of the police are not prejudicial to the journalist's civil rights; the lack of judicial review does not violate Article 6.1 ECHR.

Summary:

The World Economic Forum was held in Davos from 25 to 31 January 2001. In parallel, at the same time and in the same place, various non-governmental organisations organised an international conference entitled “*The Public Eye on Davos*”. Prior to the Forum warning was given of various actions and violent disturbances and also of an unauthorised demonstration for 27 January 2001. The police therefore took substantial security measures to protect the forum and its participants, as well as the local community and infrastructures. One such measure was the supervision and blocking of access routes to the village.

Two journalists, G. and K., attempted to enter Davos using public transport on Saturday 27 January 2001. They underwent police checks. Despite their press cards and their stated intentions with regard to their professional activities in Davos in general and at the Public Eye on Davos in particular, the police refused them access to the village and made them turn back.

The journalists each lodged appeals, separately, against these measures with the Cantonal Department of justice, police and public health, and then with the Government of Grisons canton, arguing that their fundamental rights had been violated, in particular their individual freedom and freedom of opinion, information and the media. The government recognised their entitlement to appeal against physical acts of the police, while denying any violation of these fundamental freedoms.

Using a public-law appeal, the journalist G. asked the Federal Court to set aside the government's decision and rule that there had been a violation of the fundamental rights in question. The Federal Court rejected the appeal.

At the same time, the journalist K. appealed to the Administrative Court of Grisons canton, requesting judicial review of the physical acts of the police. The Administrative Court did not process the case. Then, using a public-law appeal lodged with the Federal Court, K. claimed *inter alia* a violation of his right to judicial review guaranteed by Swiss constitutional law and by Article 6.1 ECHR. The Federal Court also rejected this appeal.

The Federal Court firstly recognised that the measures deployed by the police, and in particular the refusal to allow the two journalists access to Davos, constituted interference with fundamental rights and infringed individual freedom as well as freedom of opinion, information and the media guaranteed by the Federal Constitution and the European Convention on Human Rights. The point here is that the police measures may not be regarded as true administrative decisions within the meaning of administrative procedure, which is normally a prerequisite for an administrative appeal. However, Article 13 ECHR does stipulate that any individual whose rights and freedoms as set forth in the Convention have been violated is entitled to an effective remedy before a national authority. The disputed police measures are therefore the starting point for an appeal to the government. The government's examination of the case complies with the requirements of Article 13 ECHR, which does not stipulate an appeal to a judicial body.

Freedom of expression as set out in Article 10.1 ECHR is not guaranteed on an unlimited basis and may be restricted in keeping with the criteria listed in Article 10.2 ECHR. Similarly, Article 36 of the Federal Constitution lays down conditions for restricting fundamental rights. The prime condition is the existence of a legal basis. It is not disputed that the police measures have no formal legal basis. It is possible, however, that restrictions are justified by the

General clause on policing; Article 36.1 of the Federal Constitution rules out the need for a formal legal basis in the event of a grave, direct and imminent threat. This applies to the present case. The threat of serious disturbances was imminent. The extent of the trouble could not be determined in advance and precedents had been set by the increasingly violent anti-globalisation movements and incidents in Seattle, Washington, Melbourne, Prague and Nice.

The policing measures and restrictions on access to Davos, aimed at avoiding disturbances and violent acts by demonstrators, were undeniably appropriate in terms of guaranteeing security in the village and also protecting the World Economic Forum, the local community and infrastructures. They were not extensive, access being refused only for the morning of 27 January 2001. Security measures may equally be applied to journalists. Furthermore, the journalist G. raised suspicions by claiming that he wished to attend the Public Eye on Davos despite no event was being planned in that framework for that day. The policing measures were therefore deemed proportionate and not to have violated the freedoms cited. G.'s appeal against the government's decision proved unfounded.

Regarding the appeal by the journalist K., the Federal Court also had to rule on the question as to whether, in the circumstances, the appellant was entitled to judicial review of the disputed policing measures exercised by the Administrative Court, in addition to government review, and whether the Administrative Court's refusal to process the case was compatible with the Federal Constitution and the Convention.

The Federal Constitution generally requires the activity of the State to be governed by law and guarantees the fundamental rights for which there is express provision. These principles include a right to review of administrative acts by higher authorities. Traditionally, in Switzerland such review does not only cover examination by an independent tribunal but also by an administrative authority, in which case entitlement to judicial review may not be deduced from the right set forth in the Constitution.

On the other hand, Article 6.1 ECHR requires judicial examination where rights of a civil nature are concerned. In the case-law of the European Court of Human Rights, civil-law dispute is a broad concept, going beyond private law in the strict sense of the term, and may cover *inter alia* administrative acts of an authority in the exercise of its power of public authority. The issue of whether disputes concern rights and obligations of a civil nature is determined according to national law, taking account of the circumstances of the case. In particular it must be a

serious dispute whose outcome directly affects civil rights; indeterminate, indirect consequences are not sufficient. In the case at point, complaining of a violation of a constitutional right, such as individual freedom or freedom of expression and the media, is not sufficient to make the dispute one hinging on a civil right. The policing measures had no impact whatsoever on K.'s exercise of the profession of journalist. Access to Davos was prohibited for only a very brief lapse of time. Given these various circumstances, the journalist did not suffer sufficiently direct prejudice to his capacity of journalist. Therefore, one cannot speak of a serious and direct dispute over rights or obligations of a civil nature. K.'s appeal was therefore ill-founded and the Administrative Court's judgment complied with constitutional law and Article 6.1 ECHR.

Languages:

German.



Identification: SUI-2005-1-002

a) Switzerland / b) Federal Court / c) Second Civil Chamber / d) 01.11.2004 / e) 5P.367/2004 / f) X. v. Zug Administrative Court / g) *Arrêts du Tribunal fédéral suisse* (Official Digest), 130 III 729 / h) CODICES (German).

Keywords of the systematic thesaurus:

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:

Good faith / Involuntary committal to an institution / Application, renewal, time interval.

Headnotes:

Article 397d of the Swiss Civil Code, Article 31.4 of the Federal Constitution, Article 5.4 ECHR; involuntary committal to an institution; judicial supervision.

The right to lodge, at any time, an application for release and submit the decision rejecting it for review

by a judge is restricted by the principle of good faith. There is no reason for the court to process renewed applications within an unreasonably short time interval following an initial rejection. Case to which the provision applies.

Summary:

Within the framework of involuntary committal to an institution, Ms X. was committed to a psychiatric clinic on 3 July 2003. Her release application was refused on 27 August 2003 and her appeals at cantonal and federal level were unsuccessful.

Shortly after the Federal Court decision of 4 December 2003, X. reapplied, on 16 December 2003, to have her involuntary committal suspended and be granted release. The Zug canton Administrative Court rejected X.'s application on 18 June 2004 and the Federal Court did the same on 1 November 2004.

On 30 June 2004, X. renewed her application. The Communal council of G. did not process the case and the appeal against this decision was rejected by the Administrative Court on 16 August 2004.

Using a public-law appeal, Ms X. asked the Federal Court to set aside the Administrative Court's decision and compel the cantonal authorities to examine her application on the merits. The Federal Court rejected the public-law appeal.

The Civil Code provisions concerning involuntary committal to an institution and also Article 31.4 of the Federal Constitution and Article 5.4 ECHR provide for the right to apply to a court at any time and have the lawfulness of the committal reviewed. However, this entitlement is not unlimited and must be used in keeping with the rules of good faith. Refusing to process renewed applications within an unreasonably short time interval is therefore in accordance with civil law. Similarly, constitutional and convention-based law stipulates judicial review only for applications made at reasonable intervals.

In the case at point, the Administrative Court referred to its earlier decisions. In particular it noted that Ms X. suffered from a serious mental illness and could potentially place herself at risk as a result. The necessary conditions for an improvement in her state of health were not met at present, since *inter alia* the applicant required care, a suitable job and medication, which was not guaranteed outside the clinic. Furthermore, she was still reluctant to cooperate with the supervisory authorities. X. had done nothing to demonstrate that the situation had changed favourably. In these circumstances, the

decisions of the cantonal authorities refusing to process X.'s last application were not in violation of constitutional or convention-based law.

Languages:

German.



Identification: SUI-2005-1-003

a) Switzerland / **b)** Federal Court / **c)** Second Civil Chamber / **d)** 16.12.2004 / **e)** 5A.25/2004 / **f)** Dzieglewska v. Department of the Interior and Aargau Cantonal Court / **g)** *Arrêts du Tribunal fédéral suisse* (Official Digest), 131 III 201 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Civil status, rectification / Civil status, name / Surname / Civil status register.

Headnotes:

Article 8.3 of the Federal Constitution (equality), Article 42.1 of the Swiss Civil Code (changes of data concerning civil status), Article 40 of the Law on private international law (transcription of a name in civil status registers), Article 24.1 of the Order on civil status. Entering of foreign names in the civil status register. Change of case-law.

Admissibility of administrative-law appeal and conditions for rectification of entries by a judge (recital 1).

Refusal to enter in the civil status register a name altered to differentiate the sex of an individual is not compatible with the principle of equal treatment (recitals 2 and 3).

Summary:

In 2003, Aleksandra Dzieglewska, holding dual Swiss and Polish nationality, gave birth to a son, Florian Stefan, in Aargau. He was entered on the civil status register under the surname “Dzieglewska”, his unmarried mother’s name, in accordance with Article 270.2 of the Civil Code and the provisions of the Order on civil status.

Through his mother, Florian Stefan, relying on Article 42.1 of the Civil Code, lodged a request with the President of Aargau District Court to correct the entry “Dzieglewska” in the civil status register to the masculine form “Dzieglewski”.

The President of the District Court rejected the request on the grounds that a foreign name entered in a Swiss civil status register became a Swiss name and the rules governing the name in the country of origin (which make the surname vary according to the sex of the individual) were not taken into consideration. The Cantonal Court of Aargau confirmed this decision.

Using an administrative-law appeal, Florian Stefan Dzieglewska asked the Federal Court to set aside the cantonal court decision and order that he be recorded in the civil status register under the name “Dzieglewski”. He pointed out that the entry of his name in the feminine form was not compatible with the right of individual personality and the principles of equality set forth in the Federal Constitution and the United Nations Convention on the rights of the child. The Federal Court accepted the administrative-law appeal and ordered registration under the name “Dzieglewski”.

While the outcome of this dispute has ramifications for private law, it must be considered as a public dispute, therefore allowing the administrative-law appeal to be admissible.

Swiss law on surnames recorded in the civil status register is governed by the principle of inalterability. However, this principle is not absolute and may not be applied indiscriminately to names that vary according to the individual, male or female, concerned. To begin with, the Federal Court’s previous case-law refusing alteration of a name according to sex was heavily criticised in the doctrine. Forcing an individual of male sex to use a feminine version of their name is tantamount to denying their sexual identity and not compatible with the principle of equality enshrined by Article 8.3 of the Federal Constitution. Furthermore, there is inequality of treatment between the sexes and therefore a violation of Article 8.3 of the Constitution when a gender-

variable name is registered in the feminine version – as was the case for the appellant's mother – and the masculine form is denied to the appellant. It is therefore necessary to interpret and apply the Order on civil status in a manner conforming to the Constitution and allow the appellant to be registered under the name "Dzieglewski". Gender-variable registration does not gravely jeopardise security and the stability of the civil status register and does not pose insurmountable problems.

Languages:

German.



"The former Yugoslav Republic of Macedonia" Constitutional Court

Important decisions

Identification: MKD-2005-1-001

a) "The former Yugoslav Republic of Macedonia" / b) Constitutional Court / c) / d) 19.01.2005 / e) U.br.159/2004 / f) / g) / h) CODICES (Macedonian).

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.

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

3.18 **General Principles** – General interest.

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

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

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

Keywords of the alphabetical index:

Asylum, request, refusal / Asylum, refusal, due to criminal offence / State, security.

Headnotes:

The right to asylum is a subjective constitutional right, which is enjoyed under certain conditions, defined by the Constitution, law and international agreements.

Article 29 of the Constitution sets out the legitimate right of the state to examine the basis for granting, as well as for excluding, the right to asylum within the frameworks given in the Constitution, law and international law. At the same time, it fulfils the obligations of the state that have been undertaken internationally on the basis of this article, as an expression of the respect for the norms of international law that are not contradictory to the constitutional order.

The basis for the exclusion of the right to asylum may not be dealt with from the aspect of the constitutionally guaranteed principles of presumption of innocence and the determination of criminal offences and guilt. The stipulation of serious doubts as to whether serious criminal offences have been committed as a ground for the exclusion of the right to asylum in the disputed provision of the law is justified not only by the meeting of international commitments, but also by the fact that the state, which unilaterally decides on the right to asylum as a form of establishing relations with foreign subjects, in that context necessarily has less strict limitations for determining the conditions for realisation of such a right than those which apply to the realisation of the rights of citizens in the domestic legal order.

Summary:

In its petition, an individual petitioned the Court to instigate a procedure for the appraisal of the constitutionality of the title "Reasons for Exclusion" and Article 6 of the Law on Asylum and Interim Protection (hereinafter: "the Law").

The Court determined that under Article 6 of the Law, a foreign citizen may not enjoy the right to asylum in "The former Yugoslav Republic of Macedonia" if there is well-founded suspicion that he/she:

- has committed a criminal offence against peace, humanity or a war atrocity, in accordance with international law governing these criminal offences;
- has committed a serious criminal offence (non-political) outside the territory of "The former Yugoslav Republic of Macedonia" before being accepted in it as a refugee;
- is guilty of activities contrary to the United Nations Organisation objectives and principles.

A particularly important aspect of the case was the consideration of Article 29.1 and 29.2 of the Constitution. These provisions regulate the position of foreign subjects in the "The former Yugoslav Republic of Macedonia" in the sense that they enjoy freedoms and rights guaranteed by the Constitution, under terms defined by law and international agreements, and also insofar as the Republic guarantees the right to asylum for foreign subjects and stateless persons, expelled for democratic political beliefs and activities.

From the provisions cited, it can be shown that the "The former Yugoslav Republic of Macedonia" deems the right to asylum to be a subjective constitutional right and that right is enjoyed under conditions defined by the Constitution, law and international agreements.

The provision of the Law, through the full acceptance of Article 1.f of the Convention on the Legal Position of Refugees, additionally reinforces the fulfillment of the commitment of "The former Yugoslav Republic of Macedonia", undertaken internationally. Accordingly, the international standard for grounds for exclusion of the right to asylum is implicit content of Article 29 of the Constitution, as a result of which the Court judges that the conformity of the disputed legal provision with this article of the Constitution was not in dispute.

In this context, the Court also concluded that the right to asylum might not be dealt with from the aspect of the constitutionally guaranteed principles of presumption of innocence and the determination of criminal offences and guilt under Articles 13.1 and 14.1 of the Constitution. The stipulation of serious doubts for committed serious criminal offences as bases for the exclusion of the right to asylum in the disputed provision of the Law is not justified only with the meeting of international commitments, but also with the fact that the state, which unilaterally decides on the right to asylum as a form of establishing relations with foreign subjects, in that context there are necessarily less strict limitations for determining the conditions for realisation of such a right than those valid in the realisation of the rights of citizens in the domestic legal order.

In that sense, the surmise that there are serious suspicions for the activities of the asylum seekers, as a ground for exclusion of the right to asylum in the provision in question, may not be regarded as a breach of Articles 13.1 and 14.1 of the Constitution, since there is an unquestionable right and obligation of the state, when deciding on such matters, to protect the security of the state, as well as that of its citizens and of the international legal order.

Also, according to the Court, it was not relevant to argue that the disputed legal provision did not conform with the provisions in the Convention for the Protection of Human Rights and Fundamental Freedoms in this specific case, not only because the Constitutional Court is not competent to appraise the conformity of laws with international agreements, but also for the reason that the provisions in this part of the Convention may not be used even as an additional argument in the context of the right to asylum, which they do not in fact deal with at all.

Languages:

Macedonian.



Identification: MKD-2005-1-002

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 16.02.2005 / **e)** U.br.2/2004 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 23/2005, 12.04.2005 / **h)** CODICES (Macedonian).

Keywords of the systematic thesaurus:

2.1.1.4.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Geneva Convention on the Status of Refugees of 1951.

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

4.13 **Institutions** – Independent administrative authorities.

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

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

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

Keywords of the alphabetical index:

Asylum, request, refusal / Asylum, refusal, right to appeal / Asylum, request, apparently unfounded / Asylum, emergency procedure.

Headnotes:

While the right to asylum is a subjective constitutional human right, at the same time it is a political right, in the governing of which is expressed the sovereign right of the state from which asylum is requested to determine whether in case of violation of this right it shall protect it simply by launching an appellate procedure or whether it should allow court protection as well.

The Constitution allows for a law to stipulate under which conditions and under what procedures a foreign citizen may realise the right to asylum and the right to interim protection.

