

# THE BULLETIN

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

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

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*The decisions are presented in the following way:*

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

**G. Buquicchio**

Secretary of the European Commission for Democracy through Law

# THE VENICE COMMISSION

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

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European Court of Human Rights .....	S. Naismith
Court of Justice of the European Communities .....	Ph. Singer
Inter-American Court of Human Rights .....	S. Garcia-Ramirez / F. J. Rivera Juaristi

Strasbourg, May 2006

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There was no relevant constitutional case-law during the reference period 1 May 2005 – 31 August 2005 for the following countries:

Albania, Finland (Supreme Administrative Court), Ireland, Luxembourg, Sweden (Supreme Administrative Court), Sweden (Supreme Court), Ukraine.

Précis of important decisions of the reference period 1 May 2005 – 31 August 2005 will be published in the next edition, *Bulletin* 2005/3 for the following countries:

Denmark, Russia.

# Andorra

## Constitutional Court

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### Important decisions

*Identification:* AND-2005-2-001

a) Andorra / b) Constitutional Court / c) / d) 06.06.2005 / e) 2005-7-RE / f) / g) *Butlletí Oficial del Principat d'Andorra* (Official Gazette), 52, 2005 / h) CODICES (Catalan).

*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.

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:*

Summons, notification / Notification, required, reasonable time.

*Headnotes:*

Although it is generally impossible to decide whether or not proceedings have been conducted within a reasonable time before the end of the said proceedings and until all existing remedies in the ordinary courts have been exhausted, the situation is different if one aspect of the proceedings is likely in itself to constitute a clear obstacle to the implementation of the plaintiffs' rights, having regard to the applicable legal rules, the attitude of the parties, the facts of the case and the role of the judge.

*Summary:*

The applicant company alleged that its right of access to the courts was infringed because of the time which had passed between 6 February 2004, when it requested that the defendant company be summoned to appear in court, and 6 December 2004, the date on which the Court of first instance (*Batllia*) decided to serve the summons. The applicant alleged that this 300-day period constituted an infringement of the

principle that cases must be heard by a court within a reasonable time.

The discussion concerned whether, by refusing to publish the summons against the applicant company and consequently deferring its effect until 6 December, ie. ten months later, the Court of first instance actually prevented the applicant company from gaining access to the courts.

It transpired from the case file that numerous summonses addressed to the defendant company had been published in the Official Gazette between 20 June 2002 and 25 June 2004. It can therefore be deduced that the Court of first instance had difficulty in serving fresh summonses on the applicant company's legal representative in person.

It should also be pointed out that, in the case of a legal entity, the failure of its legal representative to appear in court, on any grounds whatsoever, cannot prevent the setting in motion or pursuit of judicial proceedings.

The individual appeal to the Constitutional Court was therefore admissible on the grounds that the applicant's right of access to the courts had been infringed as a result of the courts' failure to respect the principle of reasonable time.

*Languages:*

Catalan.



# Argentina

## Supreme Court of Justice of the Nation

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### Important decisions

*Identification:* ARG-2005-2-002

a) Argentina / b) Supreme Court of Justice of the Nation / c) / d) 02.08.2005 / e) S. 1801. XXXVIII / f) S., C. s/ adopción / g) *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 328 / h).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Child, best interest / Child, adopted / Parent, natural.

*Headnotes:*

The family courts fail to carry out their specific task when, in order to resolve human problems, they merely apply formulas or pre-established models and ignore the specific circumstances of each case. In that sense, the best interests of the child must be a primary consideration, as established by Article 3.1 of the Convention on the Rights of the Child.

In a dispute between (biological) parents and adoptive parents over what constitute the best interests of the child, the premiss that the child is better off living with the biological parents cannot be taken as a self-evident truth.

*Summary:*

The child C.S. was born in January 1997. On the day following the birth, her mother, D.M.S., gave custody of the child to the spouses H.R.S. and P.N.H, in accordance with Law no. 19.134; on 11 February H.R.S. and P.N.H applied to adopt the child. On 4 July D.M.S. applied to have her child returned to her. The family court granted her application. However, the child was not returned to the applicant,

as H.R.S. and P.N.H. lodged an appeal with the Supreme Court of Justice of the Province of Buenos Aires, which upheld the judgment. The couple then lodged an extraordinary appeal before the Supreme Court of Justice of the Nation, which set aside that judgment and decided that the child would remain in the custody of H.R.S. and P.N.H. Three assenting opinions were delivered by the Court.

In the opinion of three judges, the family courts fail to carry out their specific task when, in order to resolve human problems, they simply apply formulas or pre-established models and ignore the actual circumstances peculiar to each case. In that sense, the best interests of the child must be a primary consideration, as established by Article 3.1 of the Convention on the Rights of the Child (hereinafter “the Convention”). Those best interests are taken into consideration for two essential purposes: so that they will become as much a rule applied where there is a conflict of interests as a criterion to be followed for the institutional intervention designed to protect the child. Those interests therefore provide an objective parameter which enables problems involving children to be resolved: the decision is taken in accordance with what is most appropriate for the children. As against the presumed interest of the adult, the interest of the child takes priority. Furthermore, Article 21 of the Convention establishes that a State must ensure, in cases of adoption, that the best interests of the child are the paramount consideration.

Admittedly, a child has the right to live, so far as possible, with his/her biological family, which is axiologically desirable. However, identity of affiliation does not necessary follow from that biological component. The “biological truth” is not an absolute value where the best interests of the child are in issue: the identity of affiliation formed by means of the links created by adoption also has an axiological basis and must be invoked by the law in order to ensure the protection of the best interests of the child. Clearly, this requires respect for the child’s right to maintain his/her identity, including his/her nationality, name and family relations, which the States Parties undertake to ensure (Article 8.1 of the Convention), as they also undertake to ensure that the child is not separated from his/her parents against their will, except where such separation is essential for the best interests of the child (Article 9.1 of the Convention).

That rule of appraisal takes account not only of the economic, social or moral advantages which might be offered to the child in one or other family situation, but, applied in accordance with the principles of that institution, it also takes into consideration the effects

which the decision of the Court might have on a developing personality.

It appears in the present case that:

- a. C.S. had lived since birth in the home of the couple H.R.S. and P.N.H, with all the relevant consequences;
- b. the biological mother, in the exercise of her parental authority, gave her child for adoption;
- c. there is no evidence that the mother suffered puerperal problems;
- d. the application for the return of her child discloses no manifestation of an intention to repent;
- e. D.M.S. contacted her daughter's guardians only twice in order to obtain news (in 1997 and 2001);
- f. there is no indication that mother and daughter subsequently formed an affective link;
- g. D.M.S. was unable to provide a clear explanation of her reasons for persisting with her application for the return of C.S. It was also proved that:
- h. C.S. has been fully integrated into the family of H.R.S. and P.N.H. and that her evolutive and emotional development is excellent.

It is therefore not appropriate, in the higher interest of the child, to alter her present situation, as the change would cause her to sustain harm which must be avoided.

The opinion of the other three judges is also based on the best interests of the child. Those interests require, at least for the purposes of court decisions, that the interests of the child as a legal person must be conceptually separated from the interests of other individual or collective persons and even where necessary from the interests of the parents. In a dispute between (biological) parents and adopters concerning the best interests of the child, the premiss that the child is better off living with the biological parents cannot be taken as a self-evident truth. That is not tantamount to saying that the child does not need the love and attention of his/her father and mother, but that in the eyes of the law the child is a person whose interests may coincide with those of his/her parents without being limited to them. It is therefore the interests of C.S. that must justify her return to her family of origin, whereas the preservation of the biological link can never justify the traumatism of being returned. When faced with the conflict of rights arising between the adults connected with the child, the Court is under a duty to find a solution which enables it to best satisfy the needs of the child, with a view to the formation of his/her personality, and it must do so in accordance with the

particular circumstances of life of the child, without resorting to pre-established formulas. The law in force – and in particular the Convention – favours the family of origin, which is considered to constitute the background most favourable to the development of children. That cannot be denied, but it does not constitute an absolute truth, since it is based on the presumption that, as the biological family is the initial sphere of life, any change necessarily entails traumatism and duplicity.

In those circumstances, and on the basis of the facts analogous to those set out in the first opinion, these judges also considered that to separate C.S. from her guardians would amount to going beyond Articles 7, 8 and 9.1 of the Convention and to favouring the interest of the mother.

The third opinion, delivered by two judges, adopts the arguments set out in the other two opinions.

The three opinions took into account the expert opinion submitted to the Court, which, in the interests of all those involved in this difficult and painful situation, and in particular the interests of the child, recommended recourse to what is known as the “adoptive triangle” procedure, with professional supervision, so that the child, her mother, her biological brothers and sisters and her adoptive parents may maintain a certain degree of communication between them until such time as C.S. reaches her majority.

#### *Languages:*

Spanish.





# Armenia

## Constitutional Court

### Statistical data

1 May 2005 – 31 August 2005

- 34 referrals made, 34 cases heard and 34 decisions delivered.
  - 33 decisions concern the conformity of international treaties with the Constitution. All treaties examined were declared compatible with the Constitution.
  - 1 decision concerns the conformity of a law with the Constitution. The referral was initiated by the President of the Republic. The Constitutional Court decided that the challenged provision of the Law “On Human Rights’ Defender” was incompatible with the Constitution.

### Information on the activities of the Constitutional Court

During the period between 1 May 2005 and 31 August 2005, the Constitutional Court of Armenia considered 34 cases referred by the President of the Republic. The vast majority of the cases considered (33 cases) concerned the examination of the conformity of obligations set forth in international treaties with the Constitution. The Constitutional Court declared all the treaties examined to be compatible with the Constitution.

The multilateral and bilateral treaties which were examined concerned different fields of international relations. Among these treaties it is necessary to mention a large group of Conventions signed in the framework of the International Labour Organisation, including the Minimum Wage-Fixing Machinery Convention of 16 June 1928, Holidays with Pay Convention (Revised) of 24 June 1970. The Constitutional Court also considered a large group of cases on the subject of the conformity of obligations, stipulated in the “Eurocontrol” International Convention, relating to co-operation for the safety of air navigation of the 13 December 1960 and in related international agreements, with the Constitution.

In addition to the aforementioned treaties, the Constitutional Court also examined the compliance of

the obligations set forth in the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflicts of 26 March 1999 and in several other treaties with the Constitution.

### Important decisions

*Identification:* ARM-2005-2-001

**a)** Armenia / **b)** Constitutional Court / **c)** / **d)** 06.05.2005 / **e)** DCC-563 / **f)** On the conformity with the Constitution of the Law on “The Human Rights’ Defender” / **g)** to be published in *Tegekagir* (Official Gazette) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

4.12.9 **Institutions** – Ombudsman – Relations with judicial bodies.

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

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

*Keywords of the alphabetical index:*

Ombudsman, powers / Court, independence, right to information, parties, equality / Ombudsman, court, information, right to request.

*Headnotes:*

The right of the Defender to request information from courts and submit recommendations to courts is not caused by the necessity to administer independent and impartial justice, and it creates an inter-legislative contradiction. The practice of law enforcement demonstrates that this provision interferes with the functions of the judiciary and it is not in conformity with the provisions of Articles 39 and 97.1 of the Constitution.

The right of the Defender to request information from courts should be satisfied, if it does not interfere with judicial proceedings, if it does not concern the administration of justice by a concrete case, and if it does not concern the material and procedural issues of the examination of the case under the judicial consideration.



*Summary:*

On the basis of an appeal lodged by the President of the Republic, the Constitutional Court considered the conformity of the provision set forth in the second sentence of Article 7.2.1 of the Law on “Human Rights’ Defender” with the Constitution.

The applicant claimed that the second sentence of Article 7.2.1 of the Law on “Human Rights’ Defender”, which stated: “...S/he may request information on any case that is at the stage of trial and submit recommendations to a court, so as to guarantee the right of citizens to a fair trial as enshrined in the Constitution of Armenia and norms of International Law” contradicted Articles 39 and 97.1 of the Constitution, as it violated the principles of independence of the court and equality as between the parties to the case. The applicant mentioned that analysis of the law-enforcement practice indicated that the term “information” was interpreted in a broader sense during the practical application of the provision in dispute.

The respondent stated that the Law on “Human Rights Defender”, in determining the issue of receiving information, was in compliance with the norms of the Constitution, norms of International Law, and with a number of laws of foreign states. The respondent noted that the issue in dispute had been raised generally, based on several incidents where letters were presented by the Defender and her Deputy to the courts of first instance. The respondent also assumed that, though the law-enforcement practice might not be constitutional, the disputed provision of the Law could not be considered as being contrary to the Constitution.

The Constitutional Court stated that Article 97 of the Constitution enshrining the constitutional principle of judicial independence stipulated that, when administering justice, judges should be independent and may only be subject to the law. Article 39 of the Constitution provided for the right of everyone to a fair trial by an independent and impartial court.

The Court also mentioned that under Article 5 of the Law on “the Status of the Judge”, when administering justice, the judge was not accountable to any State body or official. Article 6 of the same Law prohibited any intervention in the activities of a judge by any State body, self-government bodies and their officials, political parties, non-governmental organisations and the mass media.

According to the Court, the international constitutional judicial practice on the disputed issue indicated that “the independent judicial system is protected

constitutionally from any external intervention; therefore prescribing any authority for the Ombudsman to review the courts is not compatible with the principles of separation of powers and independence of the courts.”

The Court also emphasised that equality as between the parties to the case was one of the elements of the right to fair trial, guaranteed by Article 39 of the Constitution and Article 6 ECHR. These principles had been set down in criminal procedural and civil procedural legislation of the Republic of Armenia.

The Constitutional Court certified that according to the applicant and respondent, the existing contradictions between the disputed legislative provision and Articles 10.1 and 12.1.5 of the Law gave rise not only to various interpretations of the competence of the Defender, but also they did not predetermine the content of term “information” used in the disputed legislative provision. However, the comparative analysis of the disputed provision and Articles 10.1 and 12.1.5 made it possible to clarify the content of the term and, consequently also the scope of competence of the Defender to request information from the courts.

The Court found that the disputed provisions of the Law had the effect of making it impossible for the Defender to request information from the court regarding the administration of justice in a concrete case and which related to procedural and material issues of a judicial proceeding.

The Court mentioned that the violation of the procedural or material rights by the judicial bodies could be eliminated only by the Court of Appeal and Court of Cassation on the basis of appeals. The Court emphasised that according to the civil and criminal procedural legislation, the Defender was not entitled to bring appeals to the afore-mentioned Courts. Hence, if the actions of the Defender, set forth in the Law on “The Human Rights’ Defender” and aimed at the restoration of the alleged violated rights of a person, were either refused by the court or were not taken into account, the Defender would not be competent to appeal the ‘refusal’ or the ‘not taking into account’ to the superior judicial instance.

The Constitutional Court stated that according to Article 67 of the Law on “The Constitutional Court” a decision should be adopted based both on the literal meaning of the Law and existing juridical practice. The Constitutional Court, proceeding from the practice formed as the result of implementation of the disputed provision in the Republic of Armenia, found that such applications of the Defender and her Deputy were directed to judges and the information

requested by them, and submitted recommendations were not conditioned by the necessity of administration of the independent and impartial justice; they were interfering with the judicial proceedings and could create unequal conditions for the parties.

The Court stated that this practice, which exists in the relevant legislation of the European Countries, had also been fixed in the Statute of the European Ombudsman. The latter prohibited the European Ombudsman from interfering in cases under examination in the courts or the subject matters of the decision of court.

On the basis of evaluation of the literal sense of the disputed provision of the Law and the formed practice of law-enforcement, as well as taking into account international practice, the Constitutional Court considered that:

- a. no due diligence appeared to have been done during the development of the concept of the Law on “The Human Rights’ Defender”, as a result of which an inter-legislative contradictions had arisen, thus establishing also a contradictive practice of law-enforcement;
- b. the disputed provision of the Law concerning the request by the Defender for information from the courts, might affect the independence of judicial bodies or threaten the independence of a judge, if during the implementation of that function, the term “information” was interpreted widely and became separated from the general logic of the Law;
- c. the disputed provision of the Law concerning the submission of recommendations to the courts by the Defender, might affect the independence of judicial bodies, because it might prevent the implementation of practical possibilities to adopt decisions by the judge and the court only on the basis of evaluation of the facts and circumstances of case and their own understanding of Law.

Based on the outcome of the investigation of the case, the Constitutional Court decided:

1. The provision, stipulated by the second sentence of Article 7.2.1 of the Law “On the Human Rights Defender” with such wording concerning the right of the Defender to request information from courts and submit recommendations to the courts, had not come about through necessity to administer independent and impartial justice, and it created inter-legislative contradiction. Also taking into account the practice of law-

enforcement, this provision interfered with the functions of the judiciary and was not in conformity with the provisions of Articles 39 and 97.1 of the Constitution.

2. The right of the Defender to request information from courts in connection with ensuring the application of the provisions of Articles 10.1, 12.5.1 and 17.1 of the Law should be satisfied, if it was not an interference with judicial proceedings, it did not concern the administration of justice by a concrete case, it did not concern the material and procedural issues of examination of the case under the judicial consideration.

The right of the Defender to request information from courts in connection with ensuring the application of provisions of Articles 10.1, 12.5.1 and 17.1 of the Law, should be clearly enshrined in the Law on “The Human Rights Defender” in order not to cause contradictive practices of law-enforcement.

*Languages:*

Armenian.



## Austria Constitutional Court

### Statistical data

Session of the Constitutional Court during June 2005

- Financial claims (Article 137 B-VG): 14
- Conflicts of jurisdiction (Article 138.1 B-VG): 0
- Review of agreements (Article 139 B-VG): 1
- Review of regulations (Article 139 B-VG): 23
- Review of laws (Article 140 B-VG): 81
- Challenge of elections (Article 141 B-VG): 1
- Complaints against administrative decrees (Article 144 B-VG): 355  
(219 refused to be examined).



## Azerbaijan Constitutional Court

### Important decisions

*Identification:* AZE-2005-2-002

**a)** Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 18.07.2005 / **e)** M5 / **f)** On Interpretation of Article 333.1 of the Criminal Code of Azerbaijan Republic / **g)** Azerbaijan, Respublika, *Khalg gazet*, *Bakinski rabochiy* (Official Newspapers); *Azerbaijan Respublikasi Konstitusiyaya Mehkemesinin Melumati* (Official Digest) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

5.1.1.4.4 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Military personnel.

*Keywords of the alphabetical index:*

Military service, abandonment / Responsibility, criminal, ground.

*Headnotes:*

According to Article 333.1 of the Criminal Code, when a military servant wilfully abandons the military unit or his place of service or does not attend for service on time for two or more times during six months after disciplinary reproach, criminal proceedings may be taken against him.

Taking into consideration the objectives of the above article, the Plenum of the Constitutional Court concluded that the starting point of the periods stipulated in this article should be calculated from the time of the wilful abandonment of the military unit or the place of service or non-attendance for service at the stipulated time without a good reason.

*Summary:*

In its application, the Court of Appeal states that there is need to interpret Article 333.1 of the Criminal Code, as there is vagueness in the application of the above-

mentioned norm, and also the lowest level of the abandonment period, which can create a ground for criminal responsibility, is not clearly stipulated.

One of the main duties of the citizens stipulated in Chapter IV of the Constitution is the defence of the Motherland. Citizens of the Republic shall serve in the army in accordance with legislation (Article 76 of the Constitution).

A military servant should strictly respect the military discipline defined in the laws and the Military Charters. The main objective of military discipline is to ensure the organisation of agreed unified activity of military servants. Military discipline is based on the conscious perception of his military obligations by each military servant and personal responsibility for the defence of his Motherland.

The definition of criminal actions committed against military service and their punishment by the legislature serves first and foremost the establishment and strengthening of military discipline.

Crimes against the established procedure of passing military service committed by military servants who are on military service in the Armed Forces of Azerbaijan Republic, other forces and military units on conscription or by agreement, or by other persons having the status of military servant by virtue of law, as well as the military officials involved in training or control meetings shall be considered as crimes against the military service (Article 327 of the Criminal Code). The complicity of persons not stipulated in this article in crimes against the military service implies the responsibility according to the relevant articles of this chapter.

If a military servant who has passed military service on conscription willfully abandons his military unit or the place of his military service or does not attend at the place of service on time without good reason for more than three days but not more than ten days and even though for less than ten days but repeatedly during six months, his punishment will be by placement in the disciplinary military unit for a period not exceeding one year.

Self-willed abandonment is understood as the abandonment by a military servant of his military unit or the place of his military service or non-attendance at the place of service without the commander's (chief's) permission. And the non-attendance on time is the non-returning of a military servant, who left the territory of his military unit or place of service on the basis of permission, to the military unit or place of service at the stipulated time without good reason.

The beginning of the period of self-willed abandonment of the military unit starts from the moment of the abandonment by a military servant of the military unit or place of service, and the beginning of non-attendance to the place of service on time shall be counted from the moment of the end of the time by which he should have returned.

This crime is considered finished at the time when a military servant comes back to the military unit or the place of service or when he is detained.

It should be noted that in case a military servant who is at military service on conscription abandons willfully his military unit or place of service for less than 3 days or does not attend at his place of service in time without good reason for the first time, he can be punished by reproach; reprimand; severe reprimand; deprivation of next release from the military unit to outside or from the ship to the shore; designation of out of turn duty (except for sending to the guard, duty and fight duty) – up to 5 service duties; arrest up to 5 days in the guardhouse; deprivation of badges; deprivation of military rank of chief soldier (chief sailor) (Article 48 of the Disciplinary Charter of the Armed Forces).

Taking into account the above mentioned, the Constitutional Court decided that the periods stipulated in the Article 333.1 of the Criminal Code should start from the moment of the self-willed abandonment by a military servant of his military unit or place of service or his non-attendance at the place of service at the stipulated time without good reason.

#### *Languages:*

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



# Belgium

## Court of Arbitration

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### Important decisions

*Identification:* BEL-2005-2-009

a) Belgium / b) Court of Arbitration / c) / d) 04.05.2005 / e) 84/2005 / f) / g) *Moniteur belge*, (Official Gazette), 07.06.2005 / h) CODICES (French, Dutch, German).

*Keywords of the systematic thesaurus:*

2.1.1.2 **Sources of Constitutional Law** – Categories – Written rules – National rules from other countries.

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

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

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

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

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

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

*Keywords of the alphabetical index:*

Social security / Pension, insurance scheme, survivor's pension, bigamy / Private international law, personal status.

*Headnotes:*

The Court of Arbitration cannot rule on differences in treatment deriving from Moroccan law.

*Summary:*

I. The Brussels Labour Court questioned the Court of Arbitration about the compatibility of Article 24.2 of the General Agreement on Social Security between Belgium and the Kingdom of Morocco with the constitutional rules of non-discrimination and equality in the exercise of the rights and freedoms guaranteed to women and men (Articles 11 and 11bis of the Constitution), taken together with Article 14 ECHR

and Articles 2.1 and 26 of the UN Covenant on Civil and Political Rights. Its reason for doing so was that Article 24.2 appeared to involve a difference in treatment depending on whether the surviving spouse of a person who had worked in Belgium was a man or a woman, or a difference in treatment between widows of a Belgian national and widows of a Moroccan national who had been polygamous.