A constitutional right, which guarantees equality of citizens in their freedoms and rights, does not apply to foreign citizens, or, in the specific case, to the seekers of the right to asylum, but refers exclusively to the citizens of "The former Yugoslav Republic of Macedonia".

Summary:

In a petition, an individual person requested the Court to instigate a procedure for the appraisal of the constitutionality of the Article 37.4 of the Law on Asylum and Interim protection (hereinafter: "the Law").

According to Article 37.1 of the Law, an asylum seeker has the right to an appeal against the resolution rejecting the request for recognition of the right to asylum in emergency procedure within three days from the date the resolution was delivered. Under paragraph 2 of the same provision, the appeal from paragraph 1 of this article postpones the execution of the resolution, and under paragraph 3 a competent commission of the government decides on the appeal from paragraph 1 of this article within 15 days from the date the appeal was lodged. The contested Article 37.4 of the Law states that an administrative dispute may not be conducted against the resolution of the Government's competent commission.

The Court concluded from the contents of Article 29.2 of the Constitution, which sets out that "The former Yugoslav Republic of Macedonia" considers the right to asylum to be a subjective constitutional right of a foreign citizen, while the conditions under which foreign citizens enjoy freedoms and rights guaranteed with the Constitution are defined by law and international agreements. Hence, the right to asylum is not only a subjective constitutional right, but also an internationally recognized right which all states which are signatories of international agreements are required to respect to the maximum in accordance with their national legislation.

Namely, the Constitution of "The former Yugoslav Republic of Macedonia" does not deal with the question as to how and with how many laws the conditions and procedure for obtaining and terminating the right to asylum of a foreign national and stateless person will be governed, as well as the manner of providing court protection of the right to asylum. The entry of foreign citizens into another state and the realisation of the right to asylum and interim protection is the right for every state to govern freely with its national legislation, depending on its policy, thereby clearly observing generally accepted international standards and principles. The conditions

and the procedure for obtaining and terminating of the right to asylum and interim protection are regulated in the Law.

Article 2 of the Law identifies the persons who may exercise the right to asylum and under this provision, the right to asylum is protection given by "The former Yugoslav Republic of Macedonia" under conditions and under a procedure envisaged by this Law to specifically defined categories of persons. The section of the Law entitled "Common procedures" regulates what is envisaged as a subsidiary application of the Law on General Administrative Procedure. This section defines the position and role of a person making a request for the recognition of the right to asylum. In the regular procedure, under Article 32.4 of the Law, there is the possibility to initiate an administrative dispute against the resolution passed by the competent commission, which, in the appellate procedure, has rejected the request for recognition of asylum. Unlike the legal solution noted, in the emergency procedure with the contested Article 37.4 of the Law, it is expressly set forth that the dissatisfied person may not conduct an administrative dispute. In the section emergency procedure ("accelerated procedure"), and notably Article 34 of the Law, such a procedure is conducted when the request for recognition of the right to asylum is apparently unfounded, except when the request has been made by a minor without accompaniment or a person with mental disability. Article 35 of this Law deals with the circumstance where the request for the recognition of asylum is considered to be apparently unfounded. The reasons when the request is considered to be as apparently unfounded, that is, when it is considered that the requester is making a premeditated fraudulent misuse of the procedure for recognition of the right to asylum, correspond with the London Resolution for apparently unfounded requests for asylum of the ministers of the European Union members of 30 November 1992.

According to the Court, Article 15 of the Law on General Administrative Procedure was particularly important. Here it is stipulated that an administrative dispute may not be conducted against acts adopted on the matters for which, according to an express legal provision, an administrative dispute may not be conducted. Hence, taking into consideration the cited provisions, the Court decided that the specific case does not concern legal exception.

Namely, while the right to asylum is a subjective constitutional human right, at the same time it is a political right in the governing of which is expressed the sovereign right of the state from which asylum is requested to determine whether, in case of violation of this right, it should protect it simply by envisaging

an appellate procedure or whether it should allow court protection as well when such a right is violated. The constitutional obligation under Article 15 of the Constitution is fulfilled with the determination that, in the emergency procedure of the Law, the dissatisfied requester may lodge an appeal to the competent commission within the Government of "The former Yugoslav Republic of Macedonia" and the envisaged suspensory effect of the appeal.

In this way, the emergency procedure, in the opinion of the Court, may also be justified in the preventive role of the state to select those requests for right to asylum which contain misuse of this right, for example those which aim at creating an alibi to avoid responsibility in the home country, or at avoiding some other type of responsibility through the realisation of the same.

Examining the provisions in the Law in general, according to the Court, the Law meets the standards regarding the right to appeal and the right to court protection, with the exception that the lack of possibility for court protection in emergency procedures may not bring into question the conformity of the contested provision with the Constitution.

According to the Court, foreign citizens enjoy freedoms and rights under conditions defined by law and international agreements, while the Law has not determined a right to conduct an administrative dispute in case of a refused apparently unfounded request, so the Court has judged that the conformity of the disputed provision with Article 29.1 and 29.2 of the Constitution may not be brought into question. Namely, the Constitution allows for a law to regulate the conditions and procedure under which a foreign citizen may exercise the right to asylum and the right to interim protection. In any case, the person whose request for asylum has not been accepted has the possibility to request the exercising of rights as a foreign citizen in "The former Yugoslav Republic of Macedonia" or to request the right to asylum in another state.

Also, in the opinion of the Court, the contested provision may not be questioned in respect of its agreement with Article 50.2 of the Constitution, because the requester of the right to asylum is a foreign citizen and he/she does not enjoy the same rights and freedoms as the citizens of "The former Yugoslav Republic of Macedonia". The provision cited refers to guaranteed court protection only in respect of the citizens of "The former Yugoslav Republic of Macedonia", and not in respect of foreign citizens.

The disputed provision, on the right to protection by a court, may not be questioned with regard to its

agreement with Article 9 of the Constitution, which guarantees equality of citizens in their freedoms and rights, since this constitutional provision does not refer to foreign citizens, or, in the specific case, to the seekers of the right to asylum, but rather it refers exclusively to the citizens of “The former Yugoslav Republic of Macedonia”.

On the other hand, there was no international legally binding act, an integral part of the legal order of “The former Yugoslav Republic of Macedonia”, which more specifically governs the procedure for the creation or loss of the right to asylum.

Pursuant to Article 110.1 of the Constitution, the Court concluded that it is not competent to decide on the conformity of the laws with international agreements, as a result of which it did not embark upon assessing the basis of the statements regarding a breach of Article 6 ECHR and Article 16 of the Convention on the Status of Refugees.

The Court has passed this Resolution with a majority of votes.

Languages:

Macedonian.



Identification: MKD-2005-1-003

a) “The former Yugoslav Republic of Macedonia” / **b)** Constitutional Court / **c)** / **d)** 02.03.2005 / **e)** U.br.192/2004 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 18/2005, 21.03.2005 / **h)** CODICES (Macedonian).

Keywords of the systematic thesaurus:

- 3.13 **General Principles** – Legality.
- 3.17 **General Principles** – Weighing of interests.
- 3.18 **General Principles** – General interest.
- 4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.

Keywords of the alphabetical index:

Municipality, decision, procedure of adoption / Environment, protection / Lake, protection.

Headnotes:

Proper urban and rural planning to promote a congenial human environment, as well as ecological protection and development, is one of the fundamental values of the constitutional order. Thus a basic function of the state is the establishment of a balance between man and nature, between economic and ecological spheres. Hence, the development of the economy and industry may not take place in an uncontrolled manner and to the maximum without paying attention to the consequences stemming from it for the environment and nature.

Summary:

In a petition, an individual requested the Court to instigate a procedure for the appraisal of the constitutionality and legality of the Decision of the Municipality of Struga on the adoption of change and supplement to the Detailed Urban Plan.

The Constitutional Court of the Republic instigated a procedure for the appraisal of the constitutionality and legality of those acts since there was a fundamental question as to its conformity with Article 8.1.10 of the Constitution and Article 9 of the Law on the Protection of Ohrid, Prespa, and Dojran Lakes.

Pursuant to Article 8.1.10 of the Constitution, one of the fundamental values of the constitutional order is proper urban and rural planning to promote a congenial human environment, as well as ecological protection and development.

From the analysis of the provision mentioned, it follows that the basic function of the state is the establishment of a balance between man and nature, between economic and ecological spheres. Hence, the development of economy and industry may not take place in an uncontrolled manner and to the maximum without paying attention to the consequences stemming from it for the environment and nature. Namely, it concerns a fundamental value with a universal character and as such it should be safeguarded and cherished in the environment in which we live.

The Law on the Protection of Ohrid, Prespa and Dojran Lakes is a law for the protection and development of the environment and nature, which in fact safeguards one of the constitutional fundamental values set down in Article 8.1.10. Pursuant to Article 1 of the Law on the Protection of Ohrid, Prespa and Dojran Lakes, Ohrid, Prespa and Dojran Lakes their waters, shores, springs and water currents, because of the specific features and natural

beauties, geological, geomorphologic, hydrological, hydro biological, limnological and other scientific values, cultural, aesthetic, educational, pedagogical, health-related, recreational, tourist-related and other economic importance are proclaimed as natural monuments of particular significance for the social community and are put under special protection.

With a view to protecting the lakes as being social goods of general interest, which are used to meet social and individual needs, the Law envisaged a series of preventive and other protection measures. Among others, in Article 7.1.5 of the Law, it is stipulated that, in order to protect the lakes, the inflow of unfiltered waste waters from settlements and industrial facilities is prohibited. Article 9.1 of the Law stipulates that construction works, hydro land-reclamation measures, horticultural or other works along the shores of the lakes may take place only under conditions and in a manner defined by space plans of the regions, space plans of the municipalities: Ohrid, Struga, Resen and Dojran, the urban plans of the settlements and the urban plans of the areas with special purpose, as well as by the regulations for the enforcement of these plans. Pursuant to Article 9.2 of the same Law, the plans of paragraph 1 of this Article are adopted following an opinion obtained by the state Bureau for the Protection of Natural Rarities.

Because the Council of the Struga municipality in the procedure prior to the adoption of the decision challenged had not asked for an opinion of the body competent for the protection of natural rarities, and given that Lake Ohrid, that is, its waters are natural monuments, the Court ruled that the acts must be repealed.

Supplementary information:

Based on the same reasons of procedure, the Court had later pronounced three more resolutions.

1. U.br.197/2004 of 13 and 14.04.2005, published in *Sluzben vesnik na Republika Makedonija* (Official Gazette), 28/2005, 28.04.2005, in which case the law in contest was the Decision no.07-351/11 of 09.06.1999, made by the Council of the Municipality of Ohrid on the adoption of the urban documentation for the settlement of Podmolje.

2. U.br.152/2004 of 20.04.2005, published in *Sluzben vesnik na Republika Makedonija* (Official Gazette), 29/2005, 04.05.2005, in which the law in contest was the Decision no. 07-1127/5 of 03.07.2004 made by the Council of the Municipality of Struga on the adoption of change and supplement to the Detailed Urban Plan for the Urban Unit 4 East Struga.

3. U.br.176/2004 of 04.05.2005, published in *Sluzben vesnik na Republika Makedonija* (Official Gazette), 35/2005, 18.05.2005 in which case the law in contest was the decision about the Detailed Urban Plan for part of the Urban Unit 7 Ohrid, made by the Council of the Municipality of Ohrid.

All of the contested laws have been repealed.

Languages:

Macedonian.



Turkey

Constitutional Court

Important decisions

Identification: TUR-2005-1-001

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 14.10.2003 / **e)** E.2003/36, K.2003/91 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 14.04.2005, 25786 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

1.3.4.9 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of the formal validity of enactments.

1.3.4.10.1 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of the constitutionality of enactments – Limits of the legislative competence.

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

3.18 **General Principles** – General interest.

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

4.5.7 **Institutions** – Legislative bodies – Relations with the executive bodies.

4.6.4 **Institutions** – Executive bodies – Composition.

4.6.9.3 **Institutions** – Executive bodies – The civil service – Remuneration.

5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Ministry, staff, working abroad / Salary, amount / Ministry, organisation, power.

Headnotes:

The competence of the Constitutional Court on the verification of laws as to form is limited to whether the requisite majority was obtained in the last ballot as a whole or not.

The creation of new ministries and merging existing ones into one ministry is within the discretion power of the National Assembly. Public interest, the fundamental aims and duties of the State mentioned in Article 5 of the Constitution and other Constitutional principles should be taken into account when using

that competence. The constitutional review of the laws creating new ministries or merging existing ones, do not cover this question of whether a law is appropriate or not from a political point of view.

Summary:

A group of deputies applied to the Constitutional Court seeking the annulment of Law on the Organisation and Duties of the Ministry on Culture and Tourism (hereinafter Law 4848 of 16 April 2003).

The deputies alleged that Law 4848 was not voted in the way required by the Constitution. Since the draft bill was not negotiated and voted article by article before the last ballot in the Parliament, the requirements of the last ballot as explained in Article 148 of the Constitution were not met.

The deputies further alleged that there was no public interest in merging two ministries into one.

Article 148.2 of the Constitution states that “the verification of laws as to form shall be restricted to consideration of whether the requisite majority was obtained in the last ballot”. Since formal review is limited to whether the requisite majority was obtained in the last ballot, the terms “last ballot” and “requisite majority” have to be clarified. When Articles 88 and 148 of the Constitution and their statement of reasons are taken into account, it is clear that the deficiencies in the present case emerged before the last ballot (as the procedures at the commissions and the debates on articles in the general assembly) may not be regarded as a reason to annul the laws. The competence of the Constitutional Court on that issue is limited to whether the last ballot related to the law as a whole is made in accordance with the quorum for convention and decisions or not. Under the provisions of Article 96 of the Constitution, there must be at least 184 deputies for convention. The quorum for decisions is the absolute majority of the deputies present in the Assembly. However, that number may not be less than 139 in any circumstances.

The last ballot of Law 4848 has been carried out via open electronic vote at the Turkish Grand National Assembly. In the ballot, 279 deputies have voted, 224 deputies voted in favour of the draft law and the rest, 55 deputies, voted against. Thus, it is understood that the last ballot has been realised in accordance with a majority required by the Constitution. Therefore, the demand related to the formal review was rejected.

As to the material review of constitutionality, the term “public interest”, on which the deputies mainly based their submissions, is not defined in the Constitution and there is no consensus on its definition in the

doctrine. It is therefore necessary to determine its meaning on a case by case basis. Laws are enacted in order to realise public interest. Their aim must be to satisfy interests directed to the society in general, and not specific interests of private individuals or a group of individuals. In the general statement of the reasons of the Law 4848, it is explained that the Turkish public administration was expanded so much that this expansion has caused inefficiency and extravagance, the bureaucratic mechanism has decreased the effectiveness and quality of public activities and this has given rise to the slowing down of the public services. Moreover, in the general statement of reasons, it is explained that the Ministry of Culture and the Ministry of Tourism have been merged under the name of "the Ministry of Culture and Tourism" in order to overcome those problems and also to reduce the organisational structure of the ministries, as well as to reduce the number of staff, to save in the personnel, in the office stock and in similar expenditures. Moreover, the departments within the ministries having similar or same duties have been organised under one department and the foreign administration of the Ministry of Culture has been closed down. These measures were all taken to ensure the efficiency of public expenditure.

In Article 113 of the Constitution, it is stated that "The formation, abolition, functions, powers and organisation of the ministries shall be regulated by law", but the number of ministries is not fixed and their titles have not been provided for in the Constitution.

The Constitution gives to the legislative power the competence to create new ministries, to abolish, merge or divide existing ones. When using this competence, the legislative has to maintain the public interest and respect the rules mentioned in Article 5 of the Constitution as well as other constitutional principles related to the fundamental aims and duties of the State.

Since it has not been ascertained that the contested law was contrary to the fundamental aims and duties of the State and public interest, the particular contested provisions are conform to Articles 2 and 5 of the Constitution. On the other hand, it is out of constitutional review whether they are appropriate or not from a political point of view. Therefore, the application has been rejected.

The provisional Article 2 of the Law 4848 provided that staff working abroad would be reappointed in Turkey to a position equivalent to their status at home and would receive as a salary an amount equal to the salary they earned before being reappointed until their new position would offer them an equal salary to

the one they earned abroad (due to inflation). The deputies appealed to the Constitutional Court alleging that this provision violates the acquired rights of the staff since the salaries of the staff abroad are substantially higher than the salaries at home. Moreover, they claimed that there would be inequalities between the staff who come from abroad and the staff originally working at home since the staff coming from abroad would receive their original salaries for a certain period of time at home.