When a Moroccan worker dies and leaves two widows, it is the custom for the courts to decide that a single pension will be granted, to be divided between the two widows. This is the rule under the impugned provision, which states that widows' pensions may be divided equally and permanently between beneficiaries in a manner determined by the insured person's personal status.

II. The Court of Arbitration noted first of all that the award of a survivor's pension to the surviving spouse of a salaried worker or equivalent was subject to the latter being insured under one or more whole-life insurance schemes.

Under the Civil and Criminal Codes and the rules applicable to public service posts, only one survivor's pension was ever paid under the Belgian system and had to be divided up if need be.

The aim of the General Agreement on Social Security – which was endorsed by Belgian law – was to guarantee that the social security laws in force in Morocco and in Belgium covered those persons to whom those laws applied. However, under Article 24.2 of the Agreement, all widows of male Moroccan workers who had had more than one wife could claim a share of the pension in accordance with the Moroccan law governing the worker's personal status.

The Court noted that, by making it possible to take account of a Moroccan worker's personal status, Article 24.2 was applying a rule of private international law taken from Article 21 of the Act of 16 July 2004 on private international law, which provided that effects deriving from marriages contracted abroad in accordance with the spouses' personal status could be recognised in Belgium if these effects did not undermine Belgium's international public policy – which it was the courts' task to assess in the specific context.

By providing that, in this case, the amount of the pension would be divided among the surviving beneficiaries and not paid in total to each of them, Article 24.2 complied with the principles of Belgian law, which made no provision for a survivor's pension to be paid in full to several beneficiaries but did allow it to be divided among several widows.



The Court concluded that the differences in treatment complained of in the preliminary questions derived from Moroccan law, which the Court could not rule on. Consequently, it was not necessary for the Court to reply to them.

*Supplementary information:*

In view of the circumstances, the Court decided to keep the applicant's identity secret, using only the initials of the party concerned in the judgment.

*Languages:*

French, Dutch, German.



*Identification:* BEL-2005-2-010

a) Belgium / b) Court of Arbitration / c) / d) 22.06.2005 / e) 107/2005 / f) / g) *Moniteur belge*, (Official Gazette), 04.07.2005 / h) CODICES (French, Dutch, German).

*Keywords of the systematic thesaurus:*

2.1.1.4.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.  
 3.16 **General Principles** – Proportionality.  
 3.17 **General Principles** – Weighing of interests.  
 3.18 **General Principles** – General interest.  
 3.19 **General Principles** – Margin of appreciation.  
 3.20 **General Principles** – Reasonableness.  
 5.2.1.1 **Fundamental Rights** – Equality – Scope of application – Public burdens.  
 5.3.39 **Fundamental Rights** – Civil and political rights – Right to property.

*Keywords of the alphabetical index:*

Tax, taxation powers / Taxation, progressive system, principle / Taxation, progressive system, proportionality / Inheritance, tax, rate.

*Headnotes:*

It is the task of the body responsible for legislating on tax to set the rates applicable to the different

categories it establishes and to make the relevant practical arrangements. Different rates for different groups of heirs depending on their kinship, marital tie or situation of cohabitation with the deceased are based on objective and relevant criteria. It is not patently unreasonable to set a different rate for different categories of people taking account of the emotional tie that can be presumed from the degree of kinship between the deceased and his or her heirs.

Setting high rates of inheritance tax (of up to 90%) is likely, however, to affect the testator's right to dispose of his or her property, as guaranteed in Article 544 of the Civil Code. Requiring beneficiaries to pay high rates of tax is also likely to infringe the right to the peaceful enjoyment of one's possessions guaranteed by Article 1 Protocol 1 ECHR.

*Summary:*

I. An application was made to the Court of Arbitration for it to set aside a decree of the Walloon Region amending the Inheritance Tax Code by an individual relying on his status as universal beneficiary, without any ties of kinship, marriage or legal cohabitation with the deceased, of an estate that had fallen to be wound up in the Walloon Region after the entry into force of the decree. The Court of Arbitration accepted that the applicant had an interest enabling him to take legal proceedings against the decree, which affected him personally as being liable for inheritance tax at the top of the highest tax bracket.

The applicant alleged an infringement of the rules apportioning powers between the Federal State and the Regions. The Court examined this allegation first, as scrutiny of a provision's conformity with the rules on the apportionment of powers had to precede examination of its compatibility with the provisions in Part II of the Constitution on rights and freedoms and Articles 170 and 172 on taxation. The argument was rejected.

The applicant also alleged an infringement of the constitutional rules on equal tax treatment (Articles 10, 11 and 172 of the Constitution), read together, if appropriate, with the constitutional rule on the right to property (Article 16 of the Constitution) and Article 1 Protocol 1 ECHR. He argued that the increase in the rates of taxation applied to the fourth category ("among all other people") undermined the contributory capacity of those beneficiaries in a way which did not affect the other three legal categories.

II. The Court of Arbitration held that it was for the body legislating on tax to set the rates applicable to the different categories it established and to lay down the relevant practical arrangements. Different rates

for different groups of beneficiaries depending on their kinship, marital tie or situation of cohabitation with the deceased were based on objective and relevant criteria. It was not patently unreasonable to set a different rate for the four different categories of people cited above, taking account of the emotional tie which could be presumed from the degree of kinship between the deceased and his or her heirs.

Having established the intentions of the legislative body by examining its preparatory work, the Court accepted that the legislator had perhaps decided to treat certain small or medium-sized estates more favourably, with the aim of budget neutrality, by increasing only the rates applicable to the category “among all other people”.

In response to the second complaint, the Court found, nonetheless, that setting high inheritance tax rates was likely to affect the testator’s right to dispose of his or her property, as guaranteed in Article 544 of the Civil Code. It could make it impossible for an indivisible item of real estate or property to be bequeathed to a person with a modest income as this person would inevitably have to part with the said property so as to be able to pay the inheritance tax, at the risk of being unable to sell it at a high enough price within the statutory time limit for payment.

The Court also noted that requiring beneficiaries to pay high rates of tax was likely to interfere with the right to peaceful enjoyment of one’s possessions as guaranteed by Article 1 Protocol 1 ECHR.

Although the body legislating on tax had to have a broad margin of discretion, taxation could be disproportionate and constitute an unwarranted interference with property rights if it upset the fair balance which should be struck between the requirements of the general interest and the protection of the right to the peaceful enjoyment of one’s possessions (European Court of Human Rights: *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, 23 February 1995, *Series A of the Publications of the Court*, no. 306-B; *S.A. Dangeville v. France*, 16 April 2002, *Reports of Judgments and Decisions* 2002-III; *S.A. Cabinet Diot et S.A. Gras Savoye v. France*, 22 July 2003 and *Buffalo SRL in liquidation v. Italy*, 3 July 2003). The Court also accepted that tax levied in respect of inherited real property could also interfere with the rights guaranteed by Article 1 Protocol 1 ECHR (*Jokela v. Finland*, 21 May 2002, *Reports of Judgments and Decisions* 2002-IV).

The Court then returned to the question of whether the 90% rate was proportionate, bearing in mind that the principle of proportionality entailed due regard for

the principles of equality and non-discrimination. It noted that, in addition to the fiscal objective it was pursuing, the legislative body might conceivably try to influence the behaviour of taxpayers in certain areas and that this might justify a particularly high rate of taxation, for example to dissuade consumers from using products that damaged the environment, to punish illegal behaviour or to curb activities that were tolerated but harmful.

In the present case, it was not established that those who had drafted and enacted the decree had regarded as amounting to illegal a testator’s desire to reward people who were dear to him but did not have a sufficiently close family or marital tie with him. While, where inheritance tax was concerned, it was acceptable for legislation to give preference, through advantageous rates, to relatives with a presumed emotional link with the deceased (see, in this connection, Judgments nos. 128/98, 82/99 and 66/2004), it did not follow that no account should be taken of emotional links whose genuine nature was confirmed by a provision in a will.

In the present case, therefore, the Walloon Region had interfered disproportionately both with the testator’s right to dispose of his property and with the legatee’s legitimate hopes of acquiring it by setting a rate that was incomparably higher than the taxes demanded for other forms of property transfer and those affecting other categories of beneficiary.

While politically it was open to those drafting tax legislation to apply different rates for different taxes and different categories of beneficiary, it was patently disproportionate to apply such a high inheritance tax rate to one category of taxpayer when no goal relating specifically to that category could justify such a high rate and the aim was purely a budgetary one.

The Court accordingly set aside the impugned provision of the Walloon Region’s decree on the ground that it raised the inheritance tax rate to more than 80%.

#### Languages:

French, Dutch, German.





*Identification:* BEL-2005-2-011

a) Belgium / b) Court of Arbitration / c) / d) 13.07.2005 / e) 124/2005 / f) / g) *Moniteur belge*, (Official Gazette), 01.08.2005 / h) CODICES (French, Dutch, German).

*Keywords of the systematic thesaurus:*

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

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

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

5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.

*Keywords of the alphabetical index:*

European arrest warrant / Jeopardy, double / International criminal law, double jeopardy, exception / European Community, legal system, unity.

*Headnotes:*

The Court of Arbitration asked the Court of Justice of the European Communities to give a preliminary ruling as to whether EU Council Framework Decision 2002/584/JAI of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States was compatible with Article 34.2.b EU, under which framework decisions may be adopted only “for the purpose of approximation of the laws and regulations of the Member States”.

In the alternative, the Court of Arbitration asked for a preliminary ruling as to whether whether Article 2.2 of the Council Framework Decision of 13 June 2002 on the European arrest warrant was compatible with Article 6.2 EU and, more specifically, with the principle that criminal offences and punishments must be strictly defined by law (the rule requiring conformity with the law) and with the principle of equality and non-discrimination guaranteed by this article, in that it waived the requirement that the double criminality of the offences to which it referred be verified.

*Summary:*

I. The non-profit-making association “*Advocaten voor de Wereld*” (Lawyers for the World) applied to the Court of Arbitration to have the Act of 19 December 2003 on the European arrest warrant set aside. This Act transposes EU Council Framework Decision 2002/584/JAI of 13 June 2002 on the

European arrest warrant and the surrender procedures between Member States into Belgian law.

The applicants submitted that the framework decision was not valid, as the European arrest warrant should have been implemented by means of a convention rather than a framework decision in view of the fact that, under Article 34.2.b EU, framework decisions may be adopted only “for the purpose of approximation of the laws and regulations of the Member States”, and this had not been the case. The applicants asked the Court of Arbitration to ask the Court of Justice of the European Communities for a preliminary ruling on the validity of the framework decision.

II. The Court noted that the impugned Act was the direct consequence of the decision by the Council of the European Union to settle the matter of a European arrest warrant by means of a framework decision. Under Article 35.1 EU, the Court of Justice was the only body with jurisdiction to give preliminary rulings on the validity of framework decisions. Under Article 35.2 EU, Belgium had accepted the Court of Justice’s jurisdiction in this respect. The Court considered that it should ask the Court of Justice for a preliminary ruling on the following question: “Is Framework Decision 2002/584/JHA of the Council of the European Union of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States compatible with Article 34.2.b EU, under which framework decisions may be adopted only for the purpose of approximation of the laws and regulations of the Member States?”

Pending a reply to this question, the Court examined other complaints. It noted that Article 2 of the framework decision and Section 5 of the Act of 19 December 2003 contained a specific rule applicable to a series of offences in respect of which it was no longer necessary to check conformity with the double criminality requirement (i.e. that they were an offence in both countries). The applicants submitted that the definition of these offences was not clear and detailed enough and that this would lead to the inconsistent application of the rules by the authorities in charge of enforcing the European arrest warrant and hence a violation of the principles of equality and non-discrimination.

The Court of Arbitration held that the rule requiring conformity with the law in criminal cases (Articles 12 and 14 of the Constitution) and the principles of equality and non-discrimination (Articles 10 and 11 of the Constitution), which the applicants claimed had been violated, should also be complied with by the European Union in accordance with Article 6.2 EU.

In the Court's opinion, the applicants' complaints in respect of the impugned Act also applied to the same degree to the framework decision. Differences in interpretation between judicial authorities as to the validity of Community law and the validity of national legislation through which such law was implemented at domestic level would undermine the unity of the Community legal system and infringe the general principle of legal certainty enshrined in Community law.

Having regard to Articles 35 and 46 EU, the Court decided, in the alternative, to ask for a second preliminary ruling on a question which it framed as follows: "Is Article 2.2 of Framework Decision 2002/584/JHA of the Council of the European Union of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, in so far as it sets aside verification of the requirement of double criminality for the offences listed therein, compatible with Article 6.2 EU and, more specifically, with the rule requiring conformity with the law in criminal proceedings guaranteed by that provision and with the principle of equality and non-discrimination?"

#### Cross-references:

For other preliminary questions put by the Court of Arbitration to the Court of Justice of the European Communities, see Judgments nos. 6/97 of 19.02.1997 [BEL-1997-1-001], 139/2003 of 29.10.2003 and 126/2005 of 13.07.2005 [BEL-2005-2-005] ([www.arbitrage.be/jurisprudence](http://www.arbitrage.be/jurisprudence)).

#### Languages:

French, Dutch, German.



#### Identification: BEL-2005-2-012

a) Belgium / b) Court of Arbitration / c) / d) 13.07.2005 / e) 125/2005 / f) / g) *Moniteur belge*, (Official Gazette), 03.08.2005 / h) CODICES (French, Dutch, German).

#### Keywords of the systematic thesaurus:

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

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

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

#### Keywords of the alphabetical index:

Terrorism, fight / Terrorism, defining an offence / Terrorism, offence.

#### Headnotes:

Section 3 of the Terrorist Offences Act of 19 December 2003, which, in transposing the Framework Decision of 13 June 2002 of the Council of the European Union into Belgian law, defined terrorist offences as offences which, "given their nature or context, may seriously damage a country or an international organisation", is not incompatible with the *nullum crimen, nulla poena sine lege* principle. There is no reason to ask for a preliminary ruling on the subject from the Court of Justice of the European Communities.

#### Summary:

I. The non-profit-making human rights organisation *Ligue des droits de l'homme* and others applied to the Court of Arbitration to have the Terrorist Offences Act of 19 December 2003 set aside. The aim of the Act was, among other things, to transpose the Framework Decision of 13 June 2002, adopted by the Council of the European Union in accordance with Article 34.2 EU, into Belgian law.

In the first part of their complaint, the applicants called for Section 3 of the Act of 19 December 2003 to be set aside. In this section, terrorist offences were defined as offences which, "given their nature or context, may seriously damage a country or an international organisation". The applicants' first submission was that the rule requiring conformity with the law had been infringed because terrorist offences were defined too broadly or inaccurately, in breach of the constitutional principle that crimes and punishments must be clearly defined in law (Articles 12 and 14 of the Constitution) read in conjunction with Article 7 ECHR and Article 15 of the International Covenant on Civil and Political Rights.

II. The Court began by pointing out that the *nullum crimen, nulla poena sine lege* principle derived from the idea that the criminal law should be framed in terms which enabled everyone to know, when he or she adopted a form of conduct, whether it was punishable. It required that it be stated in legislation, in sufficiently detailed and clear terms offering legal certainty, what acts would be punished, firstly so that someone adopting a particular form of conduct could assess in advance what the criminal consequences of that conduct would be and secondly so that the courts were not given too much discretion.

However, the *nullum crimen, nulla poena sine lege* principle did not mean that the law could not give at least some discretion to the courts, as account had to be taken of the general nature of laws, the diversity and variability of the circumstances and the subject areas to which they applied and new developments in the type of conduct they were designed to punish.

When assessing the impugned statutory provision under Articles 12 and 14 of the Constitution, the Court expressly took account of the case-law of the European Court of Human Rights on the rule requiring conformity with the law in criminal cases, as guaranteed in like manner by Article 7 ECHR (*Kokkinakis v. Greece* of 25 May 1993, *Series A*, no. 260-A, §§ 40 and 52; *S.W. v. the United Kingdom* of 22 November 1995, *Series A*, no. 335-B, § 36 and *Cantoni v. France* of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, §§ 29-35).

Having examined the scope of the impugned provision in detail, among other things in the light of the preparatory work on the Act (see paragraphs B.7.1 to B.7.3 of the full text of the judgment in CODICES or at [www.arbitrage.be/jurisprudence](http://www.arbitrage.be/jurisprudence)), the Court found that, while Section 3 of the Terrorist Offences Act of 19 December 2003 left the courts a considerable degree of discretion, it did not grant them the kind of independent power to define an offence that would encroach on the powers of the legislature.

The Court disagreed with the applicants that it was necessary in this case to ask the Court of Justice of the European Communities to give a preliminary ruling on the validity and interpretation of the Framework Decision of 13 June 2002, in accordance with Article 35 EU.

The Court rejected the application (the Court's response to the applicants' other complaints is not covered by this abridged version of the decision – see paragraphs B.9 to B.11.4 of the full text of the judgment in CODICES or at [www.arbitrage.be/jurisprudence](http://www.arbitrage.be/jurisprudence)).

### Languages:

French, Dutch, German.



### Identification: BEL-2005-2-013

a) Belgium / b) Court of Arbitration / c) / d) 13.07.2005 / e) 126/2005 / f) / g) *Moniteur belge*, (Official Gazette), 02.08.2005 / h) CODICES (French, Dutch, German).

### Keywords of the systematic thesaurus:

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

3.26 **General Principles** – Principles of Community law.

4.7.15.1.3 **Institutions** – Judicial bodies – Legal assistance and representation of parties – The Bar – Role of members of the Bar.

4.7.15.1.4 **Institutions** – Judicial bodies – Legal assistance and representation of parties – The Bar – Status of members of the Bar.

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

### Keywords of the alphabetical index:

Lawyer, professional secrecy / Money laundering / European Union, fundamental rights.

### Headnotes:

The European Parliament, like the Belgian Parliament, is required to respect due process and the right to a fair trial.

It is not for the Court to rule on the compatibility of a directive with the general principle of due process, which has to be observed in European legislation under Article 6.2 EU.

If applications to set aside the Act intended to transpose Directive 2001/97/EC into domestic law raise doubts about the validity of that Act, it is necessary to determine beforehand whether the

aforementioned directive is valid. In such cases, the Court of Arbitration puts a preliminary question to the Court of Justice of the European Communities.

### *Summary:*

Several bar associations applied to the Court of Arbitration to set aside the Act of 12 January 2004 amending a previous Act on prevention of use of the financial system to launder money. The Court began by acknowledging that the applicants had an interest enabling them to institute legal proceedings as the legislation they were asking it to set aside affected the legal profession.

Turning to the merits, the Court noted that the applicants' main complaint against the impugned Act was that it extended the scope of the Act on prevention of the use of the financial system for money laundering and funding terrorism to barristers. The applicants felt that this constituted an unwarranted infringement of the principles of professional secrecy and the independence of lawyers.

The Court noted that barristers played an important part in the administration of justice in Belgium and were subject to strict rules of professional conduct. It followed from their special status, established by the Judicial Code and regulations adopted by the bar associations, that in Belgium the profession of barrister was distinct from other independent legal professions.

The Court also pointed out that for everyone's right to due process to be effective, it had to be possible for a relationship of trust to be established between defendants and the lawyers who advised and represented them. This essential relationship could only be established and upheld if defendants could be sure that what they confided to their lawyers would not be divulged. It followed from this that the rule of professional secrecy, the violation of which was punished in particular by Article 458 of the Criminal Code, was a key component of due process.

It was true that the rule of professional secrecy had to take second place in the event of necessity or where a principle considered to carry more weight came into conflict with it. However, to be deemed compatible with the fundamental principles of the Belgian legal system, lifting barristers' professional secrecy had to be justified by an overriding reason and had to be strictly proportionate.

The impugned Act was intended to transpose Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001, amending Council Directive 91/308/EEC on prevention of the

use of the financial system for the purpose of money laundering, into Belgian law.

The Court pointed out that the European Parliament, like the Belgian Parliament, was required to respect due process and the right to a fair trial. Article 6.2 EU provided as follows:

“The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”

It was not, however, for the Court to rule on the compatibility of the aforementioned directive with the general principle of due process that had to be respected in all European legislation under Article 6.2 EU.

At the applicants' request and on the basis of Article 234 EC establishing the European Community, the Court decided to ask the Court of Justice of the European Communities for a preliminary ruling on the following question: “Does Article 1.2 of Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering infringe the right to a fair trial such as is guaranteed by Article 6 ECHR, and, as a consequence, Article 6.2 EU, in so far as the new Article 2a.5, which it inserts into Directive 91/308/EEC, requires the inclusion of members of the independent legal profession, without excluding the profession of barrister, in the scope of application of this same directive, which, in substance, has the aim of imposing an obligation on persons or establishments covered by it to inform the authorities responsible for the fight against money laundering of any fact which might be an indication of such laundering (Article 6 of Directive 91/308/EEC, replaced by Article 1.5 of Directive 2001/97/EC)?”

### *Languages:*

French, Dutch, German.





# Bosnia and Herzegovina

## Constitutional Court

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### Important decisions

*Identification:* BIH-2005-2-003

**a)** Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 22.07.2005 / **e)** U 10/05 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 30/05 / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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

2.3.7 **Sources of Constitutional Law** – Techniques of review – Literal interpretation.

4.3.2 **Institutions** – Languages – National language(s).

4.5.6.3 **Institutions** – Legislative bodies – Law-making procedure – Majority required.

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

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

5.3.23 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

5.3.24 **Fundamental Rights** – Civil and political rights – Right to information.

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

*Keywords of the alphabetical index:*

Interest, vital, constituent people / Law, future implementation / Discrimination, national / Language, official, use / Media, television, broadcasting.

*Headnotes:*

It is not the responsibility of the Constitutional Court to determine the constitutionality of possible future arrangements in the process of implementation of laws to be adopted.

*Summary:*

I. The Chair of the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, following the declaration of the Croat caucus in the House of Peoples, filed a request with the Constitutional Court seeking therein a review of procedural regularity and existence of constitutional grounds to consider whether the Draft Law on the Public Broadcasting System of Bosnia and Herzegovina might be destructive to the vital interest of the Croat people in Bosnia and Herzegovina. The decision of the Constitutional Court determines the enacting procedure carried out by the Parliamentary Assembly (simple majority or qualified majority).

The declaration of the Croat caucus refers to a vital interest of that people. The declaration contains several reasons for considering that the draft law is destructive of a vital interest of the Croat people. In substance, the reasons set out in the declaration as to the destructive nature of a vital interest are reflected in the following: it is claimed that the draft law violates the right of the Croat population in Bosnia and Herzegovina to freedom of expression under Article 10 ECHR as they are denied a radio and television channel in their own language. It is also claimed that the Croat population in Bosnia and Herzegovina are discriminated against by comparison with the Bosnian and Serb peoples because the latter *de facto* have radio and television channels in their own languages (existing RTV FBH and RTV RS). Moreover, it is maintained that the Croat population in Bosnia and Herzegovina are discriminated against on the grounds of the representation of their culture and traditional heritage in the programmes of the public broadcasters as compared to the other two constituent peoples. Furthermore, it is argued that the Draft law does not provide mechanisms for the implementation of the programming principles of the public broadcasters as defined under Article 26 thereof and that the System Board does not provide guarantees that the members of all constituent peoples would be equally represented in it. It is pointed out that national minorities in European countries may have radio and television channels in their own languages whereas the Croat population in Bosnia and Herzegovina, although not a minority but a constituent people, cannot even have one radio and television channel in their own language.

II. The Constitutional Court considers that the vital interests of the constituent peoples include upholding various rights and freedoms which significantly help to ensure that the constituent peoples can effectively advance their interests in collective equality and participation in the state. As well as being constitutional rights the freedom to use one's own

language and to have access to education, information and ideas in that language, are among these vital interests.

Therefore, the Constitutional Court concludes that the draft law and the declaration of the Croat caucus raise legitimate questions as to the effect of the draft law on a vital interest of a Croat people in Bosnia and Herzegovina since the draft law, *inter alia*, regulates the use of the official languages of the constituent peoples, representation of tradition and cultural heritage in the programmes of the public broadcasters, and the control of implementation of the programming principles of the public broadcasters by the System Board.

However, the draft law neither excludes nor favours any language of the constituent people in relation to other languages; on the contrary, Article 26 guarantees equality between the three official languages of the constituent peoples. The draft law does not contain provisions that would obviously (*prima facie*) or necessarily suggest that the Croat language would not be equally represented with the other two languages of the constituent peoples. The draft law clearly stipulates that the programmes of the public broadcasters shall be edited equally in three languages and two scripts and they shall ensure equal representation of contents so as to reflect the heritage of all three constituent peoples. Nothing on the face of the draft law in the present case suggests that the draft law is intrinsically discriminatory or that it will be applied in a discriminatory way. Indeed, the indications are that there will be an opposite effect. If it is properly implemented, the draft law should help to ensure that all television and radio broadcasters are increasingly open to the languages, cultures and traditions of all three constituent peoples.

The Constitutional Court also considers to be unjustified the invocation by the Croat caucus of the rights guaranteed to minorities under the European Charter for Regional or Minority Languages. The Croat people are not a national minority in Bosnia and Herzegovina but a constituent people as set out in the last line of the Preamble to the Constitution. In Bosnia and Herzegovina the linguistic rights of the constituent peoples enjoy extensive protection under the Constitution and laws of Bosnia and Herzegovina. The draft law itself protects the linguistic rights of the Croat population. That being so, there is no need to give additional protection to those rights by providing special radio and TV services in the Croat language to advance Croat language and traditions. The European Charter for Regional or Minority Languages therefore cannot form the basis of a claim that the draft law is destructive of a vital interest of the Croat people.

It may be that the draft law, if passed and improperly implemented, would fail to ensure the removal of any *de facto* discrimination. If that is the case it would be possible to take proceedings to enforce constitutional rights in the usual way.

Therefore, the Constitutional Court concludes that the draft law is not destructive to the vital interest of the Croat population in Bosnia and Herzegovina with respect to the use of the Croat language.

The Constitutional Court has clearly indicated in its case-law that “effective participation of the constituent peoples in state authorities” is an element inherent to the notion of vital interest of a constituent people.

In the case in point, the Constitutional Court takes the view that the System Board cannot be regarded as a “state authority” in the same way as the Parliamentary Assembly, government, ministries, etc. The System Board would not exercise the legislative or executive power of the State, but would be responsible for implementing principles and legislative rules made by other bodies. Furthermore, the System Board cannot be said to be a representative body authorised to adopt legally binding acts within the scope of its jurisdiction. The conclusion to be drawn is that it would not be necessary to define the composition of the Board with respect to representation of the constituent peoples and others. In view of the competences of the System Board, particularly with reference to the programming principles affecting vital national interests of all constituent peoples and the application of those principles in practice, the Constitutional Court considers that it would be very desirable, and might be constitutionally necessary, for all constituent peoples and others to be appropriately represented on the Board. The terms of the draft law do not prevent the members of the System Board from being selected in such a way as to meet this aim. Accordingly, there are no grounds to claim that the draft law is destructive of a vital interest of the Croat population in Bosnia and Herzegovina. Therefore, the appropriate procedure in further proceedings in the Parliamentary Assembly for adopting the law is that prescribed by Article IV.3.d of the Constitution (simple majority).

#### *Supplementary information:*

As a consequence of this decision the law on the Public Broadcasting System of Bosnia and Herzegovina has been adopted by a simple majority in the Parliamentary Assembly.

*Languages:*

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



## Bulgaria

### Constitutional Court

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#### Statistical data

1 May 2005 – 31 August 2005

Number of decisions: 3

There was no relevant constitutional case-law during the reference period 1 May – 31 December 2005.





# Canada

## Supreme Court

### Important decisions

*Identification:* CAN-2005-2-003

**a)** Canada / **b)** Supreme Court / **c)** / **d)** 09.06.2005 / **e)** 29272 / **f)** Chaoulli v. Quebec (Attorney General) / **g)** *Canada Supreme Court Reports* (Official Report), [2005] 1 S.C.R. x, 2005 SCC 35 / **h)** Internet: <http://www.droit.umontreal.ca/doc/csc-scc/en/index/html>; 335 *National Reporter* 25; [2005] S.C.J. no. 33 (Quicklaw); CODICES (English, French).

*Keywords of the systematic thesaurus:*

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

5.3.4 **Fundamental Rights** – Civil and political rights – Right to physical and psychological integrity.

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

*Keywords of the alphabetical index:*

Public health care system / Insurance, health, private, prohibition.

*Headnotes:*

In light of the waiting times inherent in the public system which prolong a patient's suffering and, in certain cases, increase his risk of death or injuries, the prohibition on private health insurance provided for in the Quebec Health Insurance Act and Hospital Insurance Act constitutes a deprivation of the rights to life and to personal inviolability protected by the Quebec Charter of Human Rights and Freedoms.

*Summary:*

By means of a motion for a declaratory judgment, the appellants contested the validity of the prohibition on private health insurance provided for in Section 15 of the Health Insurance Act (hereinafter: "HEIA") and Section 11 of the Hospital Insurance Act (hereinafter: "HOIA") of Quebec. They contended that the prohibition deprives them of access to health care

services that do not come with the waiting times inherent in the public system. They claimed, *inter alia*, that Section 15 HEIA and Section 11 HOIA violate their rights under Section 7 of the Canadian Charter of Rights and Freedoms and Section 1 of the Quebec Charter of Human Rights and Freedoms. The Superior Court and the Court of Appeal dismissed the motion for a declaratory judgment. The Supreme Court of Canada, in a majority decision, allowed the appeal and concluded that Section 15 HEIA and Section 11 HOIA are inconsistent with the Quebec Charter.

In an individual opinion, a judge found that Section 11 HOIA and Section 15 HEIA constitute a deprivation of the rights to life and to personal inviolability protected by Section 1 of the Quebec Charter. The evidence shows that, in the case of certain surgical procedures, the delays that are the necessary result of waiting lists increase the patient's risk of mortality or the risk that his or her injuries will become irreparable. The evidence also shows that many patients on non-urgent waiting lists are in pain and cannot fully enjoy any real quality of life. The right to life and to personal inviolability is therefore affected by the waiting times. The infringement of these rights protected by Section 1 is not justified under Section 9.1 of the Quebec Charter. The general objective of the HOIA and the HEIA is to promote health care of the highest possible quality for all Quebecers regardless of their ability to pay. The purpose of the prohibition on private insurance in Section 11 HOIA and Section 15 HEIA is to preserve the integrity of the public health care system. Preservation of the public plan is a pressing and substantial objective, but there is no proportionality between the measure adopted to attain the objective and the objective itself. While an absolute prohibition on private insurance does have a rational connection with the objective of preserving the public plan, the Attorney General of Quebec has not demonstrated that this measure meets the minimal impairment test. It cannot be concluded from the evidence concerning the Quebec plan or the plans of the other provinces of Canada, or from the evolution of the systems of various OECD countries that an absolute prohibition on private insurance is necessary to protect the integrity of the public plan. There are a wide range of measures that are less drastic and also less intrusive in relation to the protected rights.

In a concurring opinion, three judges agreed with the conclusion that the prohibition on private health insurance violates Section 1 of the Quebec Charter and is not justifiable under Section 9.1. They also found that this prohibition violates Section 7 of the Canadian Charter. Where lack of timely health care can result in death, the Section 7 protection of life is

engaged; where it can result in serious psychological and physical suffering, the Section 7 protection of security of the person is triggered. In this case, the government has prohibited private health insurance that would permit ordinary Quebecers to access private health care while failing to deliver health care in a reasonable manner, thereby increasing the risk of complications and death. In so doing, it has interfered with the interests protected by Section 7. Section 11 HOIA and Section 15 HEIA are arbitrary, and the consequent deprivation of the interests protected by Section 7 is therefore not in accordance with the principles of fundamental justice. In order not to be arbitrary, a limit on life, liberty or security of the person requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. Here, the evidence on the experience of other western democracies with public health care systems that permit access to private health care refutes the government's theory that a prohibition on private health insurance is connected to maintaining quality public health care. It does not appear that private participation leads to the eventual demise of public health care. Furthermore, the breach of Section 7 of the Canadian Charter is not justified under Section 1 of the Canadian Charter. The government undeniably has an interest in protecting the public health regime but, given that the evidence falls short of demonstrating that the prohibition on private health insurance protects the public health care system, a rational connection between the prohibition on private health insurance and the legislative objective is not made out. In addition, on the evidence, the prohibition goes further than would be necessary to protect the public system and is thus not minimally impairing. Finally, the benefits of the prohibition do not outweigh its deleterious effects. The physical and psychological suffering and risk of death that may result from the prohibition on private health insurance outweigh whatever benefit – and none has been demonstrated here – there may be to the system as a whole.

In a dissenting opinion, three judges were of the view that the prohibition on private health insurance did not violate the Canadian Charter or the Quebec Charter.

#### *Languages:*

English, French (translation by the Court).



#### *Identification: CAN-2005-2-004*

**a)** Canada / **b)** Supreme Court / **c)** / **d)** 28.06.2005 / **e)** 30025 / **f)** Mugesera v. Canada (Minister of Citizenship and Immigration) / **g)** *Canada Supreme Court Reports* (Official Report), [2005] 2 S.C.R. xxx, 2005 SCC 40 / **h)** Internet: <http://www.droit.umontreal.ca/doc/csc-scc/en/index/html>; 335 *National Reporter* 229; [2005] S.C.J. no. 39 (Quicklaw); CODICES (English, French).

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

1.4.8.7 **Constitutional Justice** – Procedure – Preparation of the case for trial – Evidence.  
5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.

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

Expulsion, foreigner, under criminal procedure / Crime against humanity, constitutive elements / Speech, political / Murder, incitement / Genocide, incitement.

#### *Headnotes:*

A speech made by a well-educated and well-connected member of a hard-line Hutu political party in a public place at a public meeting in Rwanda, in which he encouraged acts of violence against Tutsi at a time of ethnic tensions in the country when civilians were being killed merely by reason of ethnicity, constituted under Canadian law an incitement to commit murder, to genocide and to hatred, as well as a crime against humanity.

#### *Summary:*

In November 1992, M., an active member of a hard-line Hutu political party opposed to a negotiation process then under way to end the war, spoke to about 1,000 people at a meeting of the party in Rwanda. The content of the speech eventually led the Rwandan authorities to issue the equivalent of an arrest warrant against M., who fled the country shortly thereafter. In 1993, he successfully applied for permanent residence in Canada. In 1995, the Minister of Citizenship and Immigration commenced proceedings under Sections 27.1 and 19.1 of the Immigration Act to deport M. on the basis that by delivering his speech, he had incited to murder, genocide and hatred, and had committed a crime against humanity. An adjudicator concluded that the allegations were valid and issued a deportation order against M. The Immigration and Refugee Board (Appeal Division) (IAD) upheld the decision. The Federal Court – Trial Division dismissed the application for judicial review on

the allegations of incitement to commit murder, genocide or hatred, but allowed it on the allegation of crimes against humanity. The Federal Court of Appeal found the Minister's allegations against M. to be unfounded and set aside the deportation order. The Supreme Court of Canada unanimously restored the deportation order.

For the purposes of the Immigration Act's application, a conclusion that the elements of the crime in Canadian criminal law have been made out will be deemed to be determinative in respect of the commission of crimes under Rwandan criminal law. With respect to the allegations made pursuant to Section 27.1 of the Immigration Act – that M. have incited murder, genocide and hatred in a speech made in Rwanda – the evidence adduced must meet the civil standard of the balance of probabilities. In this case, the Minister has proved that, on the facts of this case as found on a balance of probabilities, the speech of M. constituted an incitement to murder, genocide or hatred. M. is therefore inadmissible to Canada by virtue of Section 27.1 of the Immigration Act. The IAD's findings of fact support the conclusion that viewed objectively, the message in M's speech was likely to incite, and was made with a view to inciting murder even if no murders were committed. M. conveyed to his listeners, in extremely violent language, the message that they faced a choice of either exterminating the Tutsi, the accomplices of the Tutsi, and their own political opponents, or being exterminated by them. M. intentionally gave the speech, and he intended that it result in the commission of murders. Given the context of ethnic massacres taking place at that time, M. knew his speech would be understood as an incitement to commit murder. The allegation of incitement to the crime of genocide is also well founded. M's message was delivered in a public place at a public meeting and would have been clearly understood by the audience. He was aware that ethnic massacres were taking place when he advocated the killing of members of an identifiable group distinguished by ethnic origin with intent to destroy it in part. Finally, the allegation of incitement to hatred was well founded. The IAD's analysis of the speech supports the inference that M. intended to target Tutsi and encourage hatred of and violence against that group. His use of violent language and clear references to past ethnic massacres exacerbated the already vulnerable position of Tutsi in Rwanda in the early 1990s.

Under Section 19.1.j of the Immigration Act, a person shall not be granted admission to Canada if there are reasonable grounds to believe that the person has committed a crime against humanity outside Canada. The "reasonable grounds to believe" standard

requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities. Reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information. This standard of proof applies to questions of fact. Whether the facts meet the requirements of a crime against humanity is a question of law. Here, the three required elements of the crime against humanity under Section 7.3.76 of the Criminal Code have been made out. First, M's speech bears the hallmarks of a gross or blatant act of discrimination equivalent in severity to the other underlying acts listed in Section 7.3.76. The IAD's findings of fact amply support a finding that M. committed the criminal act of persecution with the requisite discriminatory intent. As for the last two elements, they require that the proscribed act take place in a particular context: a widespread or systematic attack, usually violent, directed against any civilian population. In this case, M's speech was part of a systematic attack that was occurring in Rwanda at the time and was directed against Tutsi and moderate Hutu, two groups that were ethnically and politically identifiable and were a civilian population as this term is understood in customary international law. Furthermore, M. possessed the required culpable mental state. He was a well-educated man who was aware of his country's history, of past massacres of Tutsi and of the ethnic tensions in his country, and who knew that civilians were being killed merely by reason of ethnicity or political affiliation. Moreover, the speech itself left no doubt that M. knew of the violent and dangerous state of affairs in Rwanda in the early 1990s. Lastly, a man of his education, status and prominence on the local political scene would necessarily have known that a speech vilifying and encouraging acts of violence against the target group would have the effect of furthering the attack. Since there are reasonable grounds to believe that M. committed a crime against humanity, he is inadmissible to Canada by virtue of Sections 27.1.g and 19.1.j of the Immigration Act.

#### *Languages:*

English, French (translation by the Court).



*Identification: CAN-2005-2-005*

a) Canada / b) Supreme Court / c) / d) 20.07.2005 / e) 30063, 30065 / f) R. v. Marshall; R. v. Bernard / g) *Canada Supreme Court Reports* (Official Report), [2005] 2 S.C.R. x, 2005 SCC 43 / h) Internet: <http://www.droit.umontreal.ca/doc/csc-scc/en/index/html>; [2005] S.C.J. no. 44 (Quicklaw); CODICES (English, French).

*Keywords of the systematic thesaurus:*

1.4.8.7 **Constitutional Justice** – Procedure – Preparation of the case for trial – Evidence.  
5.5.5 **Fundamental Rights** – Collective rights – Rights of aboriginal peoples, ancestral rights.

*Keywords of the alphabetical index:*

Indigenous people, right to harvest forest resources / Aboriginal title.

*Headnotes:*

Neither a treaty nor aboriginal title confer on modern Mi'kmaq a right to log on Crown lands in Nova Scotia and in New Brunswick contrary to provincial regulation.

*Summary:*

In *Marshall*, 35 Mi'kmaq Indians were charged with cutting timber on Crown lands in Nova Scotia without authorisation. In *Bernard*, a Mi'kmaq Indian was charged with unlawful possession of spruce logs he was hauling from the cutting site to the local saw mill. The logs had been cut on Crown lands in New Brunswick. The accused argued that as Mi'kmaq Indians, they were not required to obtain provincial authorisation to log because they have a right to log on Crown lands for commercial purposes pursuant to treaty or aboriginal title. The trial courts entered convictions which were upheld by the summary conviction courts. The courts of appeal set aside the convictions. A new trial was ordered in *Marshall* and an acquittal entered in *Bernard*. The Supreme Court of Canada unanimously restored the convictions.

The majority found that the treaties of 1760-61 concluded by the British Crown with the Mi'kmaq peoples do not confer on modern Mi'kmaq a right to log contrary to provincial regulation. The truckhouse clause of the treaties was a trade clause which only granted the Mi'kmaq the right to continue to trade in items traditionally traded in 1760-61. While the right to trade in traditional products carries with it an implicit right to harvest those resources, this right to harvest is the adjunct of the basic right to trade in traditional

products. Nothing in the wording of the truckhouse clause comports a general right to harvest or gather all natural resources then used. The right conferred is the right to trade. The emphasis therefore is not on what products were used, but on what trading activities were in the contemplation of the parties at the time the treaties were made. Only those trading activities are protected. Ancestral trading activities, however, are not frozen in time and the question in each case is whether the modern trading activity in issue represents a logical evolution from the traditional trading activities at the time the treaties were made. Here, the trial judges applied the proper test and the evidence supports their conclusion that the commercial logging that formed the basis of the charges against the accused was not the logical evolution of a traditional Mi'kmaq trading activity in 1760-61.

The accused did not establish that they hold aboriginal title to the lands they logged. In analysing a claim for aboriginal title, both aboriginal and European common law perspectives must be considered. The court must examine the nature and extent of the pre-sovereignty aboriginal practice and translate that practice into a modern common law right. Since different aboriginal practices correspond to different modern rights, the question is whether the practices established by the evidence, viewed from the aboriginal perspective, correspond to the core of the common law right claimed. Here, the accused did not assert an aboriginal right to harvest forest resources but aboriginal title simpliciter. Aboriginal title to land is established by aboriginal practices that indicate possession similar to that associated with title at common law. The evidence must prove “exclusive” pre-sovereignty “occupation” of the land by their forebears. “Occupation” means “physical occupation” and “exclusive occupation” means an intention and capacity to retain exclusive control of the land. However, evidence of acts of exclusion is not required. All that is required is demonstration of effective control of the land by the group, from which a reasonable inference can be drawn that the group could have excluded others had it chosen to do so. Typically, this is established by showing regular occupancy or use of definite tracts of land for hunting, fishing or the exploitation of resources. These principles apply to nomadic and semi-nomadic aboriginal groups. Continuity is required, in the sense of showing the group's descent from the pre-sovereignty group whose practices are relied on for the right. On all these matters, evidence of oral history is admissible, provided it meets the requisite standards of usefulness and reasonable reliability. The trial judges in both cases applied the proper test in requiring proof of sufficiently regular and exclusive use of the cutting sites by Mi'kmaq people at the time of the assertion of sovereignty, and there is no



ground to interfere with their conclusions that the evidence did not establish aboriginal title.

In a concurring opinion, two judges were of the view that the protected treaty right includes not only a right to trade but also a corresponding right of access to resources for the purpose of engaging in trading activities. However, only those types of resources traditionally gathered in the Mi'kmaq economy for trade purposes would reasonably have been in the contemplation of the parties to the treaties of 1760-61. In order to be protected under those treaties, trade in forest products must be the modern equivalent or a logical evolution of Mi'kmaq use of forest products at the time the treaties were signed. On the facts of these cases, the evidence supports the conclusion that trade in forest products was not contemplated by the parties and that logging is not a logical evolution of the activities traditionally engaged in by Mi'kmaq at the time the treaties were entered into.

On the issue of aboriginal title, the two judges concluded that the patterns and nature of aboriginal occupation of land should inform the standard necessary to prove aboriginal title. The common law notion that "physical occupation is proof of possession" remains but is not the governing criterion: the nature of the occupation is shaped by the aboriginal perspective, which includes a history of nomadic or semi-nomadic modes of occupation. Anyone considering the degree of occupation sufficient to establish title must be mindful that aboriginal title is ultimately premised upon the notion that the specific land or territory at issue was of central significance to the aboriginal group's culture. Occupation should be proved by evidence not of regular and intensive use of the land but of the tradition and culture of the group that connect it with the land. Thus, intensity of use is related not only to common law notions of possession but also to the aboriginal perspective. The record in the courts below lacks the evidentiary foundation necessary to make legal findings on the issue of aboriginal title in respect of the cutting sites in Nova Scotia and New Brunswick and, as a result, the accused in these cases have failed to sufficiently establish their title claim.

#### *Languages:*

English, French (translation by the Court).



## Croatia Constitutional Court

### Important decisions

*Identification:* CRO-2005-2-007

a) Croatia / b) Constitutional Court / c) / d) 24.05.2005 / e) U-I-2766/2003 / f) / g) *Narodne novine* (Official Gazette), 68/05 / h) CODICES (Croatian, English).

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

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.

5.4.11 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

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

Trade union, membership, discrimination / Trade union, contribution, compulsory / Collective agreement, freedom not to join.

#### *Headnotes:*

Imposing an obligation on employees who are not trade union members, which may be done by collective agreement pursuant to the disputed Act, is incompatible with their decision not to join a trade union; prescribing, in the general provisions of the disputed law, that regulating by collective agreement the obligation of employees to pay the solidarity contribution shall not be considered discriminatory on the grounds that non-membership of a trade-union is contrary to constitutionally guaranteed right to equality, freedom of association (in its negative meaning) and freedom of trade unions is in contradiction with the Constitution.

#### *Summary:*

I. The Constitutional Court reviewed the constitutionality of the provision of Article 53 of the Act on revisions and amendments of the Labour Act (hereinafter: "ZIDZR") with regard to the proposal of the Ombudsman of Croatia and some other natural persons.

The applicants contend that the disputed provision does not comply with Article 14 of the Constitution, due to the fact that workers participate, through their representatives, in the procedures of negotiations and of signing a collective agreement, and they vote upon the acceptance of that collective agreement at a referendum, whereas workers who are not trade union members have the right to regulate their status as workers through other provisions of labour law. However, in the disputed Act, the legislator unconstitutionally imposed the obligation of solidarity contribution on non-members of trade unions as well, on the basis that they benefit from the advantages agreed in the collective agreement.