The Constitutional Court recalled that the principle of equality does not mean that all individuals are bound by the same rule. The differences between the status and positions may necessitate the application of different legal rules to individuals having a different legal status. The staff working abroad for the Ministry of Culture and for the Ministry of Tourism is subject to different rules as concerns financial rights and employment methods. There are specific rules in the Laws 189 and 657 for staff working abroad regarding their salaries. Within the framework of the mentioned provisions, the salaries of the permanent staff working abroad were determined under different rules than the staff working at home. When the staff working abroad starts to work at home, there shall be differences between their salaries and the salaries of the staff working at home. Since the staff working abroad had special provisions from the point of financial rights and from the point of the duties they perform, they may not be compared with the staff working at home. Therefore, applying different rules for those staff does not violate the principle of equality as mentioned in Article 10 of the Constitution.

On the other hand, the Law 4848 has abolished some positions abroad within the Ministry of Culture and the Ministry of Tourism. In order to evaluate acquired rights of the individuals, there must be rights which have become definitive and obtained. The deputies do not mention those kind of rights of the staff, but mention instead the potential rights. Since, the expected rights may not be accepted as acquired rights, the Constitutional Court did not find provisional Article 2 contrary to the Constitution.

On the other hand, provisional Article 4 of the Law 4848 provided that the existing provincial organisations of the Ministries of Culture and Tourism shall both function until the reorganisation of the new ministry, i.e. the Ministry of Culture and Tourism, and it attributed to the Council of Ministers the competence to organise the provincial administration of the Ministry of Culture and Tourism.

Since the Council of Ministers has to take into account the legal provisions (Decree Having Force of Law on General Staff and Procedures (190), the provisions of

Law 4848, the Law on State Officials (657) concerning organisation of the new ministry, provisional Article 4 is not contrary to Articles 7 and 128 of the Constitution. Therefore, the request was rejected.

Languages:

Turkish.



Identification: TUR-2005-1-002

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 26.05.2004 / **e)** E.2004/35, K.2004/64 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 10.02.2005, 25723 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.10.7 **Institutions** – Public finances – Taxation.
5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Tax, offence, sanction / Tax, criminal legislation / Tax, fraud.

Headnotes:

Since the persons who falsify tax documents and those who use those documents do not have the same legal status, they can be sanctioned differently. Furthermore, the possibility for the persons who use falsified tax documents to benefit from certain provisions while those who falsify tax documents cannot benefit from the same provisions, is constitutional.

Summary:

Under Article 359 of the Tax Procedures Law (hereinafter: "Procedures Law") the persons who falsify tax documents and the ones who use those documents shall be sentenced to a certain period of imprisonment. Article 14.1 of the Law on Tax Reconciliation (hereinafter "Reconciliation Law") provides that persons who have committed the

crimes stated in Article 359 of Procedures Law before 31 August 2002 shall not be prosecuted, that the indictments on those crimes shall be removed and finally that final court decisions shall not be executed. However, the Article 14.2 of the Reconciliation Law stipulates that the ones who totally or partially falsify the tax documents may not benefit from the provisions of Article 14.1.

Two Assize Courts appealed to the Constitutional Court alleging that Article 14.2 of the Reconciliation Law was contrary to the Constitution. They alleged that Article 14 of the same Law encompassed different rules for individuals who falsify the tax documents and for the ones who use those documents, while Article 359 of the Reconciliation Law provided for the same sanctions (imprisonment from 6 months to 3 years) for both.

A State governed by the principle of the rule of law as provided for in Article 2 of the Constitution is a State which respects human rights and strengthens those rights and freedoms. Its acts and actions must be open to judicial review and the legislator must be aware that there are fundamental principles governing the laws and those principles have to be respected.

In a State governed by the rule of law, the lawmaker may determine which actions shall be deemed as crimes and which sanctions shall be applied to those crimes within the framework of the general principles of the Constitution and those of the criminal law.

Therefore, it is within the discretionary power of the lawmaker to exclude individuals who falsify tax documents from the application of the Law on Tax Reconciliation while the ones who use the falsified documents in their tax declarations can benefit from the provisions of the Law on Tax Reconciliation. Using falsified tax documents may not be regarded as falsifying those documents since the use of falsified documents may have been committed unknowingly.

On the other hand, equality before the law does not mean that everybody shall be bound by the same rules. It is a natural consequence of the principle of equality that individuals having the same legal status shall be bound by the same rules, while individuals having different legal status shall be bound by different rules. Since the ones who falsify tax documents are in the same position as the ones who use those documents in their tax declarations, they may not be bound by the same rules.

Therefore, the Constitutional Court did not find the contested provision unconstitutional and the demand was unanimously rejected.

Languages:

Turkish.

*Identification:* TUR-2005-1-003

a) Turkey / b) Constitutional Court / c) / d) 30.06.2004 / e) E.2002/41, K.2004/90 / f) / g) *Resmi Gazete* (Official Gazette), 12.02.2005, 25725 / h) CODICES (Turkish).

Keywords of the systematic thesaurus:

5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.

Keywords of the alphabetical index:

Confidence, breach, intention / Contract, inability to fulfil, imprisonment.

Headnotes:

Breach of confidence an offence regulated by Article 508 of the Penal Code may only be committed intentionally. In other words, the perpetrator must have knowingly and intentionally committed the action written in the article for his or her own or for another's benefit.

Deprivation of liberty as a sanction for the offence of breach of confidence may not be regarded within the meaning of deprivation of liberty on the ground of inability to fulfil a contractual obligation.

Summary:

The Hatay Criminal Court of First Instance appealed to the Constitutional Court alleging that the phrase "... from 2 months to 2 years imprisonment ..." in amended Article 508 of the Penal Code was contrary to the Constitution.

Article 508 of the Penal Code provides that a person guilty of the offence breach of confidence (i.e. if something is delivered to him and he does not return it in due time or if he or she denies it etc.), shall be sentenced to imprisonment from 2 months to 2 years.

The First Instance Court alleged that the phrase was contrary to Article 38 of the Constitution which provides that "no one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation".

The phrase "inability to fulfil" mentioned in the article indicates a situation of any person *vis a vis* a contract. A person may not benefit from the provisions of Article 38 of the Constitution if he or she is able to perform a contractual obligation. Indeed, the source of the mentioned provision, Article 1 Protocol 4 ECHR, is related to unintentional inability to perform a contractual obligation.

In order to evaluate an offence within the meaning of Article 38/8 of the Constitution, there must be a contract between the parties and any kind of penalty requiring deprivation of liberty must have been provided for the inability to fulfil this contractual obligation. The actions mentioned in Article 308 of Penal Code are not related to inability to fulfil a contractual obligation; on the contrary, they are related to fraudulent actions depending on malice against the injured party. Therefore, the contested phrase is not contrary to the Constitution.

As a result, the demand was rejected unanimously.

Languages:

Turkish.

*Identification:* TUR-2005-1-004

a) Turkey / b) Constitutional Court / c) / d) 14.03.2005 / e) E.2003/70, K.2005/14 / f) / g) *Resmi Gazete* (Official Gazette), 26.04.2005, 25797 / h) CODICES (Turkish).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
3.12 **General Principles** – Clarity and precision of legal provisions.
3.18 **General Principles** – General interest.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.6.3 **Institutions** – Executive bodies – Application of laws.

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

5.2 **Fundamental Rights** – Equality.

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

Keywords of the alphabetical index:

Foreigner, right to acquire property / Legislative delegation, limits / National security / State, security.

Headnotes:

If a legal provision is applied to all persons (either legal or natural) having the same legal status, the principle of equality is not violated. The procedures and the rules of possessing real estate by aliens should be regulated by law and the competence on that issue cannot be delegated to the Council of Ministers. In the determination of the competence on possessing real estate by aliens, territorial unity, State security, geological conditions, strategic location of the country and its priorities must be taken into account.

The uncertainties in the article regarding the procedures and rules for acquiring real estate by foreigners, and with respect to the aim, duration, kind and similar features of land lease constitutes a delegation of legislative power to the executive.

Summary:

The main opposition party brought an action before the Constitutional Court alleging that some articles of the Law concerning Changes to Various Laws and the Statutory Decree Concerning the Organisation and Duties of the Ministry of Finance (“Law 4916”) were contrary to the Constitution.

A. Article 9 of the Law 4916

Article 9 was added to the Law 4706 as the provisional Article 5/1. In a government decree dated 1969, Tuzla (a district in Istanbul) was assigned as “Dockyard construction industry area” and some plots of land in Tuzla belonging to the Treasury were allocated to dockyard construction entrepreneurs under certain conditions. According to the provisional Article 5/1, the public claims against the dockyard entrepreneurs would be dropped, provided they pay an amount equal to 1% of the property tax value of the properties which have been allocated to them, as well as the expenditures of cases opened. Moreover, in order to benefit from the provisional Article 5/1, the entrepreneurs had to fulfil their contractual obligations, abandon their claims and renew their contracts. If the above conditions were met, no law

suit would be filed against them and the land allocations would continue.

The principle of equality mentioned in Article 10 of the Constitution is only valid among individuals that have the same legal status. The aim of the principle of equality is to ensure that the individuals having the same legal status are placed under the same legal processes and to ensure that they are not treated unequally.

Facilities provided in the provisional Article 5/1 shall be applied to all entrepreneurs having the same legal status. Therefore, there is no contradiction between provisional Article 5/1 and the principle of equality mentioned in Article 10 of the Constitution.

On the other hand, in Article 48/2 of the Constitution, it is provided that “everyone has the freedom to work and conclude contracts in the field of his choice”. A contract is a bilateral legal process and it is concluded when the parties express their will. The condition in the objected Article “... provided that they conclude a contract with the related ministries ...” recognises the possibility to renew the contracts for the entrepreneurs who have breached their initial contracts. Since there is no obligation to renew the initial contracts, the objected provision is not contrary to the freedom to conclude contracts.

B. Article 19 of Law 4916 amending Article 35 of the Law on Title Deed 2644

This Article stipulates that the natural persons having foreign nationality and the companies having legal personality established under the rules of foreign countries may possess real estate within the boundaries of the Turkish Republic provided that this right is reciprocal and legal limitations are observed. If they want to possess real estate encompassing more than 30 hectares, a permission from the Council of Ministers must be obtained. On the other hand, the reciprocity principle shall not be applied in cases of right of way. The Council of Ministers has the responsibility to determine the places where those rules may not apply from the point of territorial security and public interest.

According to the Constitutional Court, the developments in science and technology, emerging possibilities in transportation and communication, as well as the requirements of reorganisation appearing in social and political relations have all brought new dimensions and intensity in international relations. As a result, the necessity to recognise the right to possess real estate for aliens has emerged and equally the requirement to limit those rights had to be determined according to conditions of the country.

A State governed by the rule of law, mentioned in the Preamble and Articles 2 and 5 of the Constitution, is a State whose acts and actions are in conformity with human rights, preserving and strengthening those rights, establishing a just rule of law in all areas, a State bound by the Constitution and general principles of law and which is aware that there are basic principles of the Constitution that the lawmaker may not violate. On the other hand, it is not possible to delegate the competence of the legislative to the executive save the exceptions mentioned in the Constitution. This issue is regulated in Article 7 of the Constitution, which states "Legislative power is vested in the Turkish Grand National Assembly on behalf of the Turkish Nation. This power cannot be delegated." Under this principle, general, unlimited, uncertain regulatory competence may not be given to the executive power. Delegating competence to the executive by law does not mean that it is regulated by law. Therefore, the framework of the competence given to the executive must be drawn. However, only issues related to expertise and technique may be given to the executive.

In the impugned provisions of Article 35, the possession of real estate by aliens was bound to the condition "provided that reciprocity and the statutory limitations are observed", but the procedures and rules of possessing real estate by aliens were not indicated. In order to achieve a State governed by the rule of law, as explained above, it is necessary to indicate the location of real estate to be possessed, the differences between possessing land or building, purchasing aim, its conditions, the procedures to be observed in the registration. Territorial unity, State security, geological conditions, strategic location of the country and its priorities must also be taken into account. Since those issues were not regulated in the objected law, this amounted to a delegation of the power of the legislative to the executive. The rule of law calls for legal regulations to be clear and understandable.

Meanwhile, there is constitutional inconvenience in the provision require that limited lease may be set on real estate on behalf of the aliens without reciprocal rules. If the duration of limited lease is too long, then it is possible that some results similar to usage of possession rights may emerge.

In the last paragraph of Article 35 it is stated that "the Council of Ministers has the competence to determine locations where the article may not be applied from the point of public interest and territorial security." Thus, a large discretion was given to the Council of Ministers depending on vague concepts, i.e. public interest and territorial security. In Article 16 of the Constitution, the status of aliens was regulated

separately. Moreover, under Article 16, "The fundamental rights and freedoms of aliens may be restricted by law in a manner consistent with the international law." The restrictions in the last paragraph of the article regarding aliens must only be made by law. Consequently, the contested provision is indeed contrary to Article 16 of the Constitution.

Languages:

Turkish.



Ukraine

Constitutional Court

Important decisions

Identification: UKR-2005-1-001

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 17.03.2005 / **e)** 1-rp/2005 / **f)** A case on whether the provisions in Article 2.1 and 2.2 of the Law “On the amount of contributions to certain kinds of compulsory state social insurance” are in conformity with the Constitution (constitutionality) (case on providing assistance in the case of temporary disability) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 13/2005 / **h)** CODICES (Ukrainian).

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.

Keywords of the alphabetical index:

Disability, temporary, non work-related / Social assistance, payment, source.

Headnotes:

The impugned legal provisions, which provide that social assistance in cases of a temporary disability caused by non work-related illness or injury be paid by the social insurance fund for temporary loss of ability to work as from the sixth day of disability while the first five days of such temporary disability are to be paid by the employer, do not contradict the Constitution inasmuch as the difference in sources of the insurance contribution does not influence the right of the persons concerned to material assistance during a temporary disability.

Summary:

Exercising their right to bring a constitutional petition, 47 People’s Deputies of Ukraine petitioned the Constitutional Court for a declaration that the provisions of Article 2.1 and 2.23 of the Law “On the amount of contributions to certain kinds of

compulsory state social insurance” (hereinafter – the Law) did not conform to the Constitution.

The petitioners alleged that the above-mentioned provisions of Article 2 of the Law contradicted Article 46 of the Constitution, as the social insurance fund for temporary loss of ability to work, which is under the obligation to pay the expenses related to providing assistance to persons enjoying the right to social protection, makes payments for temporary disability only from the sixth day after the accident. For the first five days of temporary disability, the injured person is to be paid by enterprises, institutions and organisations, which are not bodies of social insurance, at their own expense.

The Constitutional Court recalled that the Constitution declares Ukraine to be a social state. An individual, his or her life and health, honour and dignity, inviolability and security are recognised to be of the highest social value in Ukraine. Human rights and freedoms and their guarantees define the content and the direction of the activity of the state. Ensuring and guaranteeing human rights and freedoms is the main duty of the state (Articles 1 and 3 of the Constitution).

Principles of the social state are also embodied in international acts – the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the European Social Charter. In particular, according to Article 22 of the Universal Declaration of Human Rights, each individual, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his or her dignity and the free development of his personality.

According to the Constitution, the features of Ukraine as a social state are the social orientation of the economy, and the establishment of and the state guarantee of the implementation of social rights of the citizens, in particular, their rights to social protection and an adequate standard of living (Articles 46 and 48) etc. This obliges the state to duly regulate the economic processes, and to establish and use fair and efficient means of distribution of social income in order to ensure the welfare of all citizens.

According to Article 46 of the Constitution, citizens have the right to social protection which includes the right of provision in case of their complete, partial or temporary disability, loss of the principal wage-earner, unemployment due to circumstances beyond their control as well as in old age and in other cases established by law (Article 46.1); this right is

guaranteed by general mandatory state social insurance on account of the insurance contributions of citizens, enterprises, institutions and organisations, as well as budget and other sources of social security, by the establishment of a network of state, communal and private institutions to care for persons incapable of work (Article 46.2).

The establishment of compulsory guarantees of social protection does not exclude the possibility of implementation by law of other additional guarantees in this field (for instance, social assistance of various kinds).

One of the organisational and legal forms of social protection of citizens is compulsory state social insurance.

The Fundamentals of the legislation of Ukraine on compulsory state social insurance of 1 January 1998, no. 16/98-VR define compulsory state social insurance as the system of rights, duties and guarantees which envisages granting social protection, which includes material maintenance of citizens in case of illness or their complete, partial or temporary loss of ability to work, loss of the principal wage-earner, unemployment due to circumstances beyond their control, as well as in old age and in other cases established by law, paid for by the funds, which are provided by way of payment of insurance contributions by the owner (employer) or the body authorised by him, citizens, as well as budgetary and other sources established by law (Article 1).

The relations that arise in cases of specific kinds of compulsory state social insurance are regulated by laws adopted in accordance with the above-mentioned Fundamentals.

The right of citizens to material maintenance in case of temporary loss of ability to work, as a component of the right to social protection, is guaranteed by compulsory state social insurance under the procedure established by the Law "On compulsory state social insurance related to temporary loss of ability to work, and maternity and funeral expenses" of 18 January 2001, no. 2240-III. Article 35.2 of that Law sets out that the conditions under which assistance is to be granted for temporary disability caused by non work-related illness or injury are defined by the Law "On the amount of contributions to certain kinds of compulsory state social insurance". The provisions of the latter are disputed.

The latter Law establishes that assistance payments to the insured for temporary disability caused by non work-related illness or injuries are to be paid by the social insurance fund for temporary loss of ability to

work from the sixth day of disability until the recovery of ability to work or establishment of invalidity in accordance with the established procedure (Article 2.1), while the first five days of temporary disability caused by non work-related illness or injury are to be paid by the owner or his authorised representative at the expense of the enterprise, institution, organisation employing the insured according to the procedure established by the Cabinet of Ministers (Article 2.2).

The adoption of the above-mentioned provisions was coupled with a reduction in the amount of employer contributions to compulsory state social insurance for temporary loss of ability to work, and maternity and funeral expenses. Employer contributions were reduced from 4 to 2.9% of the amount of salaries actually paid out.

The analysis of the legislation on general compulsory state social insurance, in particular of the Resolutions of the Cabinet of Ministers of 6 May 2001, no. 439 and of 26 September 2001, no. 1266 relating to the method of payment of the first five days of temporary disability caused by non work-related illness or injury and the method of calculation of the average salary (income) for the calculation of contributions to compulsory state social insurance, shows that the payment for the first five days of temporary disability by the enterprise, institution or organisation falls within the legal relations regulated by the Law "On compulsory state social insurance related to temporary loss of ability to work, and maternity and funeral expenses". This gives rise to legal consequences in the field of the protection of the persons insured.

The provisions in Article 2 of the Law providing for the payment to the persons insured of the allowance for temporary disability by the social insurance fund for temporary loss of ability to work from the sixth day of temporary disability and providing for the payment of the first five days of temporary disability by employers are of an imperative nature. The fact that there are various means of covering of these expenses does not influence the right of the persons insured for material provision in cases of temporary disability.

The constitutional right of citizens to social protection in cases of temporary loss of ability of work and the state guarantees of citizens' ability to realise that right (Article 46.1 and 46.2 of the Constitution) have not been violated.

Supplementary information:

Judges P. Tkachuk and V. Shapoval delivered dissenting opinions.

Languages:

Ukrainian.

*Identification:* UKR-2005-1-002

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 24.03.2005 / **e)** 2-rp/2005 / **f)** On a constitutional petition of 48 People's Deputies of Ukraine as to whether the provisions of Articles 1.1.17 and 8 of the Law "On the procedure of discharge of tax liabilities owed to budget and state special purpose funds" (case on tax liens) were in conformity with the Constitution (constitutionality) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 13/2005 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

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

4.10.7.1 **Institutions** – Public finances – Taxation – Principles.

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

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

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

Keywords of the alphabetical index:

Tax, tax lien, scope / Taxpayer, assets, limitation.

Headnotes:

By establishing a failure to submit, or an untimely submission of a tax declaration as a ground for placing a tax lien on a taxpayer's property, the legislator omitted to take into account the absence of tax liability, as well as the consequences that may arise for a taxpayer in such a case, thereby permitting

an arbitrary limitation to be placed on the right of the taxpayer to dispose of his or her property.

A tax lien may not be extended to cover to any kind of asset that a taxpayer may wish to dispose of, without account being taken of the actual amount of his or her tax debt.

Summary:

Exercising their right to bring a constitutional petition, 48 People's Deputies of Ukraine applied to the Constitutional Court for a declaration that the provisions of Articles 1.17 and 8 of the Law "On the procedure of discharge of tax liabilities owed to budget and state special purpose funds" (hereinafter – the Law) were unconstitutional.

The Constitutional Court first recalled that the Constitution lays down the right of everyone to possess, use and dispose of his or her property, the results of his or her intellectual, creative activity and the right to entrepreneurial activity which is not prohibited by law (Articles 41, 42). The Fundamental Law lays down the rule that property shall not be used to the detriment of the person and the society (Article 13).

The execution of the constitutional duty set out in Article 67 of the Constitution is realised through the payment of taxes and charges by everyone. The system of taxation, taxes and charges, their size and method of payment may only be established by law. When regulating these issues, the state has the right to determine means to ensure the timely payment of taxes and charges by the taxpayer. One of the possible means is the institute of the tax lien, introduced by the Law. Article 1.17 and Article 8 of the Law regulate the existence of the right to impose a tax lien, its content, registration, suspension and limitation as to its application.

The provisions of part two of Article 8.2.1 of the Law provide that the circumstances giving rise to the existence of the right to impose a tax lien is a taxpayer's failure to submit or untimely submission of a tax declaration. Consequently, the legislator has, in fact, made the failure to submit or untimely submission of a tax declaration equal to the failure to pay a tax debt. However, failure to submit or an untimely submission of a tax declaration is not evidence of the existence of tax liability, and much less the existence of a tax debt that is due and payable.

The Constitutional Court considered that the provision of part two of Article 8.2.1, which provides that the right to impose a tax lien arises in case of a

taxpayer's failure to submit or untimely submission of a tax declaration from the first working day after the expiry of the deadline established by law for the submission of a declaration on the tax in question, does not conform to the Constitution, as that provision can give rise to an arbitrary limitation of a taxpayer's right to freely dispose of his or her property.

The provision of Article 8.2.2 of the Law provides for the imposition of a tax lien on any kind of asset that forms part of a taxpayer's property (full economic possession) at the moment of the emergence of the right to impose a tax lien on the taxpayer's property, as well as for any other assets over which the taxpayer will acquire a property right in the future before the discharge of his or her tax liability or tax debt.

It follows from the content of this provision, and confirmed by its application in practice, that the right to impose a tax lien extends to all kinds of assets that form the taxpayer's property. At the same time, the amount of the tax liability or tax debt that is due and payable in relation to the assets of the taxpayer on which a tax lien has been imposed is not taken into account. That situation does not lead to a fair resolution of the issues relating to the implementation of the right to impose a tax lien between the subjects of tax legal relations.

Ensuring the payment of taxes and charges to budgets and state special purposes funds is to be executed by way of introduction of the imposition of a tax lien on the assets of the taxpayer for an amount that would ensure the guarantee of the reimbursement of the unpaid taxes to the state in the full amount.

Extending the right to impose a tax lien to any kind of asset at a taxpayer's disposal, including one which exceeds the total tax liability or total tax debt, may deprive a taxpayer not only of his or her income but also of other assets, thereby endangering his or her further entrepreneurial activity until the discharge of that liability or debt.

The Constitution guarantees the right of everyone to challenge in court the decisions, actions or omission of bodies of state power, bodies of local self-government, officials and officers (Article 55.2).

The provision of Article 8.1.3 of the Law provides that a tax lien arises by law and does not require written filing. The assets of a taxpayer are placed under a tax lien upon his or her failure to pay the tax liability or tax debt.

According to Article 5.2.5 of the Law a taxpayer has the right to challenge in court the decision of the body competent for tax liabilities and debts at any moment after receiving a tax notice. Thus, a taxpayer is not deprived of the right to court protection.

The provisions of Article 8.6.1 of the Law provide the possibility for a taxpayer, whose assets are under a tax lien, to dispose freely of them, except for the transactions which are subject to written co-ordination by the tax body. Article 8.6.2 of the Law sets out the conditions under which such a taxpayer may execute transactions for money without the co-ordination of the tax body. Article 8.6.3 does not permit property under a tax lien to be used as security or permit that property to be used in exchange for a current or future obligation by a third party.

Consequently, the tax authorities are granted a legal basis for the co-ordination of financial transactions which involve the debtor's assets and which would provide the execution of the obligation to pay the tax liability as well as the execution of the constitutional obligation of the debtor as to the payment of taxes and charges.

Languages:

Ukrainian.



Identification: UKR-2005-1-003

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 24.03.2005 / **e)** 3-rp/2005 / **f)** Case on the official interpretation of the provisions of Articles 56.3.4, 64.1.2 and 64.15 of the Law "On the elections of the President of Ukraine" (case on the elections of the President) / **g)** *Ophitsiynyi Visnyk Ukrayiny* (Official Gazette), 13/2005 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

2.3.7 **Sources of Constitutional Law** – Techniques of review – Literal interpretation.
4.5.2 **Institutions** – Legislative bodies – Powers.
4.9.8 **Institutions** – Elections and instruments of direct democracy – Electoral campaign and campaign material.

Keywords of the alphabetical index:

Election, presidential / Election, campaign, limitation / Election, electoral campaign, participation of civil servants.

Headnotes:

The provisions of Article 64.1.2 of the Law “On the elections of the President of Ukraine” should be understood in such a way that officials of executive bodies and bodies of local self-government are prohibited from participating in electoral campaigns at any time (work or leisure).

The provisions of Article 64.15 of the Law “On the elections of the President of Ukraine” are to be understood as follows:

- candidates for the office of President, who hold an office, including a combined one, in executive bodies or bodies of local self-government, in state or municipal enterprises, or in institutions, organisations or military units (formations), do not have the right to involve subordinate officials working in executive bodies and bodies of local self-government in electoral campaigns during work or leisure time; nor may such candidates involve any other subordinate person working in the above-mentioned bodies, including officials working in state or municipal enterprises, or in institutions, organisations or military units (formations), in electoral campaigns during work time;
- candidates for President may not use for the purpose of conducting electoral campaigns official transport, communications, equipment, premises or other objects and resources at the workplace during work and leisure time; nor may such candidates use department, professional or staff meetings for that purpose;
- “the workplace” of candidates for President is a specific body of executive power, body of local self-government, state or municipal enterprise, institution, organisation or military unit (formation), in which they hold an office, including a combined one; and
- vis-à-vis candidates for President, “the subordinate persons” at the workplace are individuals who execute official (work) duties in the executive body, body of local self-government, institution or organisation, or serve at the military unit (formation) and are in a subordinate position to such a candidate.

The provisions of Article 56.3.4 of the Law “On the elections of the President of Ukraine” are to be understood as grounds for the Central Election Commission to issue a warning to a candidate for President and to the party (bloc) which nominated him/her where such a candidate has committed one of the acts prohibited by Article 64.15 of the above-mentioned Law.

Summary:

Exercising their right of constitutional petition, the Kharkiv Oblast State Administration and the Kharkiv Oblast Council petitioned the Constitutional Court firstly, for an official interpretation of the provisions of Articles 56.3.4, 64.1.2 and 64.15 of the Law “On the elections of the President of Ukraine” (hereinafter – the Law) concerning the permissibility of the participation in the electoral campaign by officials and other employees of executive bodies or bodies of local self-government in their leisure time, and secondly, for an official interpretation of the legal terms “individuals subordinate to them” and “workplace”, used in Article 64.15 of the Law.

The Constitutional Court recalled that elections are one of the forms of direct democracy and the means used for the formation of state bodies and bodies of local self-government by the electorate. The Constitution lays down the fundamentals of electoral law: the elections to these bodies are free; the elections take place on the basis of a general, equal and direct electoral right by way of secret ballot; and the voters are guaranteed the expression of their free will (Article 71 of the Constitution).

One of the stages of the electoral process is the electoral campaign, the main objective of which is to form the will of the voters to vote for one of the candidates running for President. The electoral campaign may be carried out in any form and manner that does not infringe the Constitution and the laws (Article 58.1 of the Law).

The Law established certain restrictions as to conducting an electoral campaign. In particular, according to Article 64.1.2 of the Law, executive bodies and bodies of local self-government, as well as their officials and officers are prohibited from participating in electoral campaigns. That prohibition is directed at, firstly, laying down the rule that it is impermissible to use the resources of these bodies for a candidate’s presidential electoral campaign, and secondly, avoiding pressure being brought to bear on voters. That prohibition arises from the need to create the conditions for the expression of the free will of the voters during the elections.

According to the provisions of Article 64.15 of the Law, candidates for President, who hold an office, including a combined one, in executive bodies or bodies of local self-government, in state or municipal enterprises, or in institutions, organisations or military units (formations), are prohibited from firstly, involving individuals subordinate to them in the electoral campaign during working hours; secondly, from using for the purpose of the electoral campaign official transport, communications, equipment, premises or other objects and resources at the workplace; and thirdly, from using department, professional or staff meetings for conducting the electoral campaign.

The term “workplace” has not been used in previous legislation. However, an analysis of Articles 1, 2 and 25 of the Law “On public service”, Articles 1, 10, 14 of the Law “On service in bodies of local self-government”, Articles 38, 40, 43, 81, 82 of the Labour Code and other legal acts indicates that “workplace” implies a specific body, enterprise, institution or organisation with which the employees have official employment relations.

In Article 64.15 of the Law, the workplace is directly connected with the offices held by candidates for President, including combined offices, in particular, in state or municipal enterprises, or in institutions or organisations. A literal interpretation of the content of this norm gives reason to conclude that the legislator intends the workplace of such candidates to be a specific state or municipal enterprise, institution, or organisation in which they hold a position. That approach is also used for the definition of the workplace of the candidates for President who hold offices in bodies of executive power or bodies of local self-government.

That being so, the heads of the bodies of executive power at the lower level do not fall into the category of subordinate persons of the executive bodies at the higher level. Thus, under Article 64.15 of the Law, one may not consider heads of local state administration to be subordinate to the candidates for the President who hold office in an executive body at a higher level, in particular, in the Cabinet of Ministers. Nor may one consider the workplace of such candidates to encompass the whole system of bodies of the executive power.

The Constitutional Court held that within the system of the executive bodies, there are subordinate relationships which prove that the heads and other officials of the lower-level bodies are in a position of official dependence on the heads of higher-level bodies, in particular, on the Cabinet of Ministers, and consequently – in an administrative and legal sense – are subordinate to such heads. However, in order for

there to be such a broad understanding of terms “subordinate persons” and “workplace”, a change needs to be made to the wording of the Article 64.15, and the other provisions of the Law regulating the issues of presidential candidates’ involving subordinate persons in their electoral campaigns and using material resources of state bodies and bodies of local self-government for conducting electoral campaigns. That change is the prerogative of the legislator.

The Constitutional Court drew attention to the inconsistencies in the Law of the provisions of Articles 3.4.2 and 56.4 relating to the non-interference in the electoral process of all bodies of state power, their officials and officers with the provisions of Articles 11.2.7, 64.1.2 and 64.15 which concern only the bodies of the executive power, their officials and officers.

Supplementary information:

Judges P. Tkachuk and V. Ivaschenko delivered dissenting opinions.

Languages:

Ukrainian.



United States of America

Supreme Court

Important decisions

Identification: USA-2005-1-001

a) United States of America / **b)** Supreme Court / **c)** / **d)** 23.02.2005 / **e)** 03-636 / **f)** Johnson v. California / **g)** 125 *Supreme Court Reporter* 1141 (2005) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Review, standard of / Scrutiny, strict.

Headnotes:

Under the equal protection constitutional mandate, courts must view all express racial classifications as immediately suspect and subject them to a strict scrutiny standard of review.

Under a strict scrutiny standard of judicial review, as applied to a government-imposed racial classification challenged on equal protection grounds, the government has the burden of proving that the classification is narrowly tailored to further a compelling governmental interest.

Summary:

Garrison Johnson, an inmate at a California state prison, brought a lawsuit against an unwritten policy of the California Department of Corrections (“CDC”) that temporarily placed prisoners in two-person cells on the basis of race each time they entered a new correctional facility. Johnson, an African-American, had been transferred five times since his incarceration in 1987, and each time he was placed in a temporary cell with another African-American inmate.

His lawsuit alleged that the policy, under which new or newly transferred prisoners were placed in the two-person cells for a 60 day evaluation period to be followed by permanent placement on a non-racial basis, was a violation of his right to equal protection under the Fourteenth Amendment to the U.S. Constitution. Section 1 of the Fourteenth Amendment states in relevant part that: “No state shall ... deny to any person within its jurisdiction the equal protection of the laws.”

The Federal District Court denied Johnson’s complaint, ruling that the defendants (former CDC officials) were entitled to qualified immunity. The Court of Appeals for the Ninth Circuit affirmed that decision, ruling that the policy’s constitutionality should be reviewed under a deferential judicial standard, as set forth by the U.S. Supreme Court in the 1987 Case of *Turner v. Safley*. In *Turner v. Safley*, the Supreme Court ruled that prison regulations restricting inmate marriages and inmate-to-inmate correspondence, although they implicated prisoners’ fundamental rights, should not be reviewed under a strict scrutiny standard, but instead under a standard that would assess whether the regulations were reasonably related to legitimate penological interests. In the instant case, the Court of Appeals concluded that the CDC’s justification for its segregation policy – that such racial segregation was necessary to reduce race-related gang violence – satisfied this deferential standard.