Several applicants pointed out that the solidarity contribution is not something that non-members of trade unions should have to pay, and that they have no control over the money withheld which goes to the trade union. They contend that the right of free association and the right not to be members of a trade union are violated too (negative freedom of association). They argue too that compulsory payment of contribution from non-members of trade unions is in breach of the provision of Article 16 of the Constitution (the restriction of freedoms and rights by law in order to protect freedoms and rights of others, public order, public morality and health; every restriction of freedoms or rights must be proportional to the nature of the necessity for restriction in each individual case). In addition, they maintain that permanent withdrawal of a part of their salary is in breach of the provision of Article 50 of the Constitution (restriction or expropriation of property in the interest of the Republic of Croatia upon payment of compensation equal to its market value; exceptional restriction of entrepreneurial freedom and property rights for the purposes of protecting the interests and security of the Republic of Croatia, nature, the environment and public health), because the solidarity contribution has the effect of enrolling employees who are not trade union members in a trade union, without providing them with the possibility to freely leave the union and to stop paying the solidarity contribution. It is also the applicants' contention that the lawful possibility to introduce a solidarity contribution has the impact of enforcing the will of the minority (trade-union members) upon the majority, against which the majority, pursuant to the current legislation, does not enjoy any legal protection.

II. Firstly establishing the provisions of the Constitution immediately relevant for the review of constitutionality of the disputed provision of the Law, that is the provisions of Articles 14, 16, 43 and 59 of the Constitution, the Constitutional Court expressed its opinion as to the existence of the freedom of association both in its positive and in its negative meaning. In regard to the legal explanation of the

principle of forbidding discrimination in Article 2 of the Labour Act, the Court pointed out that every worker is free to opt for membership or non-membership in a trade union and this choice must not lead to any discrimination.

Without disputing the legislator's authority, stemming from the provision of Article 2.4.1 of the Constitution, independently to regulate economic, legal and political affairs in Croatia, and to amend and revise the existing affairs and rights in compliance with the Constitution, the Constitutional Court held that the amendment of the disputed Act was not done in accordance with the Constitution.

The disputed provisions of the Act and the collective agreement regulated the manner of collection of enrolment and membership dues, and extended the obligation to pay the solidarity contribution to third parties, although those persons did not have any influence on the negotiations and confirmation of the collective agreement. In this way the solidarity contribution became an obligation imposed on non-members of a trade union. The Court had expressed its views on the legal nature of the collective agreement in its Rulings U-II-318/2003 and U-II-643/2003 of 9 April 2003 (*Narodne novine* no. 72/03).

From the legal standpoint, restriction of the constitutionally guaranteed freedom of association in trade unions derives from the collective agreement, and the disputed Act supports this possibility of regulation by legal coercion. The Constitutional Court expressed its opinion about the substance of restricting rights and freedoms guaranteed in the Constitution in Decision no. U-I-884/1997 of 3 February 2000 (*Narodne novine* no. 20/00), *Bulletin* 2000/1 [CRO-2000-1-004].

Pursuant to the above, and to the disputed legislation in the situation under discussion, every employee has the right to join a trade union of his own free will, under conditions prescribed by the statute or rules of the trade union. In this way he assumes the rights and obligations that ensue from membership and he is free to leave the trade union and stop paying membership dues. However, employees who are not trade-union members cannot stop paying the solidarity contribution, and in accordance with Article 182a.2, which was added by Article 51 ZIDZR, the employer is obliged to calculate and withhold the solidarity contribution from the salary of the employee who is not a trade union member and to regularly deposit it in the trade union account. Unlike trade union membership dues, the solidarity contribution can be withheld, even without the employee's agreement.

In this connection, the Constitutional Court noted that the Constitution, in Article 14.1 of the Constitution, stipulates the general prohibition of discrimination, and this principle may not be restricted by law. Therefore, having found that restricting constitutional rights and freedoms, which the disputed Act allows, contravenes Article 16 of the Constitution and brings into question the constitutional rights of employees who are not trade union members to equality before the law and freedom of association, the Constitutional Court repealed the disputed provisions of ZIDZR.

*Languages:*

Croatian, English.



## Cyprus Supreme Court

### Important decisions

*Identification:* CYP-2005-2-002

**a)** Cyprus / **b)** Supreme Court / **c)** / **d)** 16.05.2005 / **e)** 7760 / **f)** / **g)** to be published in *Cyprus Law Reports* (Official Digest) / **h)**.

*Keywords of the systematic thesaurus:*

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

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

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

*Keywords of the alphabetical index:*

Proceedings, criminal, right to free interpretation / Prostitution, living on the earnings.

*Headnotes:*

Article 30.3 of the Constitution stipulates that, every person has the right to have free assistance of an interpreter if he cannot understand or speak the language used in court.

It is not prostitution which is punishable in itself but the offence of living on the earnings of prostitution which entails the element of exploitation of women.

*Summary:*

The appellant, who was Turkish Cypriot, was convicted of the offences of living on the earnings of prostitution and for the offence of employing illegal immigrants and was sentenced to 15 months and to 45 days imprisonment accordingly. The appellant was represented at the early stages of the hearing at the district court by a Greek Cypriot lawyer but later he chose to present his case personally. He challenged his conviction by means of an appeal to the Supreme



Court. He complained that there was a breach of Articles 3.1, 3.2, 3.4 and 3.8 of the Constitution since neither the Turkish language was used during the proceedings nor the depositions were drawn up or the indictment was drafted in the Turkish language. He also complained that he was not afforded, on some hearings, the services of an interpreter.

The Supreme Court held that due to practical difficulties, Article 3.1 cannot be enforced, and therefore official documents are not drafted in the Turkish language. The indictment was read over to the appellant, in a language he understood, to which he pleaded not guilty and proceeded with defending himself. Furthermore he was represented, at the time of the indictment, by a Greek Cypriot lawyer. The Supreme Court held that his right to a fair trial had not been infringed neither was a breach of Article 30.3 of the Constitution.

Article 3.1 of the Constitution stipulates that the official languages of the Republic are Greek and Turkish.

Article 3.2 of the Constitution stipulates that legislative, executive and administrative acts and documents shall be drawn up in both official languages and shall, where under the express provisions of this Constitution promulgation is required, be promulgated by publication in the official Gazette of the Republic in both official languages.

Article 3.4 of the Constitution provides that judicial proceedings shall be conducted or made and judgments shall be drawn up in the Greek language if the parties are Greek, in the Turkish language if the parties are Turkish, and in both the Greek and the Turkish languages if the parties are Greek and Turkish.

Article 3.8 of the Constitution stipulates that every person shall have the right to address himself to the authorities of the Republic in either of the official languages.

The Court dismissed his argument that on 7 hearings there was no interpreter present. It was observed that the appellant had never complained about the non presence of an interpreter. He had expressly stated that he understood the Greek language and he also requested to be allowed to cross examine the witness in English, which he did. There was no doubt in the Court's mind that the appellant followed and understood the whole procedure.

The Supreme Court dismissed the argument of the appellant about entrapment by the police. The police had information about the appellant's criminal

activities and their actions did not amount to incitement to the appellant to commit an offence.

The appellant also argued that as the European Court of Justice ruled that prostitution is a provision of services for remuneration which falls within the concept of economic activities he could not be sentenced for the offence of living on the earnings of prostitution. The court, in dismissing this argument, ruled that it is not prostitution which is punishable but the offence of living on the earnings of prostitution which entails the element of exploitation of women and in the present case the appellant had forced women to prostitution. It stated further that, in accordance with European Union law it is up to the member states to determine what they consider to be morally acceptable.

Appeal dismissed.

*Languages:*

Greek.



# Czech Republic Constitutional Court

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## Statistical data

1 May 2005 – 30 September 2005

- Judgment of the plenum: 11
- Judgment of panels: 57
- Other decisions of the plenary Court: 18
- Other decisions by chambers: 1026
- Other procedural decisions: 63
- Total: 1175

## Important decisions

*Identification:* CZE-2005-2-005

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 17.05.2005 / **e)** Pl. US 62/04 / **f)** / **g)** *Sbírka zákonu* (Official Gazette), 280/2005 Sb / **h)** CODICES (Czech).

*Keywords of the systematic thesaurus:*

- 3.10 **General Principles** – Certainty of the law.  
 3.13 **General Principles** – Legality.  
 4.6.3.1 **Institutions** – Executive bodies – Application of laws – Autonomous rule-making powers.  
 4.8.4.1 **Institutions** – Federalism, regionalism and local self-government – Basic principles – Autonomy.  
 4.8.8.2.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Implementation – Distribution *ratione materiae*.

*Keywords of the alphabetical index:*

Legislative delegation, limits / Municipality, ordinance, *ultra vires*.

*Headnotes:*

The Constitutional Court respects local government as an expression of the right and capacity of local organisations to administer public affairs, within the bounds of existing laws, within the framework of their responsibility, and in the interests of local inhabitants. The response to socially undesirable phenomena in the municipality cannot, however, be to resolve such

problems by an authoritative designation of relations among individuals by the municipality itself making law for which it has not been empowered by statute. Matters which are reserved to regulation by statute cannot be governed by generally binding municipal ordinances. Statutory regulation takes priority over regulation by generally binding ordinances; if the legislature adopts certain rules for the designated field, territorial local government units may not adopt norms that duplicate, or are in conflict with, statutes.

*Summary:*

I. In his petition the Minister of the Interior seeks the annulment of a generally binding ordinance of Municipality X, on the Principles of the Breeding of Domestic, Small and Farm Animals, due to its conflict with the constitutional order and with specific statutes which contain the same matter as is regulated in the ordinance. According to the petitioner the municipality may not, by means of a generally binding ordinance, lay down duties which are regulated in enactments of a higher legal force, unless it has been expressly empowered to do so in such higher enactments; nor may it, without express statutory empowerment, lay down duties which can be imposed only on the basis of a statute and within the bounds thereof. The petitioner states that the ordinance allows for the breeding of animals only where prescribed conditions have been met, which results in the restriction of property rights of the owners of such animals. Further, it defines related concepts in a manner that differs from their legal definition in individual statutes and provides for sanctions for the violation of the duties laid down by ordinance. Duties laid down by ordinance which are in conflict with a statute cannot, however, be considered as a legal duty, so that the failure to observe them cannot be sanctioned.

The Ministry of the Interior called upon the municipality to undertake revisions. The municipal council recommended to the municipality's representative body to repeal the ordinance at issue. However, the municipality's representative body did not adopt an ordinance repealing the one at issue. The Ministry of Interior then suspended the effect of the contested ordinance and submitted to the Constitutional Court a petition proposing its annulment.

II. In deciding on the petition proposing the annulment of generally binding ordinances, the Constitutional Court adjudges whether the ordinance was adopted and issued within the bounds of the competence defined in the Constitution and in the constitutionally-prescribed manner and whether its substance is in conflict either with a constitutional act or a statute. For such adjudication, the Constitutional Court generally adopts a four-part test, as follows: review of the

municipality's competence to issue the generally binding ordinance; review of whether, in issuing the generally binding ordinance, the municipality exceeded the bounds of its statutorily defined competence; review of whether it abused the competence entrusted to it by statute; and lastly review of the substance of the ordinance for reasonableness.

The Constitution defines the constitutional limits for the issuance by a municipality of generally binding ordinances within its autonomous competence, where it is provided that representative bodies may, within the limits of their jurisdiction, issue generally binding ordinances. As regards its original law-making authority, in principle an explicit statutory empowerment is not necessary for the issuance of such ordinances. The contested ordinance was duly issued by the municipal bodies empowered to do so and in a manner in harmony with the Constitution.

In issuing generally binding ordinances, municipalities must act in conformity with Acts of Parliament. Municipalities are thus restricted by the limits placed upon their competence by statute, may not regulate issue which are reserved solely to statutory regulation, and may not regulate matters which are already governed by public law or private law enactments. The aim and function of the issuance of generally binding ordinances is for municipalities to administer their own affairs rather than in the mere free reproduction of statutes relating to the tasks of state administration or even norm creation in this field. In cases where a municipality, by issuing unilateral prohibitions or orders, acts in its capacity as a subject determining citizens' duties, it can do so only in cases where there is explicit statutory authorisation. Therefore the Constitutional Court ruled that the municipality exceeded its authority, as the contested ordinance affects legal relationships which fall within the field governed by statute and the observance of duties arising from these relations is under the supervision of state administrative bodies.

While the provisions of the Act on Municipalities grants to municipalities the power to issue restrictive measures for the protection of public order, that power is, of course, granted with the proviso that activities which could disrupt public order in the municipality or which would conflict with good moral or with the protection of safety, health, and property, may be permitted solely in places and at times designated in a generally binding ordinance. Alternatively, an ordinance can decree that such activities can be prohibited on certain open public spaces within the municipality. This provision expresses the right of local self-government to issue restrictive measures for the autonomous regulation of

"its affairs" for the protection of public order. However, the contested ordinance did not designate any specific open public spaces. Moreover, the imposition of duties relating to the breeding of animals, as was formulated in this case, goes beyond the concept of local character and thus became an inappropriate means for the protection of public order.

It follows from what has been decided that the contested ordinance does not pass muster, even from the perspective of reviewing the question as to whether the municipality, when issuing it, acted *ultra vires* in terms of the misuse of the authority entrusted to the municipality by law; thus, it was not necessary to review its substance for reasonableness.

In view of the fact that the contested ordinance selected, as the subject of its regulation, affairs which it may not regulate in such a manner, the Constitutional Court granted the petitioner's petition and annulled the ordinance.

#### *Languages:*

Czech.



#### *Identification:* CZE-2005-2-006

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 17.05.2005 / **e)** Pl. US 71/04 / **f)** / **g)** *Sbírka zákonu* (Official Gazette), 272/05 Sb / **h)** CODICES (Czech).

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

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

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

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

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

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

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**Keywords of the alphabetical index:**

Property, restitution / Monument, cultural, privatisation / Legislative power, duty to legislate.

**Headnotes:**

It cannot be viewed as arbitrary on the part of the legislature that it has not adopted a new formal statute in the field of the custody and protection of cultural monuments; it does, however, constitute arbitrariness and also a discriminatory approach when the possibility to assert a restitution claim is bound up specifically with this condition (i.e., the adoption of such statute), moreover a condition that is vaguely expressed and in conflict with the principles for law-making in a law-based state.

**Summary:**

I. The Constitutional Court received the petition of the district court which was hearing a case on the determination of ownership in immovable property upon which stands Castle Y. A group of people asserted a claim to the surrender of this property pursuant to the Act on the Regulation of Ownership Affairs in the Land and other Agricultural Property (hereinafter: "the Act on Land"). The Land Office decided that they were co-owners of this property. As the plaintiff in subsequent proceedings before the District Court, the National Institute of Monuments objected that this decision was incorrect, due to the fact that Castle Y had been declared a national cultural monument by government order. It referred to the provisions of the Act on Land which prevents the surrender of any such immovable property until such time as an act is adopted regulating the custody and protection of cultural monuments. No act regulating the custody and protection of cultural monuments had been adopted so far, even though 13 years had passed since the adoption of the Act on Land. The petitioner asserted that government orders pursuant to the Act on Land were *de facto* individual administrative acts, which opened the way to restitution for certain entitled persons, due to the fact that certain property was removed from the list of national cultural monuments, but which, on the other hand, blocked the assertion of the restitution claims of other entitled persons. Moreover, they did so without expressing in any definite manner a time limit, citing "uncertain future events", that is to say, the adoption of a new act regulating the custody and protection of cultural monuments.

The petitioner contended that this provision was in conflict with the constitutional order of the Czech

Republic, and submitted a petition proposing its annulment.

II. The Constitutional Court came to the conclusion that the petition proposing the annulment of this provision was well-founded.

According to the Act on Land, the legal position of entitled persons is such that that Act does not exclude their claims for the return of land, buildings and structures, if those passed to the State or to other legal persons during a certain defined period. However, the Act on Land lays down an impediment to such claims in the form of a condition, which is the adoption of a statute regulating the custody and protection of cultural monuments. In the Constitutional Court's view, such a condition is formulated in a manner which contradicts the requirements which are placed upon legal enactments in a democratic, law-based state.

When, in a law-based state founded on respect for the rights and freedoms of man and of citizens, the possibility to assert a restitution claim is tied to such indefinitely formulated circumstances, in terms of the protection of the rights of persons entitled pursuant to the Act on Land, a situation comes into being which can only be described as an unconstitutional state of affairs. That is to say, the Act on Land violates the principle of law-making in a law-based state, according to which, if a condition laid down in a legal enactment is bound up with the entry into force of another legal enactment, it must concern a fact which will come about and which the addressee in some manner will come to know about. In the given case, however, it is not clear whether the Parliament had been at all successful in adopting the envisaged rules. Similarly, it is not evident how entitled persons are meant to know the moment in which the time period for assertion of such claims starts to run.

The Constitutional Court concluded that it is the government which will make the decision as to what will be surrendered to entitled persons, as by its orders it can remove certain items from the list of national cultural monuments, limit the declaration of national cultural monuments or, by subsequently expanding the list of national cultural monuments, intervene in an ongoing restitution case, thus "temporarily" excluding certain persons from it.

The Constitutional Court can only assess the constitutionality of contested legal enactments; it is not competent to anticipate future judicial decisions, even though these particular proceedings gave rise to concrete constitutional control. The subject of the proceedings was the determination of ownership rights in immovable property upon which sits a

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national cultural monument. Although it was not a monument at the time the proceedings were initiated, it had become one by the time rights in the land had been acquired by the group of persons involved in the proceedings before the ordinary court. In the given case, the creation of ownership rights should have occurred by virtue of the decision of the Ministry of Agriculture – the Land Office, which became final and enforceable at a time when the immovable property at issue had already been declared a national cultural monument.

While formally the government order was issued as a legal enactment, de facto it was an individual administrative act, in consequence of which the route of possible entitled persons to restitute Castle Y was closed off. The Constitutional Court considered these as sufficient grounds for granting the petition and annulling the contested provision.

#### *Languages:*

Czech.



#### *Identification: CZE-2005-2-007*

a) Czech Republic / b) Constitutional Court / c) Fourth Chamber / d) 01.06.2005 / e) IV. US 29/05 / f) / g) / h) CODICES (Czech).

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

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

4.10.7.1 **Institutions** – Public finances – Taxation – Principles.

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

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

5.3.42 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

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

Tax, income tax / Tax, proceedings, burden of proof, scope / Taxation, legal basis.

#### *Headnotes:*

In the field of evidence-taking, informational autonomy is reflected in the principle, according to which the person who makes a certain factual assertion bears the burden of proving that fact. This principle is observed, in modified form, even in tax proceedings as, in contrast to other types of proceedings in which it is a matter of the free choice of the individual whether or not to assert and introduce certain facts in the proceedings, in tax proceedings the tax subject is also subject to the duty of affirmation. Nonetheless, the burden of proof in tax proceedings also relates solely to the proof of facts asserted by the tax subject in the tax return, thus facts tied exclusively to the tax duties of the subject. The tax obligation has a dimension of type, that is an obligation tied to a statutorily-prescribed specific tax, and also a temporal dimension, expressed in the deadline after which the State's right to assess tax terminates. The tax subject can be expected to bear the burden of proof in a tax proceeding solely within the temporally and type restricted bounds. The extension of the burden of proof beyond these confines is an impermissible deviation, which in terms of constitutional law represents an intrusion into the autonomous sphere of the individual.

#### *Summary:*

I. In his constitutional complaint, the complainant contested the decisions of administrative courts. In its judgment, the Supreme Administrative Court rejected on the merits his appellate complaint against the Regional Court's judgment, which had rejected on the merits his action against the Financial Directorate. In that action he had sought the review and quashing of the Directorate's decision which had rejected on the merits his appeal against the tax administrator's decision assessing for a period of two years supplementary income tax on natural persons.

The complainant had lent a certain sum of money to commercial company X. However, since he did not, in the tax administrator's view, properly prove the source from which this sum came, or did not prove how it was taxed, or in the alternative whether it concerned income that was exempted from tax or not subject to tax, the complainant was assessed supplementary income tax pursuant to the loan.

The complainant rejected the administrative bodies' conclusion that the tax subject was obliged duly to prove that his property has been taxed. On the basis of the fact that the complainant made a loan, the tax administrator came to the conclusion that he obtained an increase in property, not designated in greater detail. From this it inferred that such an increase must

be income subject to income tax. The complainant objected to the violation of his rights to fair process and equal standing in a proceeding. He proposed that the Constitutional Court quash the contested decisions.

II. The Constitutional Court came to the conclusion that the complaint was well founded. Tax proceedings are based on the principle that every tax subject is obliged not only to declare tax himself, or her but also to substantiate his affirmation. The Act on the Administration of Taxes and Fees does not authorise the tax administrator to require the tax subject to prove whatever the administrator demands, rather only to demonstrate that which the subject himself has affirmed. The burden of proof placed on the tax subject can be deemed as in conformity with the Constitution only if it is interpreted in this way.

The rules on the burden of proof contained in the Act on the Administration of Taxes and Fees represent, in the field of public law, a constitutionally conforming penetration into the constitutionally protected autonomy of the individual, with which the public authority is entitled to interfere on the grounds of a specific and constitutionally approved public interest. In the given case, the interest in question is the setting, assessing, and collection of tax; taxes and fees shall be levied only pursuant to law.

In setting and collecting taxes and fees, state power must be asserted within the bounds laid down by law. Even such laws must be interpreted, not solely in the sense that public authorities are empowered to assert toward the individual by statutorily-constituted powers, in any manner whatsoever, rather they must be interpreted in the substantive sense such that, in the exercise of their power, public authorities respect the protection of fundamental rights of the individual, in the given case the autonomous sphere of the individual, of which the individual's "informational autonomy" is a component.

In the given case, the tax administrator's means of proceeding could be considered as an instance of an impermissible extension of the complainant's burden of proof. To the extent that the tax administrator's demand was directed towards having the complainant demonstrate the structure of his income to show how he was capable of furnishing, from his assets, the sum of money in question, it is precisely that breadth of the burden of proof which represents its impermissible extension, violating the autonomous space of the individual. The burden of proof tied to the complainant is limited both substantively and also temporally. The tax administrator thus could not demand of the complainant that he generally demonstrate his property relations in such a way that

it would be possible to reconstruct the fact as to whether in the relevant years he had at his disposal the amount of assets which would allow him to provide the loan. It is thus impermissible to demand of the complainant that he prove his property and income relations to an extent which exceeds the temporal and substantive framework of his tax obligations.

By laying down such an obligation, the tax administrator construed generally the complainant's duty to prove his property relations and the source of his property, which exceeded the confines of the Act on the Administration of Taxes and Fees. If the tax administrator then assessed tax, on the basis of the loan, due to the fact that the complainant did not bear the burden of proof and, in doing so, took into consideration the complainant's expenditures, that is a part of his property, as the basis of tax assessed in this way, then it impermissibly deprived the complainant of his property.

If the administrative courts accepted such an approach on the part of the tax administrator, they continued in the violation of the complainant's fundamental rights and failed to satisfy their duty to afford individuals the protection of their rights. Therefore, the Constitutional Court granted the complaint and annulled the contested decisions.

#### *Languages:*

Czech.



#### *Identification: CZE-2005-2-008*

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 14.06.2005 / **e)** Pl. US 1/05 / **f)** / **g)** *Sbírka zákonu* (Official Gazette), 302/2005 Sb / **h)** CODICES (Czech).

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

3.10 **General Principles** – Certainty of the law.  
 3.12 **General Principles** – Clarity and precision of legal provisions.  
 3.13 **General Principles** – Legality.  
 4.8.3 **Institutions** – Federalism, regionalism and local self-government – Municipalities.

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

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

*Keywords of the alphabetical index:*

Competence, normative, limits / Municipality, ordinance, imprecise.

*Headnotes:*

Due to the legal certainty of the owners of plots of land, it is necessary to specify the areas used as open public areas since, even though from the perspective of the statutory definition of “open public areas” the ownership of such plot is non-essential, there is no doubt that it is precisely the owners of such holdings who have the opportunity to prevent, by means of private law, the special use of their property.

*Summary:*

I. In his petition, the Minister of the Interior sought the annulment, on the basis of conflict with statute, of provisions of a generally binding municipal ordinance on local fees.

When the regional office discovered that the ordinance at issue here was in conflict with the law, it invited Municipality Y to revise the ordinance. On the basis of this invitation, the municipality modified the generally binding ordinance, but only in part. As a consequence, the regional office proposed that the Ministry of Interior suspend the operation of this ordinance.

The petitioner asserted that the definition, in the contested ordinance, of the term, “open public areas”, was in conflict with the constitutional order and in conflict with the Act on Local Fees. According to the petitioner the principle of the law-based state laid down in the constitutional order carries with it also the principle of legal certainty, a component of which is the requirement that duties imposed upon individual legal subjects by generally binding legal enactments must be definite. However, the wording of the article in the ordinance does not comply with this statutory obligation, as the terms, “the public green” and “additional areas accessible to everyone without restriction” are not precisely defined. He proposed that the Constitutional Court should annul the article of the ordinance at issue, together with two related articles.

II. The Constitutional Court ascertained that the contested ordinance was issued within the confines of the municipality’s authority and was adopted in the statutorily-prescribed manner.

According to the provisions of the Act on Municipalities, in exercising its autonomous competence to issue generally binding ordinances, a municipality shall act in accordance with law. This statutory directive corresponds to the delimitation of the substantive areas in which municipalities have original, undelegated competence to make law. The Act on Municipalities lays down the substantively defined areas in which municipalities may impose obligations by means of generally binding ordinances issued pursuant to their autonomous competence. Among other things, this includes cases where municipalities are empowered to do so in a special act. The Act on Local Fees is just such a special act; it provides that municipalities introduce fees by means of generally binding ordinances and sets out the details of the collection of such fees. As regards fees for the use of open public areas, the ordinance shall designate the areas in municipalities which are subject to such a fee. Where a municipality sets a fee within its territory by means of a generally binding ordinance on the basis of law, this must be considered as original, non-delegated law-making, falling within a municipality’s autonomous competence.

If the municipality then issued an ordinance on local fees in which is regulated even the paying in of the fees for the use of open public spaces, this approach cannot be considered as conduct *ultra vires*, as, in the given case, the municipality was empowered by law to regulate the given substantive field by means of generally binding ordinances issued within its autonomous competence.

Further the Constitutional Court resolved the issue of whether the municipality misused its autonomous competence as substantively defined by statute. As the Constitutional Court has already stated “the abuse of this competence represents the exercise of power in a field entrusted to it by statute by pursuing an aim which is not approved by statute, by the route of omitting relevant considerations when adopting decisions or, on the contrary, taking into account irrelevant considerations.”

The petitioner’s main objection was directed against the article of the ordinance in which is defined the concept of open public areas. It is evident that, in the given case, the municipality applied a legal definition of the concept “open public areas”, which is laid down in the Act on Municipalities. That definition generally defines which areas may be considered as open public areas.



From the perspective of the protection of citizens' legal certainty, the Constitutional Court considers it necessary for an open public space defined in this way to be designated in a generally binding ordinance in the most precise manner possible.

It is clear that, in adopting the generally binding ordinance, the municipality neglected the statutory requirement concerning the concretisation of the areas used as open public areas in such a way as to protect the legal certainty of the municipality's residents.

If then the municipality did not precisely specify in the contested ordinance the areas which are to be considered as open public spaces in conjunction with the imposition of fees for their special use, it misused its substantively defined autonomous competence, as a result of its neglect of the constitutional principle of legal certainty, which flows from the principle of the law-based state.

In view of the foregoing, the Constitutional Court granted in part the Minister of Interior's petition and annulled an article in the contested generally binding ordinance on local fees; as regards the rest, the petition was rejected on its merits.

#### *Languages:*

Czech.



#### *Identification: CZE-2005-2-009*

**a)** Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 22.06.2005 / **e)** Pl. US 13/05 / **f)** / **g)** *Sbírka zákonu* (Official Gazette), 383/2005 Sb / **h)** CODICES (Czech).

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

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

3.3 **General Principles** – Democracy.

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

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

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

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

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

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

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

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

Electoral act, notion, scope / Election, regional / Election, parliamentary.

#### *Headnotes:*

For the stability of democracy it is not only important the way in which chambers of Parliament are elected, but also the way in which bodies of territorial self-government are elected; as a matter of constitutional law, it cannot be deduced that parliamentary elections are more important for the preservation of progress and democracy than are elections to self-governing representative bodies of municipalities and regions. If democracy is genuinely to be government of the sovereign people, by the people, and for the people, it cannot be, even if indirectly, distributed top-down from the Parliament; on the contrary, it must grow from below, as a product of civic society, up to the highest organs of state power – the legislative power and the constituent naturally ranking among them.

If it is desirable that the electoral rules for parliamentary elections are not subject to constant revision and, if possible, are stabilised by means of a more difficult procedure for their adoption, it is equally desirable that rules for elections to representative bodies of regions and municipalities should also be subject to such stabilisation.

#### *Summary:*

I. The Constitutional Court received a petition from a group of Senators proposing the annulment of the Act amending the Act on Certain Measures Relating to the Protection of the Public Interest and on the Incompatibility of Certain Offices (Act on Conflicts of Interest). After the bill for this Act had been adopted by the Assembly of Deputies, it was referred to the Senate, which rejected it. The bill was nevertheless delivered to the President of the Republic for his signature; he, however, returned the bill to the Assembly of Deputies. The Assembly of Deputies took the position that the Senate had not taken action on the bill within the legally prescribed time, thus, it adopted the bill anew. The petitioners asserted that

the act was not adopted in the constitutionally prescribed manner as, according to the Constitution, in order for an electoral act to be adopted, it must be approved by both chambers of Parliament. Whereas in the case of “ordinary” statutes, the Senate’s disapproval of the bill can be overridden in a new vote by the Assembly of Deputies, such a procedure does not apply to electoral acts. According to the petitioners, the problem of interpretation consists in part in the interpretation of the actual phrase “electoral act” and in part in whether the contested statute is an electoral act, for it supplements that part of the Act on Conflicts of Interest which relates to changes to the Act on Elections to Representative Bodies of Regions and of Municipalities.

The petitioners were of the view that the contested statute can be considered an electoral act. They asserted that it could not be deduced from the mere fact that the Constitution makes use of the phrase, “electoral act”, in the singular that it referred merely to a single statute, that is, the Act on Elections to the Parliament of the Czech Republic; on the contrary, it referred to any sort of statute the substance of which concerns elections.

The contested act amended provisions of the Act on Conflicts of Interest and of the Act on Elections to Representative Bodies of Municipalities and Regions. The petitioners made reference to the fact that the amendment to the Act on Conflicts of Interest placed upon members of representative bodies of territorial self-governing units a duty which they were required to fulfil within a brief time frame, which in essence changed for them, in the middle of their terms of office, the conditions for the holding of public office. This fact violated the principle of legitimate expectations and the principle of trust in law, which are regulative expressions of the value of legal certainty emerging from the concept of the law-based state.

The basic issue for decision by the Constitutional Court was how to interpret the expression “electoral act”. Whereas the petitioner, the Senate, and the President of the Republic considered that every statute which lays down rules for election to any of the representative bodies qualifies as an electoral act, the Assembly of Deputies was convinced that only the Act on Elections to the Parliament qualifies as such an act.

II. The concept, “electoral act”, can be interpreted in entirely dissimilar fashions – from a severely restrictive to an extensively broad interpretation. It is the Constitutional Court’s conviction that it is necessary to proceed from a broader perspective, from a perspective reflecting in part the value which

the Constituent Assembly ascribed to the Senate in the framework of the entire system regulating the exercise of state power and reflecting in part the relevance of statutes regulating the substance of electoral matters for safeguarding of foundations of the Czech Republic, which in its Constitution declares itself to be a democratic law-based state.

The Constitutional Court has already in the past expressed the view that “in a situation where a dispute arises between subjects applying the Constitution as to the interpretation of a certain provision, such a dispute must be resolved in favour of the assertion of the constitutional authority to which the given provision relates, thus from the perspective of the sense and purpose of the constitutional institution at issue”.

The right of self-government of autonomous territorial units is constitutionally guaranteed already in one of the Constitution’s basic provisions. Free elections are a condition *sine qua non* of a democratic state. In the administration of public affairs, this condition cannot be limited solely to the establishment of the legislative power, that is, to the election of Deputies and Senators, rather it must relate also to the election of members of representative bodies by which public affairs are administered on the level of territorial self-government.

If the Senate is to fulfil its stabilising function, there is no reason why, in the formation of electoral rules, it should carry out this function solely in relation to parliamentary elections and not in the adoption of statutes governing elections to those bodies which autonomously govern municipalities and regions.

If both chambers of Parliament are entirely equal partners in the procedure for adopting constitutional changes, then for the given reasons, the conclusion can be reached by interpretation *ex ratione legis* that in prescribing the electoral procedure, pursuant to which the people choose their representatives to the representative bodies of territorial corporations, it is sensible, appropriate, and necessary to fix for it a procedure that is stricter than that for statutes which are not the basis for the establishment of bodies representing the will of citizens of municipalities and regions.

The Constitutional Court concluded that statutes governing elections to the representative bodies of municipalities and regions must be considered as electoral acts, so that, in order for them to be adopted, it is necessary that they be approved by the Assembly of Deputies and the Senate. Accordingly, the Constitutional Court granted the petition and annulled the contested statute.

**Languages:**

Czech.

**Identification:** CZE-2005-2-010

**a)** Czech Republic / **b)** Constitutional Court / **c)** Third Chamber / **d)** 28.07.2005 / **e)** III. US 648/04 / **f)** / **g)** / **h)** CODICES (Czech).

**Keywords of the systematic thesaurus:**

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

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

4.10.7.1 **Institutions** – Public finances – Taxation – Principles.

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

**Keywords of the alphabetical index:**

Taxation, legal basis / Tax, powers of the tax authorities / Tax, control / *Lex specialis derogat legi generali*.

**Headnotes:**

The legal concept of set-off is both a private law and a public law concept. It is not permissible to set off debts, one of which a commercial company has against a municipality pursuant to a contract on work, thus a private law relationship, and the second of which the municipality has against that commercial company resulting from local fees, thus on the basis of a public law relationship.

As a general matter, however, the possibility of mutual set-off of private law and public law debts cannot be ruled out. The assessment as to whether such a set-off is permissible must depend upon the concrete positive law rules. A special legal enactment would be necessary in order for the legal concept of set off, introduced into private law, to be applied also in the public law field.

Should a conflict arise between a general and a special rule, it can be presumed that, by means of a special act, the legislature wished to depart from the general rules. In the case of a conflict between two rules of ordinary law of the same legal force, which do not complement each other, rather overlap, the determination of which rule is the general rule and which the special depends on the subject of the proceedings.

**Summary:**

I. In his constitutional complaint, the complainant contested the judgments of the Regional Court and of the Supreme Administrative Court on converting overpaid value-added tax to effect the payment of back taxes, arguing that these courts violated the principles of equality and the law-based state, as well as his right to judicial protection.

The complainant, the administrator of the estate of a bankrupt, against whose property a bankruptcy proceeding was initiated, submitted to the Financial Office a return for value-added tax pointing out an excessive deduction in it. In its decision, the Financial Office applied a portion of the overpayment to the payment of unpaid income taxes for natural persons from dependent activities, and these unpaid taxes came due before the declaration of bankruptcy. The excess of the overpayment was returned to the complainant. The complainant objected to this decision, in particular that the tax administrator's actions were illegal, due to the impermissibility of applying excessive deductions towards the payment of back taxes. The excess deduction was assessed after the declaration of bankruptcy took effect, thus it was income of the bankrupt estate, and under the Bankruptcy Act it is not permissible to set-off property in the estate; and pre-bankruptcy claims, including tax debts, must be declared in the bankruptcy and may be satisfied solely on the basis of the distribution ruling. The financial office rejected the complainant's appeal on the merits. The complainant submitted an administrative complaint, which the Regional Court granted. However, the Financial Office appealed this judgment to the Supreme Administrative Court, which annulled the judgment of the Regional Court and remanded the matter for further proceedings with instructions that the excessive deduction on the value added tax, as a negative tax obligation, cannot be the subject of civil law relations; it is an institute of financial law and as such cannot form part of the property forming the bankruptcy estate.

II. The Constitutional Court concerned itself with evaluating the constitutionality of the public authorities' interference with the fundamental rights and basic freedoms, a process consisting of several

components: first, the evaluation of whether the provisions of the legal enactment that have been applied are constitutional, next the assessment of whether constitutional procedural rights have been adhered to, and finally the adjudication as to whether the interpretation and application of the substantive law have been in conformity with the Constitution.

The new provisions of the Act on Value-Added Tax incorporated into that Act the duty to return to the taxpayer the refundable overpayment, to the extent that it arose in consequence of the assessment of an excessive deduction, even in cases where bankruptcy had been declared. The date of the assessment was considered the day on which the overpayment due to excessive deduction occurred. The bankruptcy declaration does not suspend the tax proceeding; moreover, tax can be paid by overpayment of other tax, the overpaid tax being applied to cover any deficiency in other taxes. But it is not permissible to use property belonging to an estate in bankruptcy to effect such a set-off.

In relation to the provisions of the Act on Value-Added Tax, those of the Act on the Administration of Taxes and Fees represent special rules, which take precedence over general rules.

Whether or not the provisions of the Bankruptcy Act create an impediment to proceeding according to the Act on the Administration of Taxes and Fees, in the form of terminating the tax administrator's authorisation to apply a returnable overpayment of value-added tax towards the payment of other tax debts of the same taxpayer after that taxpayer has declared bankruptcy, depends on the determination of whether or not the Bankruptcy Act is a special act introducing the impermissibility of setting off not only private law, rather both private law and public law debts.

General legal rules are those which, from the perspective of ordinary law, govern *prima facie* the subject of the proceedings defined in a lawsuit. In the matter under consideration, the subject of the proceedings is the conversion of overpaid value-added tax to effect the payment of back taxes, thus the general rules are defined by the provisions of the Act on the Administration of Taxes and Fees. The provisions of the Bankruptcy Act apply as special rules.

Each owner's property rights have the same content and enjoy the same protection. By no interpretation may be deduced enhanced protection of the property rights of the State, which the tax administrator represents in tax matters. However, the consequence of the interpretation adopted by the administrative

courts in the matter under consideration is to accord the State, or the tax administrator, preferential treatment as against other property owners, *de facto* conferring on the State a privileged position. The Constitutional Court maintained the position that the claim to the repayment of overpaid taxes was considered as a claim of the bankrupt against its debtor, that is, the State represented by the tax administrator. At the same time, it considered such claims of the bankrupt as a part of the property in the bankrupt estate.

The Constitutional Court was of the view that the interpretation given in the contested decisions did not maintain a just balance between the requirement of the general interest in the due payment of taxes and the imperative of protecting individual fundamental rights.

Proceeding from the principle that a constitutionally conforming interpretation of ordinary law should be preferred, the Constitutional Court reached the conclusion that the provisions of the Bankruptcy Act constituted a special law, laying down the impermissibility of setting off not only private-law debts, but also those under public law. As it is a special rule, it took precedence over general rules contained in the Act on the Administration of Taxes and Fees. The ordinary court decisions did not accept the mentioned correlation of the ordinary law norms; therefore the Constitutional Court quashed them.

#### *Languages:*

Czech.



# France

## Constitutional Council

### Important decisions

*Identification:* FRA-2005-2-005

**a)** France / **b)** Constitutional Council / **c)** / **d)** 22.07.2005 / **e)** 2005-520 DC / **f)** Law defining the conduct of the approval hearing following a prior admission of guilt / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 27.07.2005, 12241 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

3.21 **General Principles** – Equality.

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

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

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

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

5.3.13.27 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel.

*Keywords of the alphabetical index:*

Plea bargaining / Guilt, prior admission / Public hearing, approval of penalties, optional presence, State Prosecutor.

*Headnotes:*

The Law which stipulates that the State Prosecutor is not required to be present at the public hearing at which the President of the Regional Court (or the judge delegated by him) adjudicates on the application for approval of the penalties agreed in the context of the French “plea bargaining” procedure does not infringe:

- the rights of the defence;

- the rules of a fair trial;
- the principle of the individualisation of the penalty;
- the principle of equality before the courts; or
- the provisions of Article 34 of the Constitution, which provides that “Statutes shall determine the rules concerning .. the fundamental guarantees granted to citizens for the exercise of their public liberties ... criminal procedure ...”.

*Summary:*

The Law defining the conduct of the hearing for approval of the penalty in the event of plea bargaining was referred to the Constitutional Council by more than sixty deputies and more than sixty senators.

That measure originated in the Law of 9 March 2004 (adapting judicial proceedings to changes in crime), which established a new procedure for dealing with criminal cases, namely the “appearance following a prior admission of guilt”.

That procedure became applicable on 1 October 2004 and appears in Articles 495-7 to 495-16 of the Code of Criminal Procedure. It enables the State Prosecutor, in the event of offences punishable primarily by a fine or by a term of imprisonment equal to or less than five years, to propose one or more principal or subsidiary penalties to an adult who admits the facts as charged.

During the first stage of the procedure, the State Prosecutor proposes a penalty to the person concerned, who may agree to it in the presence of his lawyer.

Where the penalty is agreed, the second stage of the procedure commences. A hearing for approval of the penalty is presided over by the President of the Regional Court (or by a judge delegated by him) in the presence of the person concerned and his lawyer.

In its decision of 2 March 2004, the Constitutional Council had established the principle that the approval hearing should be open to the public.

What is known as the “plea bargaining” procedure became applicable on 1 October 2004 and has become widely used.

However, its application encountered a problem when, in an opinion of 18 April 2005, the Court of Cassation held that the presence of a representative of the prosecution was mandatory at the approval hearing.



It was in that context that the Law referred to the Constitutional Council (owing to a parliamentary initiative) stipulated that the presence of the State Prosecutor at the approval hearing was not mandatory. By its decision of 22 July, the Constitutional Council dispelled all doubt when it held that the fact that the presence of a representative of the prosecution at the hearing for the approval of the “plea bargain” is optional is not contrary to the Constitution.

#### *Cross-references:*

- See Decision 2004-492 DC of 02.03.2004, Act to adapt the criminal justice system to changing patterns of crime [FRA-2004-1-002].

#### *Languages:*

French.



#### *Identification:* FRA-2005-2-006

**a)** France / **b)** Constitutional Council / **c)** / **d)** 22.07.2005 / **e)** 2005-521 DC / **f)** Law authorising the Government to adopt, by order, emergency employment measures / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 27.07.2005, 12233 / **h)** CODICES (French).

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

- 3.12 **General Principles** – Clarity and precision of legal provisions.
- 3.18 **General Principles** – General interest.
- 3.21 **General Principles** – Equality.
- 4.6.3.1 **Institutions** – Executive bodies – Application of laws – Autonomous rule-making powers.
- 4.6.3.2 **Institutions** – Executive bodies – Application of laws – Delegated rule-making powers.

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

Employment, emergency measure, order / Employment contract, young employee, small enterprise.

#### *Headnotes:*

Although under Article 38 of the Constitution the government, in order to justify its request, is required to indicate to Parliament the precise purpose of the measures which it proposes to take by means of orders and also the area in which they are to apply, it is not required to inform Parliament of the terms of the orders which it will issue under that authorisation.

The purpose of the authorisation which empowers the government to take emergency measures in order to remove certain impediments to the hiring of young employees in small enterprises, and also the sphere in which the order is to apply, are defined with sufficient precision. The same applies to the provisions intended to adapt the rules on the calculation of the workforce for the purpose of implementing provisions relating to labour law or financial obligations imposed by other legislation.

The contested provisions are not in themselves contrary to a rule or a principle of constitutional value and cannot have either the object or the effect of dispensing the government, when it makes use of the powers conferred by Article 38 of the Constitution, from observing the rules and principles of constitutional value and also the applicable international or European norms.

There is no principle or rule of constitutional value to prevent the legislature from taking measures capable of assisting categories of persons encountering particular difficulties; the differences in treatment which may arise as a result pursue a purpose in the general interest and are not contrary to the Constitution.

#### *Summary:*

The Law authorising the government to take, by order, emergency employment measures was referred to the Constitutional Council on 13 July 2005 by more than sixty deputies and more than sixty senators.

Two measures were criticised by those making the reference:

- the “new jobs” contract – a contract of employment which, during an initial period, includes specific rules on severance and a specific arrangement for compensation. The Constitutional Council considered that the complaints relating to this contract were inoperative against the Law referred to it as they were directed against a future order, the terms of which were not predetermined by the enabling law;

- the fact that the newly-engaged young employee is not counted in the calculation of the workforce for the purpose of determining the enterprise's obligations, notably as regards staff representation. The Council agreed that this measure was consistent with the principle of equality on the basis of the aim pursued in the general interest (combating unemployment among young people).

### Languages:

French.



### Identification: FRA-2005-2-007

**a)** France / **b)** Constitutional Council / **c)** / **d)** 22.07.2005 / **e)** 2005-522 DC / **f)** Law on the protection of enterprises / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 27.07.2005, 12225 / **h)** CODICES (French).

### Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.  
 5.2 **Fundamental Rights** – Equality.  
 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Effective remedy.

### Keywords of the alphabetical index:

Creditor, allocation of preferences / Judicial liquidation / Creditor, liability / Company, in difficulty, creditor, assistance, privileges.

### Headnotes:

Creditors who agree to provide an enterprise in difficulties with the assistance necessary to enable it to continue to trade (new contribution in the form of cash or assets) are in a different situation from that of creditors who merely remit debts incurred beforehand.

The allocation of preference in favour of the former does not constitute a breach of the principle of equality.

The provisions defining the liability of creditors who agree to assist enterprises in difficulties do not entail an unconstitutional violation of the rights of third parties to bring an effective action before a court.

In seeking to clarify in that regard the legal framework of the incurrance of liability, the legislature sought to remove an obstacle to the grant of the financial support necessary to enable enterprises in difficulties to continue to trade and satisfied a ground of sufficient general interest.

### Summary:

The Law on the protection of enterprises was referred to the Constitutional Council on 13 July 2005 by more than sixty deputies and more than sixty senators.