The U.S. Supreme Court, noting that it had never applied the *Turner v. Safley* approach to racial classifications, reversed the Court of Appeals. In a five-to-three decision, the Court ruled that the CDC’s policy, as an express racial classification, was immediately suspect under the Equal Protection Clause, and must be reviewed under a strict scrutiny standard. Under strict scrutiny, the Court said, the government has the burden of proving that a racial classification is narrowly tailored to further a compelling governmental interest. The Court emphasised that it had insisted on use of strict scrutiny in every context, including those involving so-called “benign” racial classifications, such as race-conscious university admissions policies and race-based preferences in government contracts. The reason for this approach, the Court explained, was that racial classifications raise special fears that they are motivated by an invidious purpose.

Because the Court of Appeals had applied the incorrect standard of review, the Court did not rule on the question of whether the CDC’s policy would satisfy strict judicial scrutiny. Instead, the Court remanded the case to the Court of Appeals for a determination on this question.

Supplementary information:

Three Justices wrote separate opinions. Justice Stevens, dissenting from the Court's opinion, wrote to say that the Court should have found the CDC policy unconstitutional, rather than remanding it to the Court of Appeals. Justice Thomas, whose separate opinion was joined by Justice Scalia, also dissented from the Court's opinion, stating that deferential review should have been the proper standard. Meanwhile, Justice Ginsburg, joined by Justices Breyer and Souter, concurred in the Court's opinion but wrote separately to voice her disagreement with the Court's view that strict scrutiny should be applied in all cases involving express racial classifications. In regard to programs designed to promote affirmative action in university admissions policies, for example, she said that governmental measures designed to extirpate entrenched discrimination and its aftereffects should not be reviewed under the same standard as those that deny full citizenship stature to racial groups.

Cross-references:

- *Turner v. Safley*, 482 *United States Reports* 78, 107 *Supreme Court Reporter* 254, 96 *Lawyer's Edition Second* 64 (1987).

Languages:

English.

*Identification:* USA-2005-1-002

a) United States of America / **b)** Supreme Court / **c)** / **d)** 01.03.2005 / **e)** 03-633 / **f)** *Roper v. Simmons* / **g)** 125 *Supreme Court Reporter* 1183 (2005) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 2.1.1.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments.
- 2.2.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources.
- 3.16 **General Principles** – Proportionality.
- 5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.

Keywords of the alphabetical index:

Death penalty / Juvenile offender / Interpretation, evolving.

Headnotes:

In determining whether a punishment is so disproportionate as to be cruel and unusual, a court must refer to evolving standards of decency that mark progress of a maturing society.

While not binding on the court, international opinion as expressed in foreign and international law may provide confirmation of the Court's conclusions based on interpretation of constitutional norms.

The death penalty must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them most deserving of execution.

Imposition of the death penalty on an offender who was under the age of 18 at the time of the crime is categorically as a cruel and unusual punishment.

Summary:

In 1993, at the age of 17, Christopher Simmons planned and committed a murder. After turning 18, he was tried for the crime in a court of the State of Missouri, found guilty, and sentenced to death. On appeal, the Missouri Supreme Court affirmed the verdict and sentence.

In 2003, however, following Simmons's filing of a petition for post-conviction relief, the Missouri Supreme Court ruled that the Eighth Amendment to the United States Constitution prohibits the execution of a person who was under the age of 18 at the time the crime was committed. The Eighth Amendment, which is made applicable to the states by means of the Due Process clause of the Fourteenth Amendment to the U.S. Constitution, states in full: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." In making this determination, the Missouri Supreme Court concluded that a national consensus had developed against the execution of juvenile offenders. The court therefore set aside the death sentence and re-sentenced Simmons to life imprisonment without eligibility for probation, parole, or release except by act of the Governor of Missouri.

The United States Supreme Court accepted the State of Missouri's petition for review of the decision of the Missouri Supreme Court. In a five to four decision, the

Court affirmed the Missouri Supreme Court's ruling. In so doing, the Court reversed the position it had adopted in its 1989 decision in the case of *Stanford v. Kentucky*. In *Stanford v. Kentucky*, the Court held that a national consensus against the execution of those who were 16 or 17 years old at the time of their crimes did not exist, and therefore the Eighth Amendment did not require a prohibition against such executions. In 1988, in *Thompson v. Oklahoma*, the Court ruled that it constituted cruel and unusual punishment to execute persons who were 15 years of age or younger at the time they committed their crimes.

In setting aside *Stanford v. Kentucky*, the Court ruled that a categorical prohibition against execution of 16 or 17 year old offenders was necessary under "evolving standards of decency that mark the progress of a maturing society" – the Court's standard for determining whether a punishment is so disproportionate as to be "cruel and unusual" under the Eighth Amendment. The Court cited objective indicators of a national consensus, as reflected in the fact that legislatures of five states in the United States since 1989 had voted to reject the death penalty for juvenile offenders, joining 25 other states that earlier had rejected such punishment or the death penalty altogether. In addition, the Court cited reasons, such as developmental differences between juveniles and adults, that supported its independent judgment that the death penalty is a disproportionate punishment for juveniles. In this regard, the Court articulated the principle that capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them most deserving of execution. Juvenile offenders, the Court concluded, cannot with reliability be included in the category of worst offenders. Finally, while declaring that it was not controlling, the Court stated that the "overwhelming weight of international opinion" against the death penalty, as reflected in international agreements and domestic legal systems, provided a "respected and significant confirmation" of the Court's own conclusions.

Supplementary information:

The views of the four dissenting Justices were expressed in two separate opinions, one authored by Justice O'Connor and the other by Justice Scalia. The dissenting opinions differed on the appropriateness of the Court's referring to foreign and international law, with Justice Scalia rejecting the relevance and legitimacy of taking international opinion into account, and Justice O'Connor declaring that "This nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries."

Both dissenting opinions raised an issue that the Court's opinion did not address. They criticised the Missouri Supreme Court, stating that it lacked authority to depart, on its own, from the U.S. Supreme Court's binding precedent (in *Stanford v. Kentucky*). In his opinion, Justice Scalia stated that: "Allowing lower courts to reinterpret the Eighth Amendment whenever they decide enough time has passed for a new snapshot leaves this court's decisions without any force."

On 1 March 2005, 72 individuals in 12 different states were in prisons awaiting execution for crimes committed while they were 16 or 17 years of age. Those executions are now prohibited as a result of the Court's decision.

Cross-references:

- *Thompson v. Oklahoma*, 487 *United States Reports* 815, 108 *Supreme Court Reporter* 2687, 101 *Lawyer's Edition Second* 702, (1988); the Supreme Court of the United States held that it constituted cruel and unusual punishment to execute persons who were 15 years of age or younger at the time of their offense. The following year, in *Stanford v. Kentucky*, 492 *United States Reports* 361, 109 *Supreme Court Reporter* 2969, 106 *Lawyer's Edition Second* 306 (1989).

Languages:

English.



Court of Justice of the European Communities and Court of First Instance

Important decisions

Identification: ECJ-2005-1-001

a) European Union / **b)** Court of First Instance / **c)** First Chamber / **d)** 15.01.2003 / **e)** T-377/00, T-379/00, T-380/00, T-260/01 and 272/01 / **f)** Philip Morris International, Inc. and Others v. Commission of the European Communities / **g)** *European Court Reports* II-00001 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

1.3.5.2 **Constitutional Justice** – Jurisdiction – The subject of review – Community law.

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

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

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

Keywords of the alphabetical index:

Civil action / European Community, proceedings, brought in third state / Tobacco, smuggling, VAT, loss / Action for annulment, admissibility.

Headnotes:

1. The decisions by which the Commission approved, first, the principle of a civil action, in the name of the Commission, against certain American cigarette manufacturers and, second, the principle of a new civil action in the US courts, jointly by the Community and at least one Member State, against those same parties, do not produce legal effects which are binding on, and capable of affecting the interests of, those manufactures by bringing about a distinct change in their legal position. Accordingly, they are

not acts which may be the subject of an action for annulment.

Although the commencement of proceedings constitutes an indispensable step for the purpose of obtaining a binding judgment and may produce as a matter of law certain consequences, such as the interruption of a limitation period or the determination of the starting point for interest owing, it does not per se determine definitively the obligations of the parties to the case. That determination can result only from the judgment of the court, be it the Community court or a national court. When it decides to commence proceedings, the Commission does not intend itself to change the legal position in question, but merely initiates a procedure whose purpose is to achieve a change in that position through a judgment (see paragraphs 75-81).

2. Any act of a Community institution carries an implication that the institution in question has adopted a position as to its competence to adopt it. The adoption of such a position cannot, however, be viewed as a binding legal effect for the purposes of Article 230 EC.

Even if the position adopted is erroneous, it has no significance independent of the act adopted and, unlike an act designed to confer competence, is not intended to alter the division of powers provided for by the Treaty.

However serious the defects which might vitiate a measure may be, having regard to either the fundamental rights or the institutional balance, they cannot justify an exception to the absolute bars to proceedings and render open to challenge measures which are not contestable because they do not produce binding legal effects. It cannot be concluded that an act is open to challenge because it may be unlawful (see paragraphs 85-91).

3. Access to justice is one of the constitutive elements of a Community based on the rule of law and is guaranteed in the legal order based on the EC Treaty in that the Treaty has established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. The constitutional traditions common to the Member States and Articles 6 and 13 ECHR serve as a basis for the right to obtain an effective remedy before a competent court.

Individuals are not denied access to justice because conduct lacking the features of a decision cannot be challenged by way of an action for annulment, since an action for non-contractual liability under Article 235

EC and Article 288.2 EC is available if the conduct is of such a nature as to entail liability for the Community.

Although it may seem desirable that individuals should have, in addition to the possibility of an action for damages, a remedy under which actions of the Community institutions liable to prejudice their interests but which do not amount to decisions may be prevented or brought to an end, it is clear that a remedy of that nature, which would necessarily involve the Community judicature issuing directions to the institutions, is not provided for by the Treaty. It is not for the Community judicature to usurp the function of the founding authority of the Community in order to change the system of legal remedies and procedures established by the Treaty traité (see paragraphs 121-124).

Summary:

In the context of its efforts to combat the smuggling of cigarettes into the European Community, the Commission approved the principle of a civil action, in the name of the Commission, against certain American cigarette manufacturers. Thus, a number of civil actions were brought by the European Community, represented by the Commission, against a number of companies belonging to the Philip Morris group and the Reynolds group and against the company Japan Tobacco, Inc. before a federal court in the United States of America (the "United States District Court, Eastern District of New York").

In the context of a first action, the Community alleged that the undertakings in question had participated in a system of smuggling aimed at bringing cigarettes on to the territory of the European Community and distributing them there. The Community sought, in particular, compensation for the loss resulting from that system of smuggling and consisting principally in the loss of customs duties and value added tax (VAT) which would have been paid on legal imports and also injunctions to have the impugned conduct stopped. The Community based its claims on a United States federal law, the Racketeer Influenced and Corrupt Organisations Act 1970 (RICO) and also on a number of common law doctrines, namely common law fraud, public nuisance and undue enrichment. However, the United States federal court before which the actions were brought dismissed the European Community's claims.

The Commission none the less approved the principle of a new civil action before the American courts, brought jointly by the Community and at least one member State, against the cigarette manufacturers' groups which were the defendants in the previous

action. A fresh action was therefore brought before the same American federal court against Philip Morris and Reynolds by the Commission, acting on behalf of the European Community and the member States which it was empowered to represent, and also by ten member States, namely the Kingdom of Belgium, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Portuguese Republic and the Republic of Finland, in their own name. In the context of that second action, the Community no longer based its claims on RICO but solely on the common-law principles invoked in the context of the first action. On the other hand, the member States based their claims both on RICO and on the common law principles on which the Commission had relied in the first action. That claim was also dismissed.

The Community, represented by the Commission, and the ten member States then brought a third action, still before the same American federal court, against the applicant Japan Tobacco, Inc. and other associated companies. However, the United States federal court dismissed the second and third actions brought by the Community and the member States on the basis of a common law rule (the revenue rule) under which the courts of the United States refrain from enforcing the tax legislation of other States.

It was specifically against the Commission's decisions to bring such civil actions against them before the United States Federal Court that the American cigarette manufacturers brought annulment proceedings before the Court of First Instance of the European Communities in the present case.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2005-1-002

a) European Union / **b)** Court of First Instance / **c)** / **d)** 21.01.2003 / **e)** C-378/00 / **f)** Commission of the European Communities v. European Parliament and Council of the European Union / **g)** *European Court Reports* I-00937 / **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.

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

4.17.4 **Institutions** – European Union – Legislative procedure.

Keywords of the alphabetical index:

Comitology, attribution, statement of reasons.

Headnotes:

1. Article 230 EC gives the Commission the right to bring an action for annulment in order to challenge the legality of any measure adopted jointly by the Parliament and the Council, without making the exercise of that right conditional on the position taken by the Commission at the time when the measure in question was adopted (see para 28).

2. In the context of an action for annulment, the absence of reasons or inadequacy of the reasons stated goes to an issue of infringement of essential procedural requirements within the meaning of Article 230 EC, and constitutes a plea distinct from that relating to the substantive legality of the contested measure, which goes to infringement of a rule of law relating to the application of the Treaty within the meaning of that article (see para 34).

3. As a measure of secondary legislation, Decision 1999/468 laying down the procedures for the exercise of implementing powers conferred on the Commission (the second comitology decision) cannot add to the rules of the Treaty.

None the less, it follows from the third indent of Article 202 EC, on the basis of which the second comitology decision was adopted, that the Council is empowered to lay down principles and rules with which the manner of exercising the implementing powers conferred on the Commission must comply. Those principles and those rules must therefore be observed when measures conferring implementing powers on the Commission are adopted, both for measures adopted by the Council alone and measures adopted by the Council together with the Parliament under the co-decision procedure. Under those principles and rules, the Council is empowered to lay down the methods for choosing between the various procedures to which the Commission's exercise of the implementing powers conferred on it may be subject, since it is specified that the Council

may define binding criteria or limit itself to defining criteria for guidance.

From its wording and from the fifth recital in the preamble to the decision it follows that Article 2 of the decision cited above lays down mere criteria for guidance, which is also confirmed by a joint declaration of the Council and the Commission at the time the decision was adopted (see paragraphs 39-47).

4. Even though an act adopted by a Community institution does not lay down a rule of law which that institution is bound to observe but merely lays down a rule of conduct indicating the practice to be followed, that institution may not depart from it without giving the reasons which have led it to do so.

That is true in the case of Article 2 of Decision 1999/468 laying down the procedures for the exercise of implementing powers conferred on the Commission (the second comitology decision), in the light of the purpose of that provision. Therefore, when the Community legislature departs, in the choice of committee procedure, from the criteria which are laid down in Article 2 of that decision, it must state the reasons for that choice. According to the fifth recital in the preamble to the decision, the criteria for the choice of committee procedure were defined with a view to achieving greater consistency and predictability in the choice of type of committee. Such an objective would be jeopardised if the Community legislature could, when adopting a basic instrument conferring implementing powers on the Commission, depart from the criteria defined in the second comitology decision without having to state the reasons which led it to do so (see paragraphs 51-55).

5. The statement of reasons for a Community measure must appear in that measure and must be adopted by the author of the measure, so that in the present case a declaration adopted by the Council alone cannot in any event serve as a statement of reasons for a regulation adopted jointly by the Parliament and the Council, such as Regulation no. 1655/2000 concerning the Financial Instrument for the Environment "LIFE" (see para 66).

Summary:

"LIFE" designates a financial instrument for the environment, established by Regulation (EC) no. 1655/2000 of the European Parliament and of the Council of 17 July 2000. Its aim is to contribute to the development and implementation of the Community environmental policy and environmental legislation. It must also facilitate the integration of the environment

into other policies and promote sustainable development in the Community.

The Commission had sought annulment of Regulation (EC) no. 1655/2000 in so far as it made the adoption of measures for the implementation of the LIFE programme subject to the regulatory procedure under Article 5 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission ("the second comitology decision"). In support of its application, the Commission maintained primarily that the regulation did not contain adequate reasoning with regard to the choice of committee procedure made in the regulation and that the declaration made by the Council at the time when the regulation was adopted could not satisfy the obligation to state reasons on that point.