The contested provisions gave creditors who provided “a new contribution in cash” with a view to saving an enterprise in difficulties preference in the order of payment of debts in the context of proceedings involving protection, judicial administration and judicial liquidation.

Those referring the law to the Council maintained that those provisions were contrary to the principle of equality.

The Council held that the creditors in question were in a different situation from that of creditors who merely agreed to remit a debt. Accordingly, there was no breach of the principle of equality.

The Law also limited the liability of creditors. Creditors could be held liable for the harm sustained as a result of the assistance only in the event of fraud, blatant interference in the management of the debtor or disproportion in the guarantees taken in consideration for the assistance.

The applicants contended that this constituted a breach of the constitutional principle that everyone is liable for the harm caused by his misconduct.

The Constitutional Council considered that this was one of the circumstances in which the law may limit liability without infringing the constitutional principle laid down by Article 4 of the Declaration of the Rights of Man and the Citizen of 1789, which has the effect that “any act whatsoever by man which causes damage to others obliges the person by whose misconduct it arose to make it good”.

It was observed in that regard that the contested measure did not bar the way to judicial remedies, that its application was circumscribed (enterprises in difficulties), that its objective was in the general types of misconduct (fraud, blatant interference in the management, etc.) were excluded from the limitation of liability.

*Languages:*

French.



## Germany

### Federal Constitutional Court

#### Important decisions

*Identification:* GER-2005-2-001

**a)** Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 07.06.2005 / **e)** 1 BvR 1508/96 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift* 2005, 1927; CODICES (German).

*Keywords of the systematic thesaurus:*

1.1.4.4 **Constitutional Justice** – Constitutional jurisdiction – Relations with other institutions – Courts.  
 1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.  
 3.4 **General Principles** – Separation of powers.  
 3.20 **General Principles** – Reasonableness.  
 4.7.1 **Institutions** – Judicial bodies – Jurisdiction.  
 5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.  
 5.4.14 **Fundamental Rights** – Economic, social and cultural rights – Right to social security.  
 5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to a sufficient standard of living.

*Keywords of the alphabetical index:*

Personal freedom to act / Statutory assignment / Parental support / Child, obligation to support parents, ability to pay / Credit, imposition by court / Social assistance, funding agency, credit, obligatory / Support, claim, parents, child / Support, parents, obligation to pay / Asset, realisation / Support, for relative.

*Headnotes:*

The interpretation of non-constitutional legal norms and their application to an individual case are matters for the courts of general jurisdiction. It is only if in the process the courts violate constitutional law that the Federal Constitutional Court may intervene in response to a constitutional complaint. This situation is not already given if a decision is objectively wrong according to non-constitutional legal norms. However, if the interpretation contrasts sharply with all applicable

legal norms and leads to the establishment of claims that have no basis whatsoever in existing law, then the courts are claiming powers which the constitution has clearly granted to the legislature. In doing so, the courts are assuming the role of lawmakers instead of accepting their true role as administrators of the law; thus; they are ignoring the fact that they are bound by law and justice within the meaning of Article 20.3 of the Basic Law. This results in their imposing a limitation on the personal freedom to act protected in Article 2.1 of the Basic Law which is no longer legitimised by the constitutional order.

### Summary:

I.1. The mother of the complainant, who was in need of long-term care, lived in an old people's nursing home in the last four years prior to her death in 1995. Since the mother's income was insufficient to cover the costs of the nursing home, she received support in the form of social assistance payments from the City of Bochum. The payments made up to the time of the mother's death amounted to a total of approximately DM 123,000.

Already at the time the mother went to live in the nursing home, the social assistance funding agency informed the present complainant that it would assume the costs. At the same time, the agency notified the daughter, who was primarily liable for the mother's support, that the mother's existing claims to support had been transferred to the City of Bochum by way of statutory assignment.

2. The complainant, who was born in 1939, had worked since she was 15 years old. Up to the time she became unemployed, in the autumn of 1996, she had earned approximately DM 1,100 per month net from a part-time job. Her husband, from whom she had lived separately since 1994, had been a pensioner since 1995. The spouses had no children and were co-owners in equal shares of a piece of real estate with a block of four flats erected on it. The complainant lived in one of the four flats whilst the other three were let. The monthly mortgage repayments in relation to the property exceeded the net rental income.

After the City of Bochum had tried unsuccessfully to sue the complainant for parental support, the Regional Court (*Landgericht*) as the appellate court of last instance held that the complainant had an obligation to pay DM 23,306.88. At the same time, the Court ordered the complainant to accept the offer of an interest-free loan for the above amount from the City of Bochum, which would be repayable three months after the complainant's death. In addition, as security for the loan, the complainant was ordered to

register a land charge in the amount of DM 23,000 against her co-ownership share in the real estate.

In the view of the Regional Court, the daughter had an obligation, which was assigned by statute to the social assistance funding agency, to pay support to her mother because she had the "ability to pay" within the meaning of the Federal Social Assistance Act thanks to the interest-free loan offered to her by the social assistance funding agency.

The complainant alleged a violation of her personal freedom to act (*allgemeine Handlungsfreiheit*) and the property guarantee (*Eigentums garantie*). The obligations to pay support and to encumber her share of the rented block of flats with a land charge, which had been imposed on her, exceeded her ability to pay. She claimed that the judgment posed a risk to her own old-age support, particularly as the purpose of buying the property was to provide for her own old age. In addition, the complainant took the view that she had no obligation to make support payments to her mother in cash because she herself did not have enough money to be able to do so.

II. In the opinion of the First Panel, the judgment compelling the complainant to pay support for one parent violates Article 2.1 of the Basic Law. It therefore set aside the underlying judgment and referred the matter to the Regional Court for rehearing. Its reasoning was essentially as follows:

1. The obligation imposed by the Court to take out an interest-free loan and to have a land charge registered on her co-ownership share in the real estate had no legal basis and was in sharp contrast to all applicable legal norms. In making such a decision, the Court ignored its duty to be bound by law and justice and had thus limited the personal freedom to act of the complainant protected in Article 2.1 of the Basic Law in a manner no longer legitimised by the constitutional order.

2. The complainant's "ability to pay" within the meaning of the Federal Social Assistance Act first arose when the social assistance funding agency offered to provide a loan, i.e. after the mother's death. In so holding, the Court allowed a support claim for a period of time that had elapsed on the basis of the complainant's ability to pay, which itself did not come into existence until after the mother had ceased to need support. This already contradicted the wording and structure of the relevant provisions dealing with support and social assistance. A support claim pursuant to § 1601 of the German Civil Code only exists where the need for support of the person entitled to support and the ability to pay of the person obliged to pay support

both exist concurrently. § 90 and § 91 of the Federal Social Assistance Act, which enable the support claims of the recipient of assistance to be assigned during the period in which assistance is being granted, also assume that there is a temporal congruence between the need for support and the ability to pay it. The reference to § 89 of the Federal Social Assistance Act in order to substantiate a support claim sharply contradicted the wording of this legal norm and its position within the framework of social assistance law.

3. The Regional Court's interpretation of the legal norms applied was also contrary to their purpose. It runs counter to the principles of social assistance law to grant a legal claim to assistance when the purpose of the grant of a loan from the social assistance funding agency is to first establish a claim under social assistance law which does not exist under private law. Such a legal construction would eventually cause social assistance claims to be extinguished completely. It would be possible to ensure with the help of a loan that a person obliged to pay support was able to pay it so that it would be ultimately up to the social assistance funding agency to decide whether it wanted a social assistance claim to take effect. The consequence of this would be that the person in need of assistance would himself or herself be unsuccessful in claiming support against a person obliged to pay support who did not have the ability to pay whereas the social assistance funding agency could establish such a claim by offering the necessary loan and thus could release itself from its obligation to grant social assistance.

4. Finally, the Regional Court's interpretation also ran counter to the intention of the legislature. It not only made parental support subordinate to child support (§ 1609 of the German Civil Code), but also clearly limited the scope of the obligation in comparison to the duty to pay child support (§ 1603.1 of the German Civil Code). The subordinate treatment of parental support corresponded to the fundamentally different circumstances in which each of the duties to pay support takes effect. The duty to pay parental support usually occurs when the children have long since started their own families and are subject to support claims from their own children and spouse as well as having to make provision for themselves and their own old age. On top of this comes the need for support of one or both elderly parents, whose income, in particular, whose pension – especially if nursing care is needed – is not adequate to cover this need. The legislature took this accumulation of demands into account by ensuring that the child retain an amount for his or her own support that was in keeping with his or her personal circumstances.

5. The latest legislative developments further emphasise the relatively weak legal position accorded by the legislature to parental support. Through the step-by-step reduction in the benefits provided by the statutory old-age pension scheme and the promotion of private old-age provision introduced in recent legal enactments, the legislature has emphasised the responsibility each individual has to provide in time and adequately for his or her old age alongside the statutory old age pension scheme. This must be taken into account in determining the appropriate amount to be retained by a child obliged to pay support. In particular, however, the legislature has also made it clear through the introduction of other measures (e.g. the introduction of a basic protection in old age and in the case of a reduction in earning capacity) that the burden placed on adult children through the obligation to pay parental support should be kept within limits taking into account their own personal circumstances.

#### *Languages:*

German.



#### *Identification:* GER-2005-2-002

**a)** Germany / **b)** Federal Constitutional Court / **c)** Second Panel / **d)** 18.07.2005 / **e)** 2 BvR 2236/04 / **f)** / **g)** / **h)** *Neue Juristische Wochenschrift* 2005, 2289; CODICES (German).

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

- 3.9 **General Principles** – Rule of law.
- 3.10 **General Principles** – Certainty of the law.
- 3.16 **General Principles** – Proportionality.
- 3.19 **General Principles** – Margin of appreciation.
- 5.1.1.1 **Fundamental Rights** – General questions – Entitlement to rights – Nationals.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.
- 5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.
- 5.3.38.1 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Criminal law.



*Keywords of the alphabetical index:*

Extradition, request, from European Union member state / Extradition, protection / Extradition, national, prohibition / European arrest warrant, constitutionality / Extradition, national, prohibition, restriction, appeal to court.

*Headnotes:*

With its ban on expatriation and extradition, the fundamental right enshrined in Article 16 of the Basic Law guarantees the citizen's special association to the legal system that is established by them. It is commensurate with the citizen's relation to a free democratic polity that the citizen may, in principle, not be excluded from this association.

The cooperation that is put into practice in the "Third Pillar" of the European Union in the shape of limited mutual recognition is a way of preserving national identity and statehood in a single European judicial area, which is considerable in terms of subsidiarity (Article 23.1 of the Basic Law).

When adopting the Act implementing the framework decision on the European arrest warrant, the legislature was obliged to implement the objective of the framework decision in such a way that the restriction of the fundamental right to freedom from extradition was proportionate. In particular, the legislature, apart from respecting the essence of the fundamental right guaranteed by Article 16.2 of the Basic Law, had to see to it that the encroachment upon the scope of protection provided by it was proportionate. In doing so, the legislature had to take into account that the ban on extradition was precisely supposed to protect, *inter alia*, the principles of legal certainty and protection of public confidence as regards Germans who are affected by extradition.

The confidence of the prosecuted person in his or her own legal system is protected in a particular manner by Article 16.2 of the Basic Law precisely where the act on which the request for extradition is based shows a significant domestic factor.

*Summary:*

I. The complainant had German and Syrian citizenship. On 19 September 2003 an international arrest warrant was issued in Spain under which the complainant was charged with membership of a terrorist organisation. In view of his German citizenship, however, the German authorities refused the complainant's extradition.

On 23 August 2004, the European Arrest Warrant Act of 21 July 2004 entered into force. It incorporates the framework decision of the Council of the European Union on the European arrest warrant and the surrender procedures between the Member States into German law. Thereupon, extradition proceedings were resumed *ex officio*. On the basis of a European arrest warrant that was issued by the competent court in Madrid on 16 September 2004, the complainant was taken into custody pending extradition on 15 October 2004. He was charged with being a key figure in the European part of the terrorist Al-Qaeda network, who lent financial support to the network and facilitated personal contact between its members.

By order of 23 November 2004 the Hamburg Hanseatic Higher Regional Court declared the complainant's extradition admissible. The judicial authority granted extradition on 24 November 2004. The grant was made contingent on the condition that, after the imposition of a prison sentence, the complainant would be offered the possibility of returning to Germany to serve his sentence.

By order of 24 November 2004, the Second Panel of the Federal Constitutional Court issued a temporary injunction by which the complainant's surrender was suspended for six months at most, pending the decision on the constitutional complaint. By order of 29 November 2004, the Hanseatic Higher Regional Court rejected the complainant's application to be released from custody pending extradition.

By his constitutional complaint, the complainant challenged the order of the Hanseatic Higher Regional Court that declared his extradition admissible, and the decision of the judicial authority that granted extradition. He challenged, *inter alia*, an infringement of the ban on extradition pursuant to Article 16.2 of the Basic Law and the violation of his fundamental rights under Article 19.4 of the Basic Law (guarantee of recourse to the courts) and Article 103.2 of the Basic Law (ban on retroactive law). Moreover, the complainant contended that the German European Arrest Warrant Act and the Council framework decision lacked democratic legitimisation.

II. The Second Panel of the Federal Constitutional Court overturned the challenged order of the Hanseatic Higher Regional Court and declared the European Arrest Warrant Act void. The Panel's reasoning was essentially as follows:

The European Arrest Warrant Act infringed the ban on extradition enshrined in Article 16.2.1 of the Basic Law because the legislature did not comply with the prerequisites of the qualified proviso of legality under

Article 16.2.2 of the Basic Law when incorporating the framework decision on the European arrest warrant into national law.

The ban on the extradition of Germans is based on Article 16.2.1 of the Basic Law. The protection of German citizens from extradition, can, however, be restricted by law subject to certain prerequisites pursuant to Article 16.2.2 of the Basic Law. The restriction of the protection from extradition is not a waiver of a state task that actually is essential. The cooperation that is put into practice in the “Third Pillar” of the European Union (police and judicial cooperation in criminal matters) in the shape of limited mutual recognition is a way of preserving national identity and statehood in a single European judicial area, in particular having regard to the principle of subsidiarity.

When adopting the Act implementing the framework decision on the European arrest warrant, the legislature was obliged to implement the objective of the Framework Decision in such a way that the restriction of the fundamental right to freedom from extradition and in particular, the encroachment upon the scope of protection provided by Article 16.2 of the Basic Law were proportionate. The ban on extradition is precisely supposed to protect, *inter alia*, the principles of legal certainty and protection of public confidence as regards Germans who are affected by extradition. Persons who are entitled to enjoy the fundamental right in question must be in a position to rely on their behaviour not being subsequently termed as illegal where it complied with the law in force at the respective point in time. The confidence in one’s own legal system was protected in a particular manner where the act on which the request for extradition was based had a significant domestic connecting factor. Anybody who, as a German, commits a criminal offence in his or her own legal area need not, in principle, fear extradition to another state power. The result of the assessment is different, however, where a significant connecting factor to a foreign country exists as regards the alleged offence. Anybody who acts within another legal system must reckon with his or her being held responsible there as well.

The European Arrest Warrant Act did not come up to this standard. It encroached upon the freedom from extradition in a disproportionate manner. When implementing the Framework Decision, the legislature failed to take sufficient account of the especially protected interests of German citizens; in particular, the legislature had not exhausted the scope afforded to it by the framework legislation. It could have chosen an implementation that shows a higher consideration in respect of the fundamental right concerned without infringing the binding objectives of

the framework decision. The framework decision permitted, for instance, the executing judicial authorities to refuse to execute the European arrest warrant if it related to offences that had been committed in the territory of the requested Member State. As regards such offences with a significant domestic connecting factor, the legislature would have had to create the possibility of refusing the extradition of Germans. Apart from this, the Arrest Warrant Act demonstrated a gap in legal protection concerning the possibility of refusing extradition due to criminal proceedings that have been instituted in the same matter in the domestic territory or because proceedings in the domestic territory had been dismissed or because the institution of proceedings had been refused. In this context, the legislature should have examined the provisions of the Code of Criminal Procedure to verify whether decisions by the Public Prosecutor’s Office to refrain from criminal prosecution must be subject to judicial review regarding a possible extradition. The deficiencies of the legal regulation were also not sufficiently compensated by the fact that the European Arrest Warrant Act provided the possibility of serving in one’s home state a prison sentence that has been imposed abroad. Admittedly, this was, in principle, a measure to protect the state’s own citizens, but it merely concerns the serving of the sentence and not criminal prosecution.

By excluding recourse to the courts against the grant of extradition to a European Union Member State, the European Arrest Warrant Act infringed Article 19.4 of the Basic Law (guarantee of recourse to the courts).

The European Arrest Warrant Act partly incorporated the grounds for optional non-execution of the European Arrest Warrant that were provided in the Framework Decision. In doing so, the German legislature had essentially opted for a discretionary solution. What the fact that the procedure for granting extradition is complemented by specified grounds for refusing the grant gave rise to was that, in the case of extraditions to a European Union Member State, the authority responsible for granting extradition no longer merely decided on foreign-policy and general-policy aspects of the request for extradition but had to enter into a process of weighing up whose subject was in particular criminal prosecution in the home state of the person affected. The fact that the procedure for granting extradition was complemented by additional constituent elements of offences that are contingent on discretion resulted in a qualitative change of the grant. The decision to be made, which was based on the weighing of facts and circumstances, served to protect the prosecuted person’s fundamental rights and could not be removed from judicial review.

The European Arrest Warrant Act was void. Consequently, the legislature would have to revise the grounds for the inadmissibility of the extradition of Germans and would need to draft the case-by-case decision on extradition in such a way that it would be an act of application of the law which was based on weighing. Moreover, amendments were necessary as regards the drafting of the decision on the grant of extradition and concerning the decision's relation to admissibility.

As long as the legislature did not adopt a new Act implementing Article 16.2.2 of the Basic Law, the extradition of a German citizen to a European Union Member State was not possible. Extraditions could, however, be performed on the basis of the Law on International Judicial Assistance in Criminal Matters in the version that was valid before the entry into force of the European Arrest Warrant Act.

III. Three judges added dissenting opinions to the decision. One of the dissenting opinions, (that of Judge Broß), concurred with the result of the decision of the Panel majority but did not concur with the reasoning behind it.

Also the second dissenting opinion (that of Judge Lübke-Wolff) shared the Panel majority's opinion that the European Arrest Warrant Act did not take sufficient account of the fundamental rights of persons potentially affected by it, but did not agree with parts of the grounds and with the dictum on the legal consequences.

The third dissenting opinion (that of Judge Gerhardt) took the view that the constitutional complaint would have had to be rejected as unfounded because the declaration of nullity of the European Arrest Warrant Act was not in harmony with the precept under constitutional and European Union law of avoiding violations of the Treaty on European Union wherever possible.

#### *Languages:*

German.



## Hungary Constitutional Court

### Statistical data

1 May 2005 – 31 August 2005

Number of decisions:

- Decisions by the plenary Court published in the Official Gazette: 10
- Decisions by chambers published in the Official Gazette: 4
- Number of other decisions by the plenary Court: 26
- Number of other decisions by chambers: 9
- Number of other procedural orders: 30

Total number of decisions: 79

### Important decisions

*Identification:* HUN-2005-2-002

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 17.06.2005 / **e)** 22/2005 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2005/81 / **h)**.

*Keywords of the systematic thesaurus:*

- 1.3.1.1 **Constitutional Justice** – Jurisdiction – Scope of review – Extension.
- 1.3.5.15 **Constitutional Justice** – Jurisdiction – The subject of review – Failure to act or to pass legislation.
- 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, constituency, number of voters, difference / Election, constituency, delimitation / Election, equal voting power.

*Headnotes:*

A doubling of the difference between the numbers of voters registered in individual voting districts is at variance with the principle of equality in voting rights. In such cases, the difference between the numbers of voters is so large that it cannot be made constitutionally acceptable in any circumstances.

*Summary:*

I. The decision arises from the constitutional review of certain parts of Act XXXIV of 1989 on the election of Members of Parliament (hereinafter described as “the Act”), and Decree 2/1990 on the demarcation of specific voting districts (hereinafter described as “the Decree”). According to the petitioners, since the Act and the Decree came into force, a significant reconstitution of groups of the population has taken place in certain parts of the country, and the number of citizens registered in the directory of voting districts has changed, with the result that the difference between the numbers of voters in individual voting districts has more than doubled. This is in breach of Article 71.1 of the Constitution, under which Members of Parliament, members of representative bodies of local governments, Mayors and the Mayor of the Capital are elected by direct, secret ballot, based on the universal and equal voting rights of citizens.

II.1. The Constitutional Court took as its starting point the principle of equality in electoral matters as set out in Article 71.1 of the Constitution. Did this mean that the numbers of voters registered in the directory of individual voting districts should be equal, and that the number of mandates to be won in individual voting districts should be in exact proportion to the number of registered voters?

The Constitutional Court stated that the principle of equality in voting rights requires each voter, under normal circumstances, to be entitled to one vote only. In this respect Article 71.1 of the Constitution excludes the right to plural voting, under which certain favoured groups amongst the electorate would be guaranteed more votes or votes with a different value during the elections. Although the constitutional requirements that follow from the equality in voting rights included in Article 71.1 of the Constitution are greatly influenced by the electoral system created by the legislature, the requirement of equality in voting rights is also to be considered standard in relation to the candidate of an individual voting district, and in relation to regional elections. Equality in voting rights in both types of election is secured by certain procedural entitlements which are due to all voting citizens. These include regulations concerning

nomination as candidate, the order of election, and legal remedies.

2. According to the Constitutional Court, equality in voting power is to be viewed differently in the procedural sense and in that of content, in the case of the constitutional review of the importance of votes. Votes are of relatively equal importance if there is the possibility of an equal number of voters’ decision resulting in winning a mandate. Under Article 71.1 of the Constitution, bringing people within certain voting groups into an unfavourable position by comparison with others can neither be the purpose nor the result of determining mandates within districts and lists. At the same time, under Article 71.1 of the Constitution, it cannot be required that the number of voters registered in the directory of individual voting districts should be absolutely equal. However, the principle of equality in voting rights does require the equal division of mandates among voting districts.

3. As the first premise of its decision, the Constitutional Court set out a constitutional requirement to the legislator that the number of people entitled to vote in individual voting districts should differ only to the slightest possible extent, and only for an adequate constitutional reason. The legislator also has to aim at the slightest possible difference in defining the mandates to be won on regional electoral lists. The mandates will have to be adjusted according to the number of voters registered in a directory. The legislator has to try to ensure that the principle of equality is manifest both in the case of voting districts and that of regional lists.

The legislator can only depart from the maximum manifestation of constitutional requirements originating in the equality in voting rights and relating to the importance of votes, if there is an adequate constitutional reason. However, in the view of the Constitutional Court, the double difference between the numbers of voters registered in individual voting districts was at all times against the principle of the equality in voting rights. In such cases the difference of the numbers of voters is so huge that it cannot be constitutionally justified under any circumstances.