The Court granted the Commission's claim and annulled Article 11.2 of Regulation no. 1655/2000, establishing the choice of regulatory procedure provided for in Article 5 of the second comitology decision for the adoption of measures to implement the LIFE programme. The Court took care, however, to make clear that the measures for the implementation of Regulation no. 1655/2000 already adopted at the time of its judgment were not affected by that judgment and that the effects of Article 11.2 of Regulation no. 1655/2000 were to be fully maintained until the Parliament and the Council adopted new provisions concerning the committee procedure to which the measures for the implementation of that regulation are subject.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2005-1-003

a) European Union / **b)** Court of First Instance / **c)** / **d)** 13.03.2003 / **e)** T-125/01 / **f)** José Martí Peix, Sa v. Commission of the European Communities / **g)** *European Court Reports* II-00865 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.10 **General Principles** – Certainty of the law.
 3.17 **General Principles** – Weighing of interests.
 3.18 **General Principles** – General interest.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.2 **Fundamental Rights** – Equality.
 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:

Fraud, prevention of benefit / Obligation, conformity, equality.

Headnotes:

The principle of the protection of legitimate expectations may not be relied upon by an undertaking which has committed a manifest infringement of the rules in force. Where serious irregularities have been established as regards the applicable legislation and the obligations to provide information and to act in good faith of a joint enterprise created to exploit and where appropriate use, with primary consideration being given to the supply of the Community market, the fishery resources of waters falling within the sovereignty and/or jurisdiction of a specific third party, that enterprise cannot, as a beneficiary of Community financial aid, maintain that the passage of allegedly significant periods of time between two actions by the Commission adversely affected its legitimate expectations that the aid which it had been granted was definitively acquired.

Nor can that enterprise continue to allege a breach of the principle of legal certainty on the basis that the Commission did not act for significant periods of time. While it is important to ensure compliance with requirements of legal certainty which protect private interests, those requirements must be balanced against requirements of the protection of public interests, and precedence must be accorded to the latter when the maintenance of irregularities would be likely to infringe the principle of equal treatment. Consequently, even if the passage of time during which the Commission takes no steps in relation to an undertaking may be capable of infringing the principle of legal certainty, the importance of the time criterion must be qualified in the light of the case.

Furthermore, to maintain the entirety of the aid despite such irregularities would serve to encourage fraud and would undermine the equality of treatment

for fisheries aid beneficiaries since it would indicate that that enterprise was receiving the treatment reserved for aid beneficiaries which scrupulously comply with their obligations although it had not done so (see paragraphs 107,110-113).

Summary:

Regulation (EEC) no. 4028/86 on Community measures to improve and adapt structures in the fisheries and aquaculture sector provides that the Commission may grant various kinds of financial aid to joint enterprise fisheries projects, of amounts differing according to the tonnage and age of the vessels in question, in so far as those projects satisfy the conditions set by the regulation. A joint enterprise is a company incorporated under private law comprising one or more Community shipowners and one or more partners from a third country with which the Community maintains relations, associated under a joint enterprise agreement, set up for the purpose of exploiting and, where appropriate, using the fishery resources of waters falling within the sovereignty and/or jurisdiction of such third country, primary consideration being given to the supply of the Community market.

The applicant company in the present case submitted to the Commission, through the Spanish authorities, an application for Community financial aid under Regulation no. 4028/86 for a project to create a joint Spanish-Angolan fisheries enterprise. That project provided for the transfer, with a view to fishing activities, of three vessels to the joint enterprise created by the applicant, a Portuguese company and an Angolan partner. The Commission granted the project referred to Community aid for a maximum amount in excess of one million ecus. Its decision provided that the Kingdom of Spain would supplement the Community aid by granting aid. The joint venture was created and registered in Luanda, in Angola. The joint venture's three vessels were registered at the port of Luanda.

More than two years after the Spanish authorities sent a letter from the applicant containing a progress report on the project, however, the Commission adopted a decision reducing the assistance initially granted, on the ground that, contrary to the requirements laid down in Regulation no. 4028/86 and Regulation no. 1956/91, the joint enterprise had not used for three years the fishery resources of the third country mentioned in the decision granting the aid. The applicant then brought an action for annulment of that decision, maintaining, in particular, that as it was adopted after long periods of inactivity on the part of the Commission, the decision infringed its legitimate expectation that the aid granted to it was definitive. The applicant also claimed that there had been a breach of the principle of legal certainty.

The Court held that the principle of protection of legitimate expectations cannot be invoked by an undertaking which has been guilty of a manifest breach of the regulations in force. It likewise refused to uphold a breach of the principle of legal certainty, stating that while it is important to ensure compliance with requirements of legal certainty which protect private interests, those requirements must also be balanced against requirements of the protection of public interests, and precedence must be accorded to the latter when the maintenance of irregularities would be likely to infringe the principle of equal treatment.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2005-1-004

a) European Union / **b)** Court of First Instance / **c)** / **d)** 10.04.2003 / **e)** T-353/00 / **f)** Jean-Marie Le Pen v. European Parliament / **g)** *European Court Reports* II-00579 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

1.3.5.2 **Constitutional Justice** – Jurisdiction – The subject of review – Community law.

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:

European Parliament, member, conviction, criminal / European Parliament, member, election / European Parliament, term of office, end.

Headnotes:

Only measures which produce binding legal effects such as to affect the interests of an applicant, by bringing about a distinct change in his legal position, may be the subject of an action for annulment under

Article 230 EC. Thus, all provisions adopted by the institutions, whatever their nature or form, which are intended to produce legal effects may be the subject of an action for annulment.

The declaration made by the President of the Parliament in the Plenary Session of 23 October 2000, according to which "in accordance with Article 12.2 of [the 1976 Act], the Parliament ... takes note of the notification of the French Government declaring that [the applicant] is disqualified from holding office", cannot form the subject of an action for annulment within the meaning of Article 230 EC.

The procedure consisting in "taking note" of the vacancy of the seat of a Member of the European Parliament, under Article 12.2 of the 1976 Act concerning the election of representatives to the European Parliament by direct universal suffrage, refers not to the disqualification from office of the person concerned but to the simple fact that his seat has become vacant as a result of the application of national provisions. In other words, the Parliament's role is not to "bring about" the disqualification from office but merely to take note of the declaration, already made by the national authorities, that the seat is vacant, that is to say, of a pre-existing legal situation resulting exclusively from a decision of those authorities (see paragraphs 77-78, 90 and 98).

Summary:

The Criminal Division of the French Court of Cassation dismissed the applicant's appeal against the judgment of the Versailles Court of Appeal of 17 November 1998 finding him guilty, *inter alia*, of assault on a public officer acting in the course of his duties and when the victim's status is apparent or known to the assailant, an offence contrary to Article 222-13.1.4 of the French Criminal Code. For that offence the applicant was given a suspended sentence of three months' imprisonment and fined 5,000 French francs. As a further penalty, he was deprived of his rights, as provided for in Article 131-26, paragraph 2 of the Criminal Code, limited to eligibility, for a period of one year.

In the light of that conviction, and in accordance with Article 5.2 of the Law of 1977, the French Prime Minister, by decree of 31 March 2000, declared that the applicant's ineligibility brought to an end his term of office as a representative in the European Parliament.

By an undated letter, Ms Nicole Fontaine, then President of the European Parliament, informed the applicant that the French authorities had officially

brought before her the file relating to applicant's disqualification from holding office as a Member of the European Parliament. However, it was only after receiving official communication from the competent authorities of the French Republic of the judgment of the French *Conseil d'État* of 6 October 2000 definitively dismissing the applicant's appeal against the decree of 31 March 2000 that the European Parliament, through its President, took notice of the notification of the French Government declaring that the applicant had been disqualified, in accordance with Article 12.2 of the Act concerning the election of the representatives of the Assembly by direct universal suffrage annexed to the Council Decision of 20 September 1976.

It was specifically against that "decision" of the European Parliament, taken in the form of a declaration by its President, that the applicant brought the action for annulment at the origin of the present case.

The European Parliament claimed that the application was inadmissible, on the ground that there was no measure open to challenge under Article 230 EC. Supported by the French Republic, the Parliament claimed that the contested measure was purely declaratory and that the applicant's legal position had been altered not by that measure but by the Decree of 31 March 2000. It asserted that it had acted only within the limits of and in strict compliance with the national provisions, as required by the 1976 Act.

On this occasion, the Court of First Instance recalled that only measures which produce binding legal effects such as to affect the interests of an applicant, by bringing about a distinct change in his legal position, may be the subject of an action for annulment under Article 230 EC and held that the declaration made by the President of the Parliament in the Plenary Session of 23 October 2000, by which the Parliament took note of the notification of the French Government declaring that the applicant was disqualified from holding office, could not be the subject of such an action.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2005-1-005

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 10.04.2003 / **e)** C-20/01 and C-28/01 / **f)** Commission of the European Communities v. Federal Republic of Germany / **g)** *European Court Reports* I-03609 / **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.

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

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

3.18 **General Principles** – General interest.

4.17.1.3 **Institutions** – European Union – Institutional structure – Commission.

Keywords of the alphabetical index:

European Commission, role / Public contract, tender, obligation.

Headnotes:

In exercising its powers under Article 226 EC the Commission does not have to show that there is a specific interest in bringing an action. The provision is not intended to protect the Commission's own rights. The Commission's function, in the general interest of the Community, is to ensure that the Member States give effect to the Treaty and the provisions adopted by the institutions thereunder and to obtain a declaration of any failure to fulfill the obligations deriving therefrom with a view to bringing it to an end. Given its role as guardian of the Treaty, the Commission alone is therefore competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfill its obligations and to determine the conduct or omission attributable to the Member State concerned on the basis of which those proceedings should be brought. It may therefore ask the Court to find that, in not having achieved, in a specific case, the result intended by the directive, a Member State has failed to fulfill its obligations (see paragraphs 29-30).

Summary:

Two German municipalities in the Land of Lower Saxony had each concluded a contract, one with an energy distribution undertaking for collection of its

waste water and the other with a mining undertaking for disposal of its residual waste by thermal processing.

In each case the Commission gave the German Government formal notice to submit observations on whether the provisions of Directive 92/50 should be applied in this case and then, not being satisfied by the German Government's replies, sent it a reasoned opinion in which it claimed that the provisions of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts should have been applied and that it was irrelevant in law that the infringement of the provisions of Community law had been acknowledged by that member State. The Commission also called on Germany to remind the authorities concerned without delay of the relevant requirements and to urge them to comply with those provisions in the future.

It was in those circumstances that the Commission brought two actions against the Federal Republic of Germany. The first sought a declaration that by failing to invite tenders for the award of the contract for the collection of waste water in the first municipality and to publish notice of the results of the procedure for the award of the contract in the Supplement to the Official Journal of the European Communities, the Federal Republic of Germany had, at the time of the award of that public service contract, failed to fulfil its obligations under Article 8 in conjunction with Articles 15.2 and 16.1 of Directive 92/50. In the second case, the Commission complained of the fact that, at the time of the award of a public service contract, the Federal Republic of Germany had failed to fulfil its obligations under Articles 8 and 11.3.b of Directive 92/50, as the second municipality had awarded a contract for waste disposal by negotiated procedure without prior publication of a contract notice, although the criteria laid down by Article 11.3 of that directive for an award of a contract by privately negotiated procedure without a Community-wide invitation to tender had not been met.

The German Government claimed, *inter alia*, that both of the infringement actions thus brought were inadmissible, since there was no longer a breach which the defendant member State was required to bring to an end. It pointed out that the Community legislation on the award of public contracts consists solely of procedural rules and concluded that the effects of the breach of those rules are exhausted as soon as the breach is committed. It maintained that once the Federal Republic of Germany had acknowledged that breach, there was no longer any objective interest in bringing infringement proceedings.

The Court held, however, that in exercising its powers under Article 226 EC the Commission does not have to show that there is a specific interest in bringing an action. It recalled that that provision is not intended to protect the Commission's own rights, as its function, in the general interest of the Community, is to ensure that the member States give full effect to the Treaty and the provisions adopted thereunder by the institutions and to obtain a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing it to an end. It is for that reason that, given its role as guardian of the Treaty, the Commission alone is competent to decide whether it is appropriate to bring proceedings against a member State for failure to fulfil its obligations and to determine the conduct or omission attributable to the member State concerned on the basis of which those proceedings should be brought. The Court concluded that the Commission may therefore ask it to find that, in not having achieved, in a specific case, the result intended by a directive, a member State has failed to fulfil its obligations.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2005-1-006

a) European Union / b) Court of First Instance / c) / d) 06.05.2003 / e) C-104/01 / f) Libertel Groep BV v. Benelux-Merkenbureau / g) *European Court Reports* II-03793 / 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.

Keywords of the alphabetical index:

European Community, directive, declaration, validity.

Headnotes:

A declaration recorded in the minutes of the Council on the occasion of the adoption of a directive cannot

be used for the purpose of interpreting a provision of that directive where no reference is made to the content of that declaration in the wording of the provision in question and therefore has no legal scope.

Summary:

The Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands established their law on trade marks in a common piece of legislation, the Uniform Benelux Law on Trade Marks. That Law was amended in order to implement Directive 89/104/EEC to approximate the laws of the member States relating to trade marks in the legal orders of those three member States. The Law established the Benelux Trade Marks Office, which is the competent trade mark authority for those three member States. The Benelux Trade Mark Office is responsible, *inter alia*, for examining filings of trade marks in the light of the absolute grounds for refusal.

Libertel is a company established in the Netherlands whose principal activity is the supply of mobile telecommunications services. It filed with the Benelux Trade Mark Office an orange colour as a trade mark for certain telecommunications goods and services. The application form contained, in the space for reproducing the trade mark, an orange rectangle and, in the space for describing the trade mark, the word "orange", without reference to any colour code.

The Benelux Trade Mark Office informed Libertel that it was provisionally refusing registration of the sign. It considered that unless Libertel were able to show that the sign filed, consisting exclusively of the colour orange, had acquired distinctive character through use, it was devoid of any distinctive character within the meaning of the Benelux Law on trade marks. Libertel objected to that provisional refusal. Taking the view that there was no need to reconsider the refusal, the Benelux Trade Mark Office served notice of final refusal. Libertel therefore brought an appeal against that refusal before the Court of Appeal of The Hague, which dismissed the appeal. Libertel then appealed in cassation to the *Hoge Raad der Nederlanden*. In the course of the examination of the dispute by the Hoge Raad, a number of questions arose as to the correct application of the Benelux Law on trade marks, and therefore also as to the interpretation of the directive the implementation of which had led to the amendment of the Law. The *Hoge Raad* therefore referred to the Court of Justice for a preliminary ruling the questions which gave rise to the present case.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.

**Identification:** ECJ-2005-1-007

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 15.05.2003 / **e)** C-300/01 / **f)** Doris Salzmann / **g)** *European Court Reports* I-04899 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

2.2.3 **Sources of Constitutional Law** – Hierarchy – Hierarchy between sources of Community law.

4.7.6 **Institutions** – Judicial bodies – Relations with bodies of international jurisdiction.

Keywords of the alphabetical index:

Preliminary ruling, reference, admissibility / European Economic Area, agreement interpretation, jurisdiction.

Headnotes:

1. In the context of the cooperation between the Court of Justice and national courts instituted by Article 234 EC, the Court is, in principle, obliged to give a ruling when the questions submitted relate to the interpretation of Community law. Moreover, in principle it is for the national courts alone to determine, having regard to the particular features of each case, both the need to refer a question for a preliminary ruling and the relevance of such a question. It follows that, in the factual and legislative context which the national court is responsible for defining and the accuracy of which is not a matter for the Court to determine, the questions submitted by the national court enjoy a presumption of relevance. It is only in the exceptional case, where it is quite obvious that the interpretation of Community law

sought bears no relation to the facts or the purpose of the main action, that the Court refrains from giving a ruling.

A situation where national law requires that a national be allowed to enjoy the same rights as those which nationals of other Member States would derive from Community law in the same situation does not correspond to the abovementioned exceptional case. On the contrary, in such a situation, the Court's reply may be useful to the national court (see paras 29-33).

2. Although the Court of Justice has, in principle, jurisdiction under Article 234 EC to give a preliminary ruling on the interpretation of the Agreement on the European Economic Area (EEA) where such a question is raised before a court or tribunal of one of the Member States, that jurisdiction applies solely with regard to the Communities. The Court therefore has no jurisdiction, pursuant to Article 234 EC, to rule on the interpretation of that agreement as regards its application in the States of the European Free Trade Association (EFTA).

Nor has such jurisdiction been conferred on the Court in the context of the EEA Agreement. Under Article 108.2 of that Agreement and Article 34 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice, the EFTA Court has jurisdiction to rule on the interpretation of the EEA Agreement applicable in the States of EFTA. There is no provision in the EEA Agreement for parallel jurisdiction to be exercised by the Court of Justice of the European Communities.

The fact that the EFTA State in question subsequently became a Member State of the European Union, so that the question emanates from a court or tribunal of one of the Member States, cannot have the effect of conferring on the Court jurisdiction to interpret the EEA Agreement as regards its application to situations which do not come within the Community legal order. Thus, although the jurisdiction of the Court covers the interpretation of Community law, of which the EEA Agreement forms an integral part, as regards its application in the new Member States with effect from the date of their accession, the Court does not have jurisdiction to rule on the effects of that agreement within the national legal system of those States during the period prior to their accession (see paras 65-71, operative part 2).

Summary:

Ms Salzmann, an Austrian national residing in Fußach, bought a building plot in that commune from Mr Walter Schneider, also of Austrian nationality. She

did not apply for the prior administrative authorisation of transfer of ownership provided for in Article 8.3 of the Law on real property ownership, on which the validity of that type of transaction depends. However, Ms Salzmann applied to the land registry judge of the *Bezirksgericht* Bregenz for entry of that real property transaction in the land register and annexed to her application a declaration similar to that provided for in Article 7.2 of the Law on real property ownership, whereby she undertook not to use the land acquired for the purpose of building a holiday home. She claimed that the prior authorisation procedure introduced by Article 8.3 of the Law contravened the Community obligations of the Republic of Austria and was unnecessary, since a declaration analogous to that provided for in Article 7.2 was sufficient, in her view, for the purpose of effecting entry in the land register. Ms Salzmann's application was rejected by order of the judicial official employed by the *Bezirksgericht* Bregenz and performing certain duties by delegation and under the authority of that court, on the ground that prior authorisation, which has constitutive effect for the purpose of establishing title, was lacking.

Ms Salzmann then brought an appeal against that order, which was examined by the *Bezirksgericht* Bregenz. The *Bezirksgericht* Bregenz referred the matter to the Court of Justice, which, by judgment of 14 June 2001 in Case C-178/99 Salzmann [2001] ECR I-4421, Article 21, ruled that it had no jurisdiction to answer the questions referred to it, since the *Bezirksgericht* Bregenz was acting in an administrative capacity in the proceedings pending before it and could not, therefore, be regarded as a court or tribunal within the meaning of Article 234 EC. The *Bezirksgericht* Bregenz decided, in consequence, to submit Ms Salzmann's action to the Landesgericht Feldkirch, which decided to refer to the Court of Justice the three questions for a preliminary ruling which give rise to the present case.

The *Landesgericht* was uncertain, *inter alia*, as to the compatibility of the prior authorisation procedure with Annex XII, point 1.e, to the EEA Agreement, in view of the fact that the Law on real property ownership applicable to the case before it entered into force after the signature of that agreement.

It was on that occasion that the Court held that while it has, in principle, jurisdiction to give a ruling under Article 234 EC on the interpretation of the Agreement establishing the European Economic Area (EEA) where such a question is raised before a court or tribunal of one of the member States, that jurisdiction is valid solely with regard to the Communities, so that the Court has no jurisdiction under Article 234 EC to give a ruling on the interpretation of that agreement

as regards its application in the European Free Trade Area (EFTA).

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2005-1-008

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 20.05.2003 / **e)** C-465/00, C-138/01 and C-139/01 / **f)** Österreichischer Rundfunk and others / **g)** *European Court Reports* I-04989 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
 3.16 **General Principles** – Proportionality.
 3.18 **General Principles** – General interest.
 3.26.1 **General Principles** – Principles of Community law – Fundamental principles of the Common Market.
 5.3.32.1 **Fundamental Rights** – Civil and political rights – Right to private life – Protection of personal data.

Keywords of the alphabetical index:

Court of Auditors, employment data, access / Publication, interdiction / Salary / European Community, directive, direct application.

Headnotes:

1. The applicability of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data cannot depend on whether the specific situations at issue have a sufficient link with the exercise of the fundamental freedoms guaranteed by the Treaty, in particular the freedom of movement of workers. A contrary interpretation could make the limits of the field of application of the directive particularly unsure and uncertain, which would be contrary to its essential objective of approximating the laws, regulations and administrative provisions of the Member States in order to eliminate obstacles to the

functioning of the internal market deriving precisely from disparities between national legislations (see para 42).

2. The provisions of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, in so far as they govern the processing of personal data liable to infringe fundamental freedoms, in particular the right to privacy, must necessarily be interpreted in the light of fundamental rights, which form an integral part of the general principles of law whose observance the Court ensures (see para 68).

3. While the mere recording by an employer of data by name relating to the remuneration paid to his employees cannot as such constitute an interference with private life, the communication of that data to third parties, in the present case a public authority, infringes the right of the persons concerned to respect for private life, whatever the subsequent use of the information thus communicated, and constitutes an interference within the meaning of Article 8 ECHR.

To establish the existence of such an interference, it does not matter whether the information communicated is of a sensitive character or whether the persons concerned have been inconvenienced in any way. It suffices to find that data relating to the remuneration received by an employee or pensioner have been communicated by the employer to a third party (see paras 74-75).

4. The interference with private life resulting from the application of national legislation which requires a State control body to collect and communicate, for purposes of publication, data on the income of persons employed by the bodies subject to that control, where that income exceeds a certain threshold, may be justified under Article 8.2 ECHR only in so far as the wide disclosure not merely of the amounts of the annual income above a certain threshold of persons employed by the bodies subject to control by the State body in question but also of the names of the recipients of that income is both necessary for and appropriate to the aim of keeping salaries within reasonable limits, that being a matter for the national courts to examine (see para 90).

5. Articles 6.1.c, 7.c and 7.e of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data do not preclude national legislation requiring a State control body to collect and communicate, for purposes of publication, data on the income of persons employed by the bodies subject to that control, where that income exceeds a certain

threshold, provided that it is shown that the wide disclosure not merely of the amounts of the annual income above a certain threshold of persons employed by the bodies subject to control by the State body in question but also of the names of the recipients of that income is necessary for and appropriate to the objective of proper management of public funds pursued by the constituent power, that being for the national courts to ascertain (see para 94, operative part 1).

6. Wherever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may, in the absence of implementing measures adopted within the prescribed period, be relied on against any national provision which is incompatible with the directive or in so far as they define rights which individuals are able to assert against the State.

Such a character may be attributed to Article 6.1.c of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, under which 'personal data must be [...] adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed', and to Article 7.c or Article 7.e of that directive, under which personal data may be processed only if *inter alia* 'processing is necessary for compliance with a legal obligation to which the controller is subject' or 'is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller [...] to whom the data are disclosed' (see paras 98, 100-101, operative part 2).

Summary:

The Court had been requested by the Austrian Constitutional Court (*Verfassungsgerichtshof*) and the Austrian Supreme Court (*Oberster Gerichtshof*), respectively, to give a preliminary ruling on a number of questions, framed in substantially identical terms, on the interpretation of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Each of the two courts was dealing with disputes concerning the obligation of public bodies subject to control by the Court of Auditors, the *Rechnungshof*, to communicate to the *Rechnungshof*, pursuant to the Federal Constitutional Law on the limitation of salaries of officials, the salaries and pensions exceeding a certain level paid by them to their employees and pensioners, together with the names of the recipients, for the purpose of drawing up an annual report to be transmitted to the

National Council and the Parliaments of the Länder and made available to the public. In the proceedings before the *Verfassungsgerichtshof*, certain territorial communities, public undertakings and a statutory professional representative body, all subject to control by the *Rechnungshof*, had refused to communicate the information relating to the income of the personnel concerned, or had communicated the information, to various degrees, anonymously. In the proceedings before the *Oberster Gerichtshof*, two employees of a body subject to control by the *Rechnungshof* had lodged an application for interim measures seeking to prevent the authority for which they worked from complying with such requests for communication.

The two referring courts thus asked the Court in substance whether the provisions of Community law, in particular the provisions on data protection, must be interpreted as precluding national legislation which requires a legal body to communicate data on the income of its staff members and a State body to collect and communicate those data, for the purposes of the publication of the names and income of those staff members.

The Court answered in the negative, stating however that, in view of the requirement of respect for private life laid down by the European Convention on Human Rights, it must be shown that the wide disclosure not merely of the amounts of the annual income above a certain threshold of persons employed by the bodies subject to control by the *Rechnungshof* but also of the names of the recipients of that income is necessary for and appropriate to the objective of proper management of public funds pursued by the constituent power, which was a matter for the national courts to ascertain.

Cross-references:

- Constitutional Court of Austria, *Bulletin* 2003/3 [AUT-2003-3-004] and *Bulletin* 2000/3 [AUT-2000-3-009].

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2005-1-009

a) European Union / b) Court of Justice of the European Communities / c) / d) 22.05.2003 / e) C-462/99 / f) Connect Austria Gesellschaft für Telekommunikation GmbH v. Telekom-Control-Kommission, in the presence of Mobilkom Austria AG / g) *European Court Reports* I-05197 / h) CODICES (English, French).

Keywords of the systematic thesaurus:

1.2.3 **Justice constitutionnelle** – Saisine –
 1.3.4.8 **Constitutional Justice** – Jurisdiction – Types of litigation – Litigation in respect of jurisdictional conflict.
 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Effective remedy.
 3.26.2 **General Principles** – Principles of Community law – Direct effect.

Keywords of the alphabetical index:

Preliminary ruling, reference, obligation / Telecommunication, frequencies, distribution / Telecommunication, regulation / European Community, directive, direct effect.

Headnotes:

In order to ensure that national law is interpreted in compliance with Directive 90/387 on the establishment of the internal market for telecommunications services through the implementation of open network provision, and that the rights of individuals are effectively protected, national courts must determine whether the relevant provisions of their national law provide individuals with a right of appeal which satisfies the criteria laid down in Article 5bis paragraph 3 of that directive against decisions of the national regulatory authority responsible for authorising the provision of telecommunication services. If national law cannot be applied so as to comply with the requirements of that article, a national court or tribunal which satisfies those requirements and which would be competent to hear appeals against decisions of the national regulatory authority if it was not prevented from doing so by a provision of national law which explicitly excludes its competence, has the obligation to disapply that provision.

Where a provision of a directive conferring rights on individuals has not been transposed into the national legal system, the obligation arising from a directive for the Member States to achieve the result envisaged

therein and their duty under Article 10 EC to take all appropriate measures, whether general or particular, to ensure compliance with that obligation is binding on all the authorities of Member States, including, for matters within their jurisdiction, the courts. It follows that, when applying national law, whether adopted before or after the directive, the national court which has to interpret that law must do so, as far as possible, in the light of the wording and the purpose of the directive so as to achieve the result it has in view and thereby comply with Article 249.3 EC.

Where application of national law in accordance with the requirements of the directive is not possible, the national court must fully apply Community law and protect the rights conferred thereunder on individuals, if necessary disapplying any provision in the measure the application of which would, in the circumstances of the case, lead to a result contrary to that directive, whereas national law would comply with the directive if that provision was not applied (see paragraphs 38, 40, 42, operative part 1).

Summary:

Following a public call for tenders in the Republic of Austria, the first licence for the provision of digital mobile telecommunications services based on the DCS 1800 standard was granted to Connect Austria, for a fee of ATS 2.3 billion. Connect Austria was allocated a certain frequency cluster, which was to be increased when it had acquired 300,000 customers, with a prospective cover rate of 75%. By a decision based on Article 125.3 of the Austrian Law on Telecommunications, the Telecommunications Control Commission, acting in its capacity as national regulatory authority, granted Mobilkom, a company most of whose capital is held by the State, as an extension to its GSM 900 licence, an additional frequency cluster from the frequency band reserved for the DCS 1800 standard, in order to provide digital mobile telecommunications services using only base stations situated in the Land of Vienna.

Connect Austria contested that decision of the Telecommunications Control Commission before the *Verfassungsgerichtshof* (Constitutional Court). The *Verfassungsgerichtshof* dismissed the action [AUT-1999-1-002], finding that the contested decision had not harmed the applicant either through breach of a constitutionally guaranteed right or through application of an unlawful general rule. It considered, however, that Article 5bis paragraph 3 of Directive 90/837 is, in regard to the right to appeal against the decision of a national regulatory authority, sufficiently precise, for the purposes of the settled case-law of the Court of Justice, to have direct effect, since there must be an effective right of appeal to an

independent body. The *Verfassungsgerichtshof* then found that, taking into account its limited possibilities of review, the action brought before it did not satisfy the requirements of that provision but that, by contrast, the power of review of administrative action enjoyed by the *Verwaltungsgerichtshof* (Administrative Court) was likely to satisfy the requirements of Community law. The *Verfassungsgerichtshof* therefore referred the appeal by Connect Austria against the contested decision to the *Verwaltungsgerichtshof*.

The *Verwaltungsgerichtshof* pointed out that the Telecommunications Control Commission is designated by the Austrian Law on telecommunications as the national regulatory authority as regards, *inter alia*, the allocation, removal and revocation of licences and the approval of transfers of and amendments to licences. It further explained that the Telecommunications Control Commission is an independent collegiate body consisting of three members, including a magistrate, appointed by the Federal Government, and that it takes decisions at first and last instance. Under Article 133.4 of the Federal Constitutional Law, appeals to the *Verwaltungsgerichtshof* alleging the unlawfulness of decisions of the Telecommunications Control Commission are inadmissible because their admissibility is not expressly provided for by that provision. It was in that context that the *Verwaltungsgerichtshof* asked, in particular, whether, in the light of Case C-54/96 Dorsch Consult [1997] ECR I-4961, Article 40 *et seq.*, Article 5bis paragraph 3 of Directive 90/387 had direct effect, so that it should set aside Article 133.4 of the Federal Constitutional Law and declare itself competent to hear the action brought by Connect Austria against the contested decision. That formed the subject-matter of one of the preliminary questions referred to the Court of Justice of the European Communities in the present case.

Cross-references:

- Constitutional Court of Austria, *Bulletin* 1999/1 [AUT-1999-1-002].

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2005-1-010

a) European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 12.06.2003 / **e)** C-112/00 / **f)** Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich / **g)** *European Court Reports* I-05659 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.17 **General Principles** – Weighing of interests.
3.19 **General Principles** – Margin of appreciation.
3.26.1 **General Principles** – Principles of Community law – Fundamental principles of the Common Market.
4.7.16.1 **Institutions** – Judicial bodies – Liability – Liability of the State.
5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Demonstration, impeding free movement of goods / Free movement of goods, barrier, private origin, obligation of state to prevent.

Headnotes:

The fact that the competent authorities of a Member State did not ban a demonstration by protesters which resulted in the complete closure of a major transit route between Member States for a given period is not incompatible with Articles 30 and 34 of the Treaty (now, after amendment, Articles 28 EC and 29 EC), read together with Article 5 of the Treaty (now Article 10 EC) provided that that restriction of trade in goods between Member States is justified by the legitimate interest in the protection of fundamental rights, in this case the protesters' freedom of expression and freedom of assembly, which applies both to the Community and the Member States.

In considering that justification, the interests involved must be weighed, namely the free movement of goods which may, in certain circumstances, be subject to restrictions for the reasons laid down in Article 36 of the Treaty (now, after amendment, Article 30 EC) or for overriding requirements relating to the public interest, on the one hand, and the freedom of expression and freedom of assembly, which are also subject to certain limitations justified by objectives in the public interest, on the other, having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests.

It is true that the national authorities enjoy a wide margin of appreciation in that regard, but it is for the Court to determine whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights.

Whilst a demonstration on a public highway usually entails inconvenience for non-participants, in particular as regards free movement, that inconvenience may in principle be tolerated provided that the objective pursued is the public and lawful demonstration of an opinion (see paras 38, 40, 42, operative part 1).

Summary:

In this case the *Oberlandesgericht* Innsbruck had been requested by the Court of Justice of the European Communities to give a preliminary ruling on a number of questions on the interpretation of Articles 30, 34 and 36 of the EC Treaty (now, after amendment, Articles 28 EC, 29 EC and 30 EC), read in conjunction with Article 5 of the EC Treaty (now Article 10 EC), and also on the conditions in which a member State would be liable for the damage caused to individuals by a breach of Community law. Those questions were raised in proceedings between a transport undertaking and the Republic of Austria concerning the permission implicitly granted by the competent authorities of that State to an environmental association whose objective was mainly to organise a demonstration on the Brenner motorway, which had the effect that that motorway was completely closed to traffic for almost 30 hours.

An association, whose objective is the protection of the biosphere space in the Alpine region, had informed the local authorities, as required by both the Austrian code on meetings and the Austrian highway code, that a demonstration would be held on the Brenner motorway, with the result that while it was in progress a section of that motorway would be closed to traffic.

Taking the view that the demonstration was lawful under Austrian law, the competent authorities had decided not to ban it, without however considering whether their decision might infringe Community law.

An international transport undertaking, whose principal activity consists in transporting timber from Germany to Italy and steel from Italy to Germany, and whose articulated vehicles essentially use the Brenner motorway, brought an action for damages against the Republic of Austria on the ground that five of its vehicles had been unable to use the Brenner

motorway on four consecutive days. The undertaking contended that the failure to ban the demonstration and the Austrian authorities' failure to prevent the closure of that trunk route constituted a restriction of the free movement of goods which, as it could not be justified by the demonstrators' rights to freedom of expression and freedom of assembly, infringed Community law and was, accordingly, of such a kind as to render the member State concerned liable.