5. The Constitutional Court also criticised the rules concerning the formation of constituencies as being highly inadequate. Neither the Act, nor any other law defines any authoritative standpoints relating to changes of constituency boundaries. It is also unclear what the government does or does not have to consider when deciding upon such changes. There is no legal regulation which could deal with the acceptable degree of difference, either by the definition of difference between the numbers of registered voters in individual voting districts, or by



the definition of difference of individual districts from the average, and any possible exceptions. Legal guarantees are also lacking that would enable parliamentary procedure to meet the requirements of balance and impartiality. These deficiencies give rise to a breach of Article 71.1 of the Constitution. Therefore, the Constitutional Court *ex officio* stated that the parliament had neglected its duty as legislator and created an unconstitutional situation. It had not guaranteed the statutory conditions necessary for the manifestation within the electoral system of the constitutional requirements resulting from the basic principle of equality in voting rights embedded in Article 71.1 of the Constitution.

#### *Languages:*

Hungarian.



#### *Identification:* HUN-2005-2-003

**a)** Hungary / **b)** Constitutional Court / **c)** / **d)** 14.07.2005 / **e)** 28/2005 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 2005/99 / **h)**.

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

5.2.2.13 **Fundamental Rights** – Equality – Criteria of distinction – Differentiation *ratione temporis*.  
5.4.2 **Fundamental Rights** – Economic, social and cultural rights – Right to education.

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

Education, entrance examination, regulation / Education, students, equal chances / Education, entrance exams, system change.

#### *Headnotes:*

The method of introducing the new system and the regulation of the conversion of results of secondary school leaving examinations into entrance points meant that those students taking the secondary school leaving examination from 2005 onwards were potentially at a disadvantage (that is, possibly fewer of them could enter their preferred institution of higher education), by comparison with those who had taken it under the old system.

#### *Summary:*

I. Government decrees have introduced a new system of secondary school leaving examinations and entrance examinations. In essence, from 2005 onwards, there is to be a so-called two-tier secondary school leaving examination. Dispositions relating to standardised requirements and to an upper secondary school leaving examination have to be employed with regard to the examinations taken by those secondary school students who began their secondary education in the 9<sup>th</sup> grade on or before 1 September 2001. With the introduction of the two-level secondary school leaving examination, the entrance examination to institutions of higher education has ceased to exist.

The petitioners argued that the new regulation is at variance with the prohibition of discrimination, because those students taking their secondary school leaving examination this year do not have the same opportunity of entering higher education financed by the state as students who took the examination under the previous system. The new method would result in discrimination against students of equal talents, as it assigns a different number of “acquired points” to the same examination results of students who took the examination either this year, or in previous years. The petitioners also referred to Article 70/F of the Constitution on the right to education.

II.1. The Constitutional Court rejected the petitions. It said that the government decree did not affect the determination of entrance points counted on the basis of secondary school leaving examination results on the basis of when (before or after 2005) or how (within the framework of the old one-level, or the new two-level secondary school leaving examination) the student applying for an institution of higher education took the secondary school leaving examination. The rules of the decree were obligatory for either type of applicant. When the results of the secondary school leaving examinations were converted into entrance points for those who took the examination in the new, not upper level, and those who took the secondary school leaving examination under the old system, the only difference was that behind the percentage result forming the basis for the entrance points, in the first case there was a converted result, while in the latter there was an achievement originally also expressed in a percentage.

It does not follow directly from Article 70/F.2 of the Constitution that the applicant should start his higher education in the year that seems desirable for him. Article 70/F.2 guarantees access to higher education for all applicants with the abilities required. It does not entitle everyone to start their higher education at the time and in the institution of higher education of their choice.



The purpose of entrance examinations is to select the most suitable applicants for higher education. The Constitutional Court accordingly rejected the petitions relating to the breach of Article 70/F.2 of the Constitution.

2. The Constitutional Court considered whether those students who had taken their secondary school leaving examination under the old system and those who took it within the new, two-level system could form a homogenous group, and thus whether the differentiation could be judged on the basis of Article 70/A.1 of the Constitution at all. The Constitutional Court stated that in the case in point, the major factor both groups had in common was that the students who took the secondary school leaving examination before 2005, and those who took it after 2005 could enter an institution of higher education by means of the same entrance examination. By the calculation of entrance points, the same rules bound both groups. As the differentiation did not affect the right to higher education embedded in Article 70/F of the Constitution, the Constitutional Court only examined whether the differentiation had a correct and reasonable justification, or whether it was arbitrary. There may be differences in the opportunities arising from the regulation in question, to the disadvantage of those students taking the basic secondary school leaving examination from 2005 onwards. However, this is only one factor out of the many that influence the chance of a successful entrance examination, and any resulting disadvantages can be compensated for in other parts of the entrance examination system (for instance by the acquired points). The Constitutional Court also stated that there was reasonable justification for the new regulation possibly affecting the chances of students taking the new secondary school leaving examination for entering higher education so it would not find there had been a breach of Article 70/A.1 of the Constitution.

3. During its proceedings the Constitutional Court also declared that the introduction of the new system of secondary school leaving examinations and entrance examinations, the setting forth of the rules, and guarantees of its predictability did not meet the constitutional requirements of legal certainty (such as “proper time”) that the Constitutional Court had noted in previous cases.

The remaining part of the Constitutional Court’s decision accordingly drew the legislature’s attention to the fact, that when a system was to undergo fundamental and radical change, any outline rules and individual provisions not only had to meet statutory conditions (notably formal ones relating to

chronology), but the complete impact of the changes had to be properly communicated to, received and understood by those concerned. Furthermore, the legislature was compelled to check carefully from the outset whether those concerned were suitably prepared for the implementation of the new system. Conscious decision-making could only be made in the possession of necessary information and with insight into possible consequences.

4. Finally, the Constitutional Court stated *ex officio* that the Government failed to act with circumspection when enacting the decrees creating and introducing the new system of secondary school leaving examinations and entrance examinations. The method of introducing the new system and the regulation of the conversion of results of secondary school leaving examinations into entrance points meant that those students who took the secondary school leaving examination from 2005 onwards were potentially at a disadvantage (that is, possibly fewer of them could enter their preferred institution of higher education), by comparison with those who had taken it under the old system. The legislature has a duty to enact statutes that guarantee not only equality before the law, but also (to the greatest possible extent) equality of opportunity. For this reason the Constitutional Court called upon the government to reconsider the subject as a whole and the provisions within the regulations pertaining to the two-level secondary school leaving examination and entrance examination, and to create a statute which fully met its duties as set out in Article 70/A.3 of the Constitution.

*Languages:*

Hungarian.



# Italy

## Constitutional Court

### Important decisions

*Identification:* ITA-2005-2-002

a) Italy / b) Constitutional Court / c) / d) 16.06.2005 / e) 233/2005 / f) / g) *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 22.06.2005 / h).

*Keywords of the systematic thesaurus:*

3.20 **General Principles** – Reasonableness.

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

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

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

*Keywords of the alphabetical index:*

Leave, entitlement / Disabled person, dependent / Disabled person, care, appropriate.

*Headnotes:*

Article 42.5 of Legislative Decree no. 151 of 26 March 2001, which approves the Consolidated Act (*testo unico*) on maternity and paternity protection and support, is contrary to the principles of equality and reasonableness in providing that a disabled person's brothers and sisters can receive a period of leave to care for that person only where the parents are dead, without providing the same facility in the event that the living parents are incapable of rendering assistance to the disabled person because they are prevented by ill-health from meeting their own needs and are therefore entitled to a special attendance allowance (*indennità di accompagnamento*).

*Summary:*

The Turin Court of Appeal had referred to the Court Article 42.5 of Legislative Decree no. 151 of 26 March 2001, which approves the Consolidated Act (*testo unico*) on maternity and paternity protection and support. The article provides that a disabled person's brothers and sisters can receive a period of leave to

care for him or her only where the parents are dead. The Court considered it inimical to the principle of equality to withhold the same benefit where the parents, though living, were incapable of providing for their own needs. The Court held the question of constitutionality founded, basing its reasoning on the aim pursued by the law, namely to secure appropriate care for a disabled person in all circumstances. The principle of reasonableness was therefore infringed by not granting a brother or sister entitlement to a period of leave where the parents, though living, were incapable of giving the disabled child the care necessitated by his or her condition.

*Cross-references:*

The judgment is in the mainstream of a consolidated body of constitutional case-law regarding assistance to people with disabilities and removal of obstacles to their cultural and vocational fulfilment. The Court recalled numerous precedents in this respect. As to education, the Court, in its Judgment no. 215 of 1987, invoking Articles 2, 3, 34 and 38.3 of the Constitution, modified the terms of a statutory provision on secondary education requiring disabled pupils' attendance (*frequenza*) at lessons to be "facilitated", by replacing this expression with "ensured". More recently in Judgment no. 467 of 2002, the Court held that the possibility of placement in a nursery was a means of overcoming one's disability and accordingly declared unconstitutional the provision which did not grant any financial assistance for a nursery place for children with a disability. The Court further recalled its precedent in Judgment no. 350 of 2003 (*Bulletin* 2003/3 [ITA-2003-3-004]) in which it declared unconstitutional the provision of Law no. 354 of 1975 on the prison regime and enforcement of custodial sentences restricting personal freedom, in so far as it did not contemplate the possibility of house arrest (*detenzione domiciliare*) for a mother sentenced to imprisonment – or a father incurring the same penalty where the mother was dead or unable to take care of her children – living with a child suffering from a severe disability causing total incapacity.

*Supplementary information:*

This is a "manipulative" judgment of the "additive" type in which the Court censures an omission by the legislator who has not anticipated a circumstance that should have been anticipated in order to comply with the Constitution. To avoid the gap which would be created by an outright finding of unconstitutionality, the Court itself made the addition and the provision became effective without the necessity for intervention on the part of the legislator.

*Languages:*

Italian.



## Latvia Constitutional Court

### Important decisions

*Identification:* LAT-2005-2-005

**a)** Latvia / **b)** Constitutional Court / **c)** / **d)** 13.05.2005 / **e)** 2004-18-0106 / **f)** On the Compliance of Section 9.3 of the Transitional Provisions of the Education Law with Articles 1, 91 and 114 of the Constitution (*Satversme*), Article 2 Protocol 1 ECHR as well as with Article 14 ECHR (linked with Article 2 Protocol 1 ECHR), Articles 26 and 27 of the International Covenant on Civil and Political Rights, Article 5 of the International Convention on the Elimination of all Forms of Racial Discrimination, Articles 2 and 30 of the Convention on the Rights of the Child as well as Article 18 of the Vienna Convention on the Law of Treaties / **g)** *Latvijas Vestnesis* (Official Gazette), 77(3235), 17.05.2005 / **h)** CODICES (English, Latvian).

*Keywords of the systematic thesaurus:*

2.1.1.4.9 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Vienna Convention on the Law of Treaties of 1969.  
 5.2.2.3 **Fundamental Rights** – Equality – Criteria of distinction – National or ethnic origin.  
 5.3.45 **Fundamental Rights** – Civil and political rights – Protection of minorities and persons belonging to minorities.  
 5.4.2 **Fundamental Rights** – Economic, social and cultural rights – Right to education.

*Keywords of the alphabetical index:*

Language, education / Education, language, official, minimum quota / Minority, Framework Convention for the Protection of Minorities.

*Headnotes:*

The determination of proportion of language use for acquirement of study content is not at variance with Articles 1, 91 and 114 of the Constitution and international norms.

### Summary:

According to the contested norm, from 1 September 2004 not less than three fifths of the total yearly study load, including foreign languages, of the study contents in the tenth form and the first academic years of the educational institutions shall be ensured in the official language. That means that at least 22 out of 36 classes, not less than five study subjects (including foreign languages) should be taught in the official State language.

The claimant – twenty deputies of the 8<sup>th</sup> *Saeima* – maintained that the contested norm did not comply with Articles 1, 91 and 114 of the Constitution and several international legal provisions.

When assessing the conformity of the contested provision with several legal norms, incorporated within the Constitution and international human rights instruments, the Constitutional Court took into consideration the fact that the above matter could not be reviewed in isolation from the complicated ethno-demographic situation, which came about as the result of the Soviet occupation. The content of the impugned norm was causatively connected with the situation.

By reference to Judgment no. 2BVR 1481/04 of the German Federal Constitutional Court of 14 October 2004, the Constitutional Court pointed out that, when interpreting the Constitution and international liabilities of Latvia, one should look for an interpretation, which was non-confrontational but which would, rather, ensure harmony.

The Court established that the content of Article 91 of the Constitution included the norms of Article 5 of the International Convention on the Elimination of all Forms of Racial Discrimination and Article 2.1 of the Convention on the Rights of the Child. Article 114 of the Constitution included not only the norms of Article 30 of the Convention on the Rights of the Child and Article 27 of the International Covenant on Civil and Political Rights. The conformity of the contested provision with Article 2 Protocol 1 ECHR should be analysed in conjunction with Article 112 of the Constitution.

The Court held that the signed Framework Convention for the Protection of National Minorities was not binding on Latvia as it had not yet been ratified. In its turn, the aim of Article 18 of the Vienna Convention on the Law of Treaties is simply to overcome obstacles which make it difficult to ratify international contracts. It could not be established that the contested norm would defeat the aims and objects of the Framework Convention for the Protection of National Minorities. Thus the contested

norm complied with Article 18 of the Vienna Convention on the Law of Treaties.

The Court considered that in Latvia possibilities for maintaining and developing their language, ethnic and cultural originality were established for persons belonging to ethnic minorities. Determination of proportion of language use for acquirement of study content was not at variance with Article 114 of the Constitution.

The Court also stressed that the contested norm was not at variance with Article 2 Protocol 1 ECHR on the observance of the religious and philosophical convictions of parents in the process of education.

The Court pointed out that the first sentence of Article 112 of the Constitution, which determines that everyone has the right to education, should be interpreted in exactly the same way as Article 2 Protocol 1 ECHR. In their turn, the second and third sentences of Article 112 of the Constitution envisage more extensive rights for persons. Even though Article 2 Protocol 1 ECHR does not impose the duty of creating an educational system of a certain type upon the state, the second sentence of Article 112 of the Constitution obliged the State to ensure that everyone might acquire primary and secondary education free of charge. The third sentence of this article even determines that primary education shall be compulsory.

As the secondary school educational system was created and still exists in Latvia, the first and second sentences of Article 112 of the Constitution undoubtedly covered the question of accessibility to secondary education. Arguably, the contested norm, taking linguistic factors into account, might be regarded as being restrictive of the right included in this article. However the fact as to whether the restriction is justifiable, taking into consideration the formulation included in the claim, should be assessed as read in conjunction with Article 14 ECHR and Article 91 of the Constitution.

The Constitutional Court recognised that the contested norm only partly envisaged different attitudes to persons, who are in different circumstances, and thus restriction of the right to education was established. Therefore it was necessary to assess the above restriction, namely, to ascertain whether it had been determined by law, whether it had a legitimate aim and whether it complied with the principle of proportionality.

The Court held that the contested norm had legitimate aims – strengthening of the use of the State language and the protection of the rights of other persons. The measure chosen by the legislator

– use of the official language in acquiring knowledge of study content by determining the proportion of the use of the language of instruction – was, overall, appropriate for reaching legitimate aims and there were no other more lenient measures to reach the legitimate aims.

The Court established that it was not possible to verify whether the implementation of the contested norm would cause decline in the quality of education and educational process. However the existing controlling mechanism of education and the educational process was not effective enough.

The Court stressed the necessity of finding a balanced solution between ensuring a lenient transition and not violating the interests of other pupils by the determination of such a transition. However, if the norm in question is adequately interpreted, it should be concluded that it was in conformity with Article 91 of the Constitution.

The Court held that the norm in question conformed to Articles 1, 91 and 114 of the Constitution and to the above mentioned international norms.

#### Cross-references:

Cf. decisions:

- Case no. 2002-04-03 of 22.10.2002, *Bulletin* 2002/3 [LAT-2002-3-008];
- Judgment no. 2003-02-0106 of 06.06.2003, *Bulletin* 2003/2 [LAT-2003-2-007];
- German Federal Constitutional Court, 14.10.2004, Judgment no. 2BVR 1481/04.

European Court of Human Rights:

- *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (1976), Series A, no. 23; *Special Bulletin ECHR* [ECH-1976-S-002];
- *Case "Relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium (Merits)*, Series A, no. 6;
- *Cyprus v. Turkey, Reports of Judgments and Decisions* 2001-IV.

#### Languages:

Latvian, English (translation by the Court).



## Liechtenstein State Council

### Important decisions

*Identification:* LIE-2005-2-001

**a)** Liechtenstein / **b)** State Council / **c)** / **d)** 09.05.2005 / **e)** StGH 2004/60 / **f)** / **g)** / **h)**.

*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.

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

*Keywords of the alphabetical index:*

Expulsion, former spouse / Divorce, authorisation to remain / Child, authorisation to remain / Foreigner, residence, authorisation.

*Headnotes:*

In the light of Article 8 ECHR, it appears disproportionate to include the former spouse in the procedure leading to the expulsion of her ex-husband. That is so because the applicant is economically integrated in Liechtenstein and in the meantime divorced, so that the decision to include her in the expulsion of the former husband is even less acceptable, more particularly since the authorisation to remain of the two children would thus be ignored in practice.

*Summary:*

This constitutional appeal is against a decision of the Administrative Court relating to the procedure of non-extension of the first applicant's authorisation to remain and the procedure for the cancellation of the right to remain of the second and third applicants, who are the first applicant's children.

The Administrative Court relied, *inter alia*, on a provision of a regulation which the State Court held to



be unlawful and unconstitutional on the ground that it lacked a legal basis, and also on Liechtenstein's reservation in respect of Article 8 ECHR. The State Court questioned the validity of that reservation for the Liechtenstein rules, which had in the meantime been amended, but left the question open since it assumed that, even if the Liechtenstein reservation continued to be applicable, Article 8 ECHR should apply to the case as submitted, with its particular features.

The State Court allowed the appeal based on a violation of the fundamental right to family life under Article 8 ECHR.

#### *Languages:*

German.



#### *Identification:* LIE-2005-2-002

a) Liechtenstein / b) State Council / c) / d) 09.05.2005 / e) StGH 2004/70 / f) / g) / h).

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

1.3.4.6 **Constitutional Justice** – Jurisdiction – Types of litigation – Admissibility of referenda and other consultations.

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

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

4.5.7 **Institutions** – Legislative bodies – Relations with the executive bodies.

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

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

Legislative initiative, admissibility / Legislative initiative, popular, annulment.

#### *Headnotes:*

It follows from the sense and the purpose of Section 70b VRG that when the State Court examines the annulment by Parliament of a legislative initiative it may raise unconstitutional issues which were not put

forward either by the government or in the parliament's declaration that the legislative initiative is void.

The provision of a legislative initiative to the effect that certain international treaties must be signed by Liechtenstein is unconstitutional. That provision has the effect of removing all discretion from the government, which is alone competent to sign international treaties. It is not permitted to the legislature to deprive the executive of any room for manoeuvre, as it would thus assume the role of the executive. That would be contrary to the constitutional principle of the separation of powers.

#### *Summary:*

The parliament adopted the arguments submitted in the preparatory report and the government's request and declared that the popular initiative for a law on the protection of the climate was void on the ground that it was unconstitutional. On the basis of Section 70b.3 of the Law on the political rights of the people (VRG), the Initiative Committee brought an action against that annulment before the State Court, which did not uphold the action. The State Court made a finding of unconstitutionality not in respect of the passages in the legislative initiative which the Parliament put forward but in respect of a provision in the initiative for a law not mentioned in the grounds of the declaration of nullity, which provides that international treaties aimed at reducing global warming must be signed by Liechtenstein.

#### *Languages:*

German.



#### *Identification:* LIE-2005-2-003

a) Liechtenstein / b) State Council / c) / d) 10.05.2005 / e) StGH 2004/63 / f) / g) / h).

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

4.7.4.1.1 **Institutions** – Judicial bodies – Organisation – Members – Qualifications.

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:**

Court, composition / Judge, lay / Judge, qualifications.

**Headnotes:**

The right to a procedure that complies with the rules deriving from Article 6 ECHR, like the right to an ordinary court according to Article 43 of the Constitution, does not in any event prohibit lay judges from sitting in the higher courts acting as courts dealing exclusively with questions of law. The composition of a court incorporating lay judges does not, as a matter of principle, constitute a problem from the point of view of fundamental rights. Even though lay judges are less qualified for appellate courts dealing exclusively with questions of law than for lower courts, there are also objective reasons which argue in favour of the bench being occupied by lay judges within courts dealing solely with questions of law. For example, lay judges, as representatives of the Liechtenstein people, satisfy a legitimate need of national policy and the incorporation of lay judges encourages the legal argument to be more comprehensible. The presence of lay judges is also legally established at constitutional level, even if such judges are in a minority in the public-law courts. By a recent constitutional amendment establishing, *inter alia*, new rules on the courts, the constitutional legislature apparently did not consider it necessary to provide for a majority of professional judges in the civil and criminal courts.

**Summary:**

In an appeal before the State Court against a decision delivered by the Supreme Court in civil proceedings, it was claimed, among other grounds of appeal, that the Chamber of the Supreme Court which delivered the judgment included two professional judges and three lay judges without legal training. The fact that a majority of lay judges participated in taking the decision was challenged as a violation of the right to a fair hearing in accordance with Article 6 ECHR and Article 33.1 of the Constitution, since appraisal of the specific legal problems requires not only legal powers but also a sound knowledge of the law and the non-jurists might place the jurists in a minority, even when dealing with the most complex legal questions of principle.

The State Court considered that, on the whole, the fact that the Supreme Court was composed of a majority of lay judges was consistent with the Constitution.

**Languages:**

German.



# Lithuania

## Constitutional Court

### Important decisions

*Identification:* LTU-2005-2-001

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 19.01.2005 / **e)** 23/2003 / **f)** On the compliance of the law of the Republic of Lithuania Law on the Supplement and Amendment of Articles 86, 87 of the law on Elections to Municipal Councils and its Supplement with Article 88-1 with the Constitution of the Republic of Lithuania / **g)** *Valstybės Žinios* (Official Gazette), 9-289, 22.01.2005 / **h)** CODICES (English, Lithuanian).

*Keywords of the systematic thesaurus:*

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

1.6.3 **Constitutional Justice** – Effects – Effect *erga omnes*.

2.2.2.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution.

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

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

*Keywords of the alphabetical index:*

Parliament, statute, binding force.

*Headnotes:*

Under Article 69.1 of the Constitution, laws shall be adopted in the parliament (*Seimas*) in accordance with the procedure established by law, and, under Article 76 of the Constitution, the structure and procedure of activities of the parliament shall be established by the Statute of the parliament, which has the power of law. Under the Constitution, legislative procedure may be regulated by Statute and also by other laws and the duty of the parliament to follow the legislative rules defined by the Statute should be treated as a constitutional duty. The parliament, when it adopts laws and other legal acts, is bound not only directly by the Constitution but also by its Statute.