On appeal, the case came before the *Oberlandesgericht* Innsbruck, which, taking the view that account must be taken of the requirements of Community law where rights based at least in part on Community law are in issue, asked the Court of Justice principally whether, in essence, the principle of free movement of goods, possibly in conjunction with Article 5 of the Treaty, requires that a member State guarantee free access to main transit routes and whether that obligation takes precedence over the fundamental rights, such as freedom of expression and freedom of assembly, guaranteed by Articles 10 and 11 ECHR.

The Court held that while a demonstration on the public highway normally entails some inconvenience for those not taking part, in particular as regards freedom of movement, that inconvenience may in principle be tolerated provided that the aim pursued is the public and lawful demonstration of an opinion.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2005-1-011

a) European Union / **b)** Court of First Instance / **c) / d)** 09.07.2003 / **e)** T-220/00 / **f)** Cheil Jedang Corp. v. Commission of the European Communities / **g)** *European Court Reports* II-02473 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.10 General Principles – Certainty of the law.
5.3.38 Fundamental Rights – Civil and political rights – Non-retrospective effect of law.

Keywords of the alphabetical index:

Fine, determination, method of calculation, change / Administrative procedure / Competition, Community law, infringement, gravity.

Headnotes:

The principle that penal provisions may not have retroactive effect is one which is common to all the legal orders of the Member States and is enshrined in Article 7 ECHR, and is an integral part of the general principles of law whose observance is ensured by the Community judicature.

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.

The change to the Commission's administrative practice brought about by the Guidelines on the method of setting fines imposed pursuant to Article 15.2 of Regulation no. 17 and Article 65.5 of the ECSC Treaty does not constitute an alteration of the legal framework determining the level of fines which can be imposed that is contrary to the principles of non-retroactivity of penalties and legal certainty.

The Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters, since that framework is defined solely in Regulation no. 17, from which the Guidelines do not diverge. Moreover, having regard to the wide discretion which Regulation no. 17 leaves the Commission, the fact that the latter introduces a new method of calculating fines, which may, in certain cases, lead to an increase in the general level of 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 15.2 of Regulation no. 17 (see paras 64, 69, 74, 78-82, 91, 94 and operative part).

Summary:

This case originated in the action for partial annulment brought by a company against a decision pursuant to Article 81.1 of the EC Treaty, adopted by the Commission, which had been notified to the company for its participation in certain agreements on prices, sales volumes and the exchange of individual information on sales volumes of synthetic lysine, covering the whole of the EEA. The applicant is active in the pharmaceutical and foodstuffs sector. Lysine is the principal amino acid used in animal feedstuffs for nutritional purposes and synthetic lysine is used as an additive in feedstuffs which do not contain sufficient natural lysine, for example cereals, in order to allow nutritionists to formulate protein-based diets which satisfy the dietary needs of animals.

For the purpose of calculating the amount of the fines, the Commission applied in the contested decision the method set out in the Guidelines on the method of setting fines imposed pursuant to Article 15.2 of Regulation no. 17 and Article 65.5 of the ECSC Treaty and also the Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4).

Among the pleas raised for the purpose of contesting the Commission's decision, the applicant criticised the Commission in particular for having retroactively applied the 1996 Guidelines, which had the consequence that the fine imposed was higher than that which ought to have been imposed in accordance with its earlier practice, the infringement having come to an end in June 1995. The applicant concluded that the Commission had infringed the principle of non-retroactivity enshrined in Article 7 ECHR and forming part of the general principles of Community law.

The Court of First Instance rejected that complaint, however, considering that the change brought about by the Guidelines on the method of setting fines imposed pursuant to Article 15.2 of Regulation no. 17 and Article 65.5 of the ECSC Treaty by comparison with the Commission's previous administrative practice did not amount to a change in the legal framework determining the amount of the fines that could be imposed, contrary to the general principle of non-retroactivity of criminal provisions or the principle of legal certainty.

Cross-references:

- TPICE, 09.07.2003, *Archer Daniels Midland Company and Archer Daniels Midland Ingredients Ltd v. Commission of the European Communities*, Judgment T-224/00, ECR 2003, p. II-02597.

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



European Court of Human Rights

Important decisions

Identification: ECH-2005-1-001

a) Council of Europe / b) European Court of Human Rights / c) Chamber / d) 25.01.2005 / e) 56529/00 / f) *Enhorn v. Sweden* / g) *Reports of Judgments and Decisions of the Court* / h) CODICES (English).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
5.3.5.1.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Non-penal measures.

Keywords of the alphabetical index:

Disease, infectious, preventive detention / HIV, homosexual, prohibition of sexual intercourse / HIV, preventive detention.

Headnotes:

The two essential criteria for assessing the “lawfulness” of detention for the purpose of preventing the spreading of infectious diseases are that the spreading of the disease was dangerous for public health or safety and that detention was the last resort to prevent the spreading of the disease, less severe measures having been found to be insufficient. It is incumbent on States to attempt less severe measures before resorting to compulsory confinement.

Summary:

I. In 1994, the applicant, a homosexual, discovered that he was infected with the HIV virus and that he had transmitted it to a 19-year old man with whom he had first had sexual contact in 1990. On these grounds, a county medical officer issued a number of instructions to the applicant to avoid the spreading of the disease, including the prohibition for him to have sexual intercourse without first informing his partners about his HIV infection, as well as the obligation to keep to several appointments with the county medical officer. As the applicant failed to comply with some of the visits, the county medical officer petitioned the

courts for an order that the applicant be kept in compulsory isolation.

In a judgment of February 1995, the County Administrative Court, under the 1988 Infectious Diseases Act, ordered that the applicant be kept in compulsory isolation for up to three months. The order took effect immediately, but as the applicant failed to report to the hospital, he was taken there by the police in March 1995. Prolongations of the confinement order were repeatedly prolonged by periods of six months at a time. The order to deprive the applicant of his liberty was in force until 2001, for almost seven years. However, as the applicant absconded from the hospital several times, his actual deprivation of liberty lasted around one and a half years in total. The applicant’s successive appeals were dismissed by the Administrative Court of Appeal. Leave to appeal to the Supreme Administrative Court was also refused.

In 2001, the County Administrative Court turned down a petition for a further prolongation of the compulsory isolation order. It argued that the applicant’s whereabouts were unknown and that therefore no information was available regarding his behaviour, state of health and so on. It appears that since 2002 the applicant’s whereabouts have been known, but that the competent county medical officer has made the assessment that there are no grounds for the applicant’s further involuntary placement in isolation.

In the application lodged with the Court, the applicant claimed that his detention had been unlawful. He relied on Article 5.1 ECHR.

II. The Court noted that it was common ground between the parties that the applicant had been deprived of his liberty, and that his detention could be examined under Article 5.1.e ECHR, as the purpose of this provision was to prevent the spreading of the diseases such as the HIV virus. The Court was satisfied that the detention had a basis in national law, the 1988 Infectious Diseases Act, which entrusted the consulting physician with a wide discretion when issuing the practical instructions needed to prevent the spread of infection. The two essential criteria to assess the “lawfulness” of the detention were whether the spreading of the infectious disease had been dangerous for public health or safety, and whether detention had been the last resort to prevent the spreading of the disease, because less severe measures had been found insufficient. It was undisputed that the first criteria had been fulfilled. As to the second one, despite the fact that the applicant had absconded several times during the compulsory orders, he had in total remained one and a half years deprived of his liberty.

The Government had not provided any examples of less severe measures which might have been considered.

Among the several instructions which were issued to the applicant, the one of 1 September 1994 prohibited him from having sexual intercourse without first having informed his partner about his HIV infection. The Court noted that between February 1995 and December 2001, there was no evidence or indication that the applicant had transmitted the virus to anybody during that period or that he had engaged in sexual intercourse without informing his partner of his disease. As to the infection of a 19-year old man in 1990, there was no indication that the applicant had transmitted the virus to the young man as a result of intent or gross neglect. He had himself become aware of his infection in 1994. In these circumstances, the compulsory isolation was not a last resort to prevent the spreading of the disease because less severe measures had been considered and found insufficient to safeguard the public interest.

By extending the orders for a period of almost seven years, which resulted in the applicant's involuntary hospitalisation for almost a year and a half, the authorities had failed to strike a fair balance between the need to ensure that the HIV virus did not spread and the applicant's right to liberty. There had therefore been a violation of Article 5.1 ECHR.

Cross-references:

- *Winterwerp v. the Netherlands*, Judgment of 24.10.1979, Series A, no. 33; *Special Bulletin Leading Cases* [ECH-1979-S-004];
- *Guzzardi v. Italy*, Judgment of 06.11.1980, Series A, no. 39; *Special Bulletin Leading Cases* [ECH-1980-S-002];
- *Ashingdane v. the United Kingdom*, Judgment of 28.05.1985, Series A, no. 93;
- *Bouamar v. Belgium*, Judgment of 29.02.1988, Series A, no. 129; *Special Bulletin Leading Cases* [ECH-1988-S-001];
- *Amuur v. France*, Judgment of 25.06.1996, *Reports of Judgments and Decisions* 1996-III; *Bulletin* 1996/2 [ECH-1996-2-011];
- *Chahal v. the United Kingdom*, Judgment of 15.11.1996, *Reports* 1996-V; *Bulletin* 1996/3 [ECH-1996-3-015];
- *Eriksen v. Norway*, Judgment of 27.05.1997, *Reports* 1997-III;
- *Johnson v. the United Kingdom*, Judgment of 24.10.1997, *Reports* 1997-VII;
- *Steel and Others v. the United Kingdom*, Judgment of 23.09.1998, *Reports* 1998-VII;

- *Amann v. Switzerland [GC]*, no. 27798/95, *Reports of Judgments and Decisions* 2000-II; *Bulletin* 2000/1 [ECH-2000-1-001];
- *Witold Litwa v. Poland*, no. 26629/95, *Reports of Judgments and Decisions* 2000-III;
- *Varbanov v. Bulgaria*, no. 31365/96, *Reports of Judgments and Decisions* 2000-X;
- *Magalhães Pereira v. Portugal*, no. 44872/98, *Reports of Judgments and Decisions* 2002-I;
- *Vasileva v. Denmark*, no. 52792/99, 25.09.2003;
- *Morsink v. the Netherlands*, no. 48865/99, 11.05.2004;
- *Brand v. the Netherlands*, no. 49902/99, 11.05.2004;
- *Hilda Hafsteinsdóttir v. Iceland*, no. 40905/98, 08.06.2004.

Languages:

English, French.



Systematic thesaurus (V16) *

* 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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² Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

³ E.g. Rules of procedure.

⁴ Including the conditions and manner of such appointment (election, nomination, etc.).

⁵ Including the conditions and manner of such appointment (election, nomination, etc.).

⁶ Vice-presidents, presidents of chambers or of sections, etc.

⁷ E.g. State Counsel, prosecutors, etc.

⁸ Registrars, assistants, auditors, general secretaries, researchers, etc.

⁹ E.g. assessors, office members.

¹⁰ Registrars, assistants, auditors, general secretaries, researchers, etc.

¹¹ Including questions on the interim exercise of the functions of the Head of State.

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¹² Referrals of preliminary questions in particular.

¹³ Enactment required by law to be reviewed by the Court.

¹⁴ Review *ultra petita*.

¹⁵ Horizontal distribution of powers.

¹⁶ Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

¹⁷ Decentralised authorities (municipalities, provinces, etc.).

¹⁸ This keyword concerns decisions on the procedure and results of referenda and other consultations.

¹⁹ This keyword concerns decisions preceding the referendum including its admissibility.

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²⁰ 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).

²¹ As understood in private international law.

²² Including constitutional laws.

²³ For example, organic laws.

²⁴ Local authorities, municipalities, provinces, departments, etc.

²⁵ Or: functional decentralisation (public bodies exercising delegated powers).

²⁶ Political questions.

²⁷ Unconstitutionality by omission.

²⁸ For the withdrawal of proceedings, see also 1.4.10.4.

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²⁹ Pleadings, final submissions, notes, etc.

³⁰ May be used in combination with Chapter 1.2 Types of claim.

³¹ For the withdrawal of the originating document, see also 1.4.5.

³² Comprises court fees, postage costs, advance of expenses and lawyers' fees.

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³⁶ Including its Protocols.

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³⁷ Presumption of constitutionality, double construction rule.

³⁸ Including the principle of a multi-party system.

³⁹ Includes the principle of social justice.

⁴⁰ See also 4.8.

⁴¹ Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

⁴² Including maintaining confidence and legitimate expectations.

⁴³ Principle according to which sub-statutory acts must be based on and in conformity with the law.

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⁴⁵ Including compelling public interest.

⁴⁶ Only where not applied as a fundamental right.

⁴⁷ Including questions of treason/high crimes.

⁴⁸ Including prohibition on monopolies.

⁴⁹ For the principle of primacy of Community law, see 2.2.1.6.

⁵⁰ Including the body responsible for revising or amending the Constitution.

⁵¹ For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

⁵² For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

⁵³ For example, the granting of pardons.

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⁵⁴ Bicameral, monocameral, special competence of each assembly, etc.

⁵⁵ Including specialised powers of each legislative body and reserved powers of the legislature.

⁵⁶ In particular commissions of enquiry.

⁵⁷ For delegation of powers to an executive body, see keyword 4.6.3.2.

⁵⁸ Obligation on the legislative body to use the full scope of its powers.

⁵⁹ Representative/imperative mandates.

⁶⁰ Presidency, bureau, sections, committees, etc.

⁶¹ Including the convening, duration, publicity and agenda of sessions.

⁶² Including their creation, composition and terms of reference.

⁶³ State budgetary contribution, other sources, etc.

⁶⁴ For the publication of laws, see 3.15.

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⁶⁵ For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.

⁶⁶ For local authorities, see 4.8.

⁶⁷ Derived directly from the constitution.

⁶⁸ See also 4.8.

⁶⁹ 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.

⁷⁰ Civil servants, administrators, etc.

⁷¹ Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

⁷² Other than the body delivering the decision summarised here.

⁷³ Positive and negative conflicts.

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⁷⁴ Notwithstanding the question to which to branch of state power the prosecutor belongs.

⁷⁵ For example, Judicial Service Commission, *Conseil supérieur de la magistrature*.

⁷⁶ Comprises the Court of Auditors in so far as it exercises judicial power.

⁷⁷ See also 3.6.

⁷⁸ And other units of local self-government.

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⁷⁹ See also keywords 5.3.41 and 5.2.1.4.

⁸⁰ Organs of control and supervision.

⁸¹ Proportional, majority, preferential, single-member constituencies, etc.

⁸² For aspects related to fundamental rights, see 5.3.41.2.

⁸³ For the creation of political parties, see 4.5.10.1.

⁸⁴ E.g. Names of parties, order of presentation, logo, emblem or question in a referendum.

⁸⁵ Tracts, letters, press, radio and television, posters, nominations, etc.

⁸⁶ Impartiality of electoral authorities, incidents, disturbances.

⁸⁷ E.g. signatures on electoral rolls, stamps, crossing out of names on list.

⁸⁸ E.g. in person, proxy vote, postal vote, electronic vote.

⁸⁹ E.g. *Panachage*, voting for whole list or part of list, blank votes.

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⁹⁰ E.g. Auditor-General.

⁹¹ Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

⁹² E.g. Court of Auditors.

⁹³ The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

⁹⁴ *Staatszielbestimmungen*.

⁹⁵ Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

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⁹⁶ Including state of war, martial law, declared natural disasters, etc; for human rights aspects, see also keyword 5.1.3.1.

⁹⁷ Positive and negative aspects.

⁹⁸ For rights of the child, see 5.3.44.

⁹⁹ The question of "Drittwirkung".

¹⁰⁰ The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in chapter 3.

¹⁰¹ Includes questions of the suspension of rights. See also 4.18.

¹⁰² Taxes and other duties towards the state.

¹⁰³ Here, the term "national" is used to designate ethnic origin.

¹⁰⁴ For example, discrimination between married and single persons.

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¹⁰⁵ This keyword also covers "Personal liberty". It includes for example, identity checking, personal search and administrative arrest.

¹⁰⁶ Detention by police.

¹⁰⁷ Including questions related to the granting of passports or other travel documents.

¹⁰⁸ May include questions of expulsion and extradition.

¹⁰⁹ 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.

¹¹⁰ This keyword covers the right of appeal to a court.

¹¹¹ Including the right to be present at hearing.

¹¹² Including challenging of a judge.

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¹¹³ Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

¹¹⁴ This keyword also includes the right to freely communicate information.

¹¹⁵ Militia, conscientious objection, etc.

¹¹⁶ Aspects of the use of names are included either here or under "Right to private life".

¹¹⁷ Including compensation issues.

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For institutional aspects, see 4.9.5.

119

This keyword also covers "Freedom of work".

120

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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