*Summary:*

I. A group of members of the parliament (*Seimas*) of the Republic of Lithuania submitted a petition to the Constitutional Court, requesting it to investigate whether the Law on the Supplement and Amendment of Articles 86, 87 of the Law on Elections to Municipal Councils and its Supplement with Article 88 according to the procedure of its adoption, by its content and to the extent of its regulation, was in conflict with the principle of a state under the rule of law set out in the Preamble to the Constitution and certain provisions of the Constitution. In the opinion of the petitioner, the procedure of the adoption of the law in question was breached and this meant that the law was in conflict with the Constitution. Moreover, the petitioner submitted that the present law was contrary to the principle of the prohibition of the double mandate set out in the Constitution. Finally, the petitioner submitted that since in Article 3 of the present law the legislator did not establish a final list of those officials who have the power to control and supervise the activity of municipalities, such lack of regulation may serve as grounds for recognising the legal act to be in conflict with the Constitution.

II. The Constitutional Court stressed that under Article 69.1 of the Constitution, laws shall be adopted in parliament in accordance with the procedure established by law and, under Article 76 of the Constitution, the structure and procedure of activities of the parliament shall be established by its Statute, which has the power of law. Under the Constitution, the legislative procedure may be regulated by the Statute and also by other laws and the duty of the parliament to follow the legislation rules defined by its Statute should be treated as a constitutional duty. The parliament, when it adopts laws and other legal acts, is bound not only directly by the Constitution but also by its Statute.

The Constitutional Court emphasised that having stated that after the Legal Department of the Office of the parliament presented its conclusion on the 28 January 2003, which *inter alia* stated that the provision of the Draft Law on the Supplement and Amendment of Articles 86, and 87 of the Law on Elections to Municipal Councils and its Supplement with Article 88-1 (no. IXP-2222(2SP)), saying that the norms of Article 88-1.2 of the Law on Elections to Municipal Councils regarding the refusal of the mandate of a council member by a person elected a member of the municipal council before the first sitting of the municipal council were to be applied from the municipal council elections of the new term of office were in conflict with the Constitution, and after the Committee on Legal Affairs of the parliament failed to consider the said draft law, Article 138.2 of its Statute

was violated and that this violation should be treated as a fundamental breach of the legislative procedure. The Constitutional Court also stated that at this stage of the legislative procedure the provision of Article 69.1 of the Constitution, indicating that laws shall be adopted in the parliament in accordance with the procedure established by law, was also breached. The Constitutional Court held that taking account of the arguments set forth, the conclusion must be drawn that the Law on the Supplement and Amendment of Articles 86, 87 of the Law on Elections to Municipal Councils and its Supplement with Article 88-1 with regard to the procedure of its adoption was in conflict with Article 69.1 of the Constitution.

The Constitutional Court stressed that the legislator, when adopting new laws and amending and supplementing the existing laws, may not disregard the concept of the provisions of the Constitution and other legal arguments set forth in a Constitutional Court ruling, which have been officially published and which have come into force. Otherwise, preconditions would be created to recognize the laws, provided the Constitutional Court was addressed regarding their constitutionality, as contradictory to the Constitution. In the context of the constitutional law case in point, it should also be stressed that such preconditions could appear also in cases when laws are adopted, and valid laws amended and supplemented, while disregarding the concept of the provisions of the Constitution and other legal arguments stated in the Constitutional Court ruling which was publicly announced at the hearing of the Constitutional Court but which had not yet been published officially, regardless of whether or not that Constitutional Court ruling recognised a certain law (or part thereof) to be in conflict with the Constitution.

The Constitutional Court emphasised that under Article 69.1.3 of the Law on the Constitutional Court, by a decision, the Constitutional Court shall refuse to consider petitions to investigate the compliance of a legal act with the Constitution, if the compliance of the legal act with the Constitution indicated in the petition has already been investigated by the Constitutional Court and the ruling on this issue adopted by the Constitutional Court is still in force. On the basis of the aforementioned constitutional provision, the Constitutional Court decided to dismiss the other part of the case regarding the issue as to whether the second part of Article 4 of the Law on the Supplement and Amendment of Articles 86, 87 of the Law on Elections to Municipal Councils and its Supplement with Article 88-1 is contrary to the principle of the prohibition of the double mandate set out in the Constitution, because the Constitutional Court had already recognised that this provision was contrary to the Constitution.

The Constitutional Court also decided to dismiss the part of the case in which the petitioner submitted that since in Article 3 of the aforementioned law the legislator did not establish a final list of those officials who have the power to control and supervise the activity of municipalities, such lack of regulation may serve as grounds for recognising the legal act to be in conflict with the Constitution. The Court decided to dismiss this part of the case since the disputed legal act was annulled and, according to the Paragraph 4 of the Article 69 of the Law on the Constitutional Court, it is established that the annulment of the disputed legal act shall be grounds to adopt a decision to dismiss the instituted legal proceedings.

#### *Languages:*

Lithuanian, English (translation by the Court).



#### *Identification:* LTU-2005-2-002

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 07.02.2005 / **e)** 9/02 / **f)** On social insurance indemnities for occupational diseases / **g)** *Valstybės Žinios* (Official Gazette), 19-623, 10.02.2005 / **h)** CODICES (English, Lithuanian).

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

1.3.5.10 **Constitutional Justice** – Jurisdiction – The subject of review – Rules issued by the executive.  
 2.2.2.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national sources – Hierarchy emerging from the Constitution.  
 3.5 **General Principles** – Social State.  
 3.13 **General Principles** – Legality.

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

Social assistance, regulation by decree / Sub-statutory legal act / Decree, scope.

#### *Headnotes:*

In its rulings, the Constitutional Court has held more than once that by sub-statutory legal acts (thus, Government resolutions as well) one may establish solely the procedure of implementation of laws regulating relations of social protection and social



assistance. The sub-statutory legal regulation of relations of social protection and social assistance may comprise the establishment of respective procedures, as well as the legal regulation based on laws, where the need to provide more details about and to particularise the legal regulation in sub-statutory legal acts is objectively caused by the necessity in the law-making process to rely upon specialist knowledge and specialist (professional) competence in a certain area. However, as the Constitutional Court has held more than once in its rulings, one may not establish any conditions for the existence of a person's right to social assistance, nor may one restrict the scope of this right by sub-statutory legal regulation.

### Summary:

I. The petitioner, the Supreme Administrative Court of Lithuania, applied to the Constitutional Court with a petition requesting it to investigate whether Item 37 of the Regulations Concerning Social Insurance Benefits for Accidents at Work and Occupational Diseases, which were confirmed by Government Resolution no.506 "On Confirmation of the Regulations Concerning Social Insurance Benefits for Accidents at Work and Occupational Diseases" of 8 May 2000, is in conflict with Article 29.1 of the Law on Social Insurance for Accidents at Work and Occupational Diseases. In the opinion of the petitioner, the commencement of payment of periodic work disablement indemnity is linked in Article 29.1 of the law with one legal fact – becoming ill with an occupational disease (wording of 23 December 1999) or diagnosing an occupational disease (wording of 5 July 2001), meanwhile in Item 37 of the regulations it is linked with another legal fact, namely the moment of diagnosing the incapacity to work. Therefore, the petitioner questioned whether Item 37 of the Regulations was in conflict with Article 29.1 of the law.

II. Article 52 of the Constitution provides: "The State shall guarantee the right of citizens to receive old age and disability pensions, as well as social assistance in the event of unemployment, sickness, widowhood, loss of breadwinner, and other cases provided for in law." When construing Article 52 of the Constitution, the Constitutional Court has held many times that the State of Lithuania is socially oriented and every citizen of it has the right to social protection; that social maintenance, i.e. contribution of society towards the maintenance of such its members who are incapable of providing for themselves from work or by other means or who are not sufficiently provided for as a result of important reasons provided by law, is recognised as having the status of a constitutional value; that the measures of social protection express

the idea of social solidarity, they help a person to protect himself from possible social hazards; that pensions and social assistance provided for in Article 52 of the Constitution are one of the forms of social protection; that the provisions of Article 52 of the Constitution guaranteeing citizens' rights to social maintenance, oblige the state to establish sufficient measures to implement and legally protect the said right; that the formula "the state shall guarantee" in Article 52 of the Constitution *inter alia* means that various types of social assistance are guaranteed for the persons on the bases and by the amounts that are established in law; that separate types of social assistance, persons who are granted social assistance, the bases and conditions of granting and paying the social assistance, amounts thereof may, according to the Constitution, be set solely by the law; and that the legal regulation of social assistance is one of the most important guarantees of the constitutional right to social assistance.

The principle of a state under the rule of law entrenched in the Constitution implies the hierarchy of legal acts as well, *inter alia* the fact that sub-statutory legal acts may not be in conflict with laws, constitutional laws and the Constitution, that sub-statutory legal acts must be adopted on the basis of laws, that a sub-statutory legal act is an act of application of norms of the law, irrespective of whether the act is of one-time (*ad hoc*) application, or whether it has permanent validity. A legal act of the Government is a sub-statutory legal act, it may not be in conflict with the law, nor amend the content of norms of the law, nor contain any legal norms which would compete with the norms of the law.

In its rulings, the Constitutional Court has held more than once that by sub-statutory legal acts (thus, by Government resolutions as well) one may establish solely the procedure of implementation of laws regulating relations of social protection and social assistance. The sub-statutory legal regulation of relations of social protection and social assistance may comprise the establishment of respective procedures, as well as the legal regulation based on laws, where the need to provide more details about and particularise the legal regulation in sub-statutory legal acts is objectively caused by the necessity in the law-making process to rely upon specialist knowledge and specialist (professional) competence in a certain area. However, as the Constitutional Court has held more than once in its rulings, one may not establish any conditions of appearance of person's right to social assistance, nor may one restrict the scope of this right by sub-statutory legal regulation.

When it made the comparison between disputed sub-statutory legal regulation and statutory legal



regulation, the Constitutional Court concluded that the provision “periodic work disablement indemnity is granted and paid as from the day of the appearance of the right to it (the day of establishment of incapacity to work by the SMCSE)” of Item 37 (wording of 8 May 2000) of the Regulations did not compete with the provision “insurance benefits shall be paid to the insured as from the day of the event insured against (<...> becoming ill with an occupational disease)” of Article 29.1 of the law (wording of 23 December 1999) (to the extent that the notion “insurance benefits” comprises also periodic work disablement indemnities to the insured person who is ill with an occupational disease).

#### *Languages:*

Lithuanian, English (translation by the Court).



#### *Identification:* LTU-2005-2-003

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 13.05.2005 / **e)** 14/02 / **f)** On the Republic of Lithuania Law on Hunting / **g)** *Valstybės Žinios* (Official Gazette), 63-2235, 19.05.2005 / **h)** CODICES (English, Lithuanian).

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

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

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

Hunting, access to private land, prohibition.

#### *Headnotes:*

Pursuant to the Constitution the legislator, when regulating the affairs of hunting and those linked therewith, may not establish a legal regulation whereby hunting may be permitted in private land lots located in the hunting plots without the permission of the owners of these particular land lots. In this regard the owner may not be subject to any restrictions on the grounds established in any legal acts, in the absence of which one could pay no heed of his wish that no hunting should take place in the land, forest, or water body belonging to him under the ownership

right. If it is intended to use a land lot owned by the person by right of ownership for hunting, the owner of this lot must be informed in a due manner directly – and a reasonable and sufficient period must be established, during which the owner could have a realistic opportunity to express freely his wish as to whether one may or may not hunt in this lot, as well as under what circumstances he agrees that hunting may take place in this lot.

#### *Summary:*

I. The petitioner, a group of members of the parliament (*Seimas*), applied to the Constitutional Court with a petition requesting it to investigate two issues. First, as to whether the provision “It shall be prohibited to hunt <...> in the land lots located in hunting plots, if their owners have prohibited hunting therein under the procedure established in Article 7.2 of the Law on Hunting, the provision “The owner of a private land lot, whose land is intended to be assigned to a hunting plot unit according to the procedure established in Article 8 of this law, shall have the right to prohibit hunting in the land owned by him, if agricultural crops or forest will suffer damage during the hunting” of Article 13.2 of the same law, and the provision “The damage inflicted by animals being hunted shall not be recovered, if it is made in the land lots whose owner has prohibited hunting under the procedure established in Article 13.2 of the law” of Article 18.7 of the same law were in conflict with Article 23.1 and 23.2 of the Constitution. Second, as to whether the provision “A hunting plot unit must comprise at least 1000 ha of continuous hunting area, save the cases where smaller hunting plot units are established for scientific and educational purposes upon the proposal of the Ministry of Environment, or where such units are established in the territories of fishery ponds upon the proposal of the Ministry of Agriculture” of Article 8.1 of the Law on Hunting was in conflict with Article 46.1 of the Constitution.

The petitioner submitted that according to the disputed provisions of the Law on Hunting, dangerous actions of shooting and catching wild animals may be exercised in a private lot without the owner’s knowing about particular hunting events. Therefore, in the opinion of the petitioner, the presumption that it was allowed to hunt in private lots until it becomes prohibited to do so, violated the rights of the owners, which are entrenched in Article 23 the Constitution. The petitioner also claimed that the provision of Article 8.1 of the Law on Hunting that a hunting plot unit must comprise at least 1000 ha of continuous hunting area unreasonably restricted the rights of private owners to use lots, the area of which is less than 1000 ha, for hunting and restricts the private initiative of hunting businesses. Therefore the

petitioner considered this provision of the Law on Hunting might be in conflict with Article 46 of the Constitution.

II. The Constitutional Court ruled that pursuant to the Constitution the legislator, when regulating matters of hunting and those linked therewith, might not establish a legal regulation where hunting may be permitted in the private land lots located in the hunting plots without permission of the owners of these particular land lots. In this regard, the owner may not be subject to any restrictions on the grounds established in any legal acts, in the absence of which one could pay no heed of his wish that no hunting should take place in the land, forest, or water belonging to him under the rights of ownership. If it is intended to use a land lot owned by the person by right of ownership for hunting, the owner of this lot must be informed in a due manner – directly, and a reasonable and thus sufficient period must be established, during which the owner could have a realistic opportunity to express freely his wish as to whether one may or may not hunt in this lot, as well as under what circumstances he agrees that hunting may take place in this lot.

The Constitutional Court noted that the ownership rights of the owner would not be automatically violated by such legal regulation where the fact that the failure of the owner of the private land lot which is located in hunting plots, whose land is intended to be used for hunting and who has been duly informed of this, to express his wish as to whether hunting may or may not take place in this particular lot within a reasonable time is considered to be his consent that hunting may take place in that lot. Moreover, it is worth noting that under the law one may establish various forms and procedures for expressing the consent of the owner of the private land lot which is located in hunting plots that hunting may take place in that lot, *inter alia* that agreements may be concluded concerning the granting of the right to hunt in the land lot of the owner.

The Constitutional Court ruled that Article 13.2 of the Law on Hunting was contrary to Article 23 of the Constitution which establishes the fundamental right of the inviolability of property, since by legal regulation established in Article 13.2 of the law one interfered in the right of the owner of private land, forests or water bodies to decide whether the land, forests or water bodies belonging to him under the private ownership right may be used for hunting, thus the ownership rights of owners of private land, forests, or water bodies would become unreasonably restricted.

The Constitutional Court ruled that the provision “A hunting plot unit must comprise at least 1000 ha of continuous hunting area, save the cases where smaller hunting plot units are established for scientific and educational purposes upon the proposal of the Ministry of Environment, or where such units are established in the territories of fishery ponds upon the proposal of the Ministry of Agriculture” of Article 8.1 of the Law on Hunting was not in conflict with Article 46.1 of the Constitution, since the establishment by a law of the minimum size of a hunting plot unit as one of the means by which one strives to ensure a rational use (i.e. regulation and control) of the population of huntable animals, did not violate per se the ownership rights of the owners of private land lots, forests, and water bodies, as well as the freedom and initiative of their economic activity, that are defended by *inter alia* Article 46.1 of the Constitution. Moreover with regard to the aspect that the established minimum size of a hunting plot unit amounts to 1000 ha, the Constitutional Court held that there were not enough legal arguments proving that this size did not match the amount of resources of huntable wild animals and the need to regulate their abundance and that for this reason it should be different.

The Constitutional Court ruled that the provision “The damage inflicted by huntable animals shall not be recovered, if it is made in the land lots whose owner has prohibited hunting under the procedure established in Article 13.2 of the law” of Article 18.7 of the same law was not in conflict with Article 23.1 and 23.2 of the Constitution, because the owner who has prohibited hunting of huntable animals in the land owned by him accepts consequential risk and there is no reason to require the above mentioned damage to be recovered by someone else.

#### *Languages:*

Lithuanian, English (translation by the Court).



#### *Identification:* LTU-2005-2-004

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 02.06.2005 / **e)** 10/05 / **f)** On the appointment of R. K. Urbaitis as a justice of the Constitutional Court / **g)** *Valstybės Žinios* (Official Gazette), 71-2561, 07.06.2005 / **h)** CODICES (English, Lithuanian).

*Keywords of the systematic thesaurus:*

1.1.2.3 **Constitutional Justice** – Constitutional jurisdiction – Composition, recruitment and structure – Appointing authority.

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

1.1.3.4 **Constitutional Justice** – Constitutional jurisdiction – Status of the members of the court – Professional incompatibilities.

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

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

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

*Keywords of the alphabetical index:*

Constitutional Court, judge, appointment / Constitutional Court, organisation.

*Headnotes:*

In the Constitution, the legal regulation is established under which an appointed justice of the Constitutional Court must remove incompatibilities with the office of a justice of the Constitutional Court (Articles 104.3 and 113 of the Constitution) until the oath in the parliament (*Seimas*). If the removal of the said incompatibilities depends upon decisions of certain institutions (officials), these institutions (officials) have a duty to adopt respective decisions until the oath of the justice of the Constitutional Court in the parliament. Otherwise, the appointed justice of the Constitutional Court would be impeded from taking office as a justice of the Constitutional Court and thus the reconstitution of the Constitutional Court – one of the institutions of state power consolidated in the Constitution – under procedures established in the Constitution would be impeded.

It needs to be stressed that the Constitution does not contain any provisions requiring that a person whose candidature has been presented to justices of the Constitutional Court, should, prior to the voting on his candidature in the parliament, refuse his job, or the office that he is holding, or remove other incompatibilities with the office of a justice of the Constitution which are specified in the Constitution.

The special institution of judges provided for by law (the Council of Courts, under the Law on Courts) which are provided for in Article 112.5 of the Constitution does not enjoy, under the Constitution,

any powers to adopt any decisions related to the appointment of justices of the Constitutional Court.

*Summary:*

I. The petitioner, a group of members of the parliament (*Seimas*), had applied to the Constitutional Court with a petition requesting to investigate as to whether:

1. Decree of the President of the Republic no. 237 “On Presentation to the Parliament of the Republic of Lithuania concerning Dismissal of R. K. Urbaitis from the Office of Justice of the Supreme Court of Lithuania” of 17 March 2005, according to its content and procedure of adoption, was in compliance with the principles of a state under the rule of law and responsible governance entrenched in the Constitution, as well as Articles 5.1, 5.2, 6.1, 7.1, 77, 84.11, 112.5 and 115.4 thereof;
2. Article 2 of Resolution of the parliament no. X-131 “On the Appointment of Justices of the Constitutional Court of the Republic of Lithuania” of 15 March 2005 and Resolution of the parliament no. X-138 “On the Dismissal of R. K. Urbaitis from the Office of a Justice of the Supreme Court of Lithuania” of 17 March 2005, according to the procedure and succession of their adoption, were in compliance with the principles of a state under the rule of law and responsible governance entrenched in the Constitution, Articles 103, 104, 112.5, 113 and 115.4 thereof;
3. Article 2 of Resolution of the parliament no. X-131 “On the Appointment of Justices of the Constitutional Court of the Republic of Lithuania” of 15 March 2005 and Resolution of the parliament no. X-138 “On the Dismissal of R. K. Urbaitis from the Office of a Justice of the Supreme Court of Lithuania” of 17 March 2005, according to their content, were in compliance with the principles of a state under the rule of law and responsible governance entrenched in the Constitution, Articles 5.1, 5.2, 6.1, 7.1, 67.10, 112.5 and 115.4 thereof.

In the opinion of the petitioner, Article 112.5 of the Constitution is applicable to justices and the President of the Supreme Court, whereby a special institution of judges provided for by law shall advise the President of the Republic concerning the appointment of judges, as well as their promotion, transferal, or dismissal from office. The petitioner believed that the absence of advice of a special institution of judges (the Council of Courts) provided for in Article 112.5 of the Constitution was a

constitutional obstacle to the President of the Republic to issue Decree of the President of the Republic of Lithuania no. 237 "On Presentation to the Parliament of the Republic of Lithuania Concerning Dismissal of R. K. Urbaitis from the Office of a Justice of the Supreme Court of Lithuania" of 17 March 2005 and to submit this decree to the parliament for consideration.

According to the petitioner, by adopting Resolution no. X-131 of 15 March 2005 and Resolution no. X-138 of 17 March 2005, the parliament violated the procedure of the appointment of justices of the Constitutional Court and that of dismissal of judges from office, which is entrenched in the Constitution. The petitioner noted that the norms of Articles 103, 104, 112.5, 113 and 115 of the Constitution are designed for ensuring the guarantees of independence of judges, including justices of the Constitutional Court. Beside other limitations, they also include a prohibition for the same person to be a justice both of the Supreme Court and the Constitutional Court at the same time. In the opinion of the petitioner, by the disputed legal acts the President of the Republic initiated dismissal of Justice of the Supreme Court R. K. Urbaitis from office too late and improperly, while the parliament appointed R. K. Urbaitis as a justice of the Constitutional Court without dismissing him from the office of a justice of the Supreme Court.

According to the petitioner, Article 115.4 of the Constitution does not provide for either the election of a justice of the Constitutional Court, nor the transfer of a judge of a court of general jurisdiction to the office of a justice of the Constitutional Court, who executes specific competence – constitutional justice. Meanwhile, in his Decree no. 237 "On Presentation to the Parliament of the Republic of Lithuania Concerning Dismissal of R. K. Urbaitis from the Office of a Justice of the Supreme Court of Lithuania" of 17 March 2005, the President of the Republic indicated Article 115.4 of the Constitution as the grounds of dismissal of R. K. Urbaitis from the office of a justice of the Supreme Court, but he did not specify upon which grounds – "upon election to another office" or "upon transferral to another place of work with his consent", which are set forth in the said item – R. K. Urbaitis must be dismissed from the office of a justice of the Supreme Court.

II. The Constitutional Court emphasised that Article 104.3 of the Constitution provides that the restrictions on work and political activities, which are established for court judges, shall apply also to justices of the Constitutional Court. The said limitations are applied to a justice of the Constitutional Court from the day when he takes office. Under

Article 104.2 of the Constitution, before entering office, justices of the Constitutional Court shall take an oath in the parliament to be faithful to the Republic of Lithuania and the Constitution. In the Constitution, the legal regulation is established under which an appointed justice of the Constitutional Court must remove incompatibilities with the office of a justice of the Constitutional Court (Articles 104.3 and 113 of the Constitution) until the oath in the parliament. If the removal of the said incompatibilities depends upon decisions of certain institutions (officials), these institutions (officials) have a duty to adopt respective decisions until the oath of the justice of the Constitutional Court in the parliament. Otherwise, the appointed justice of the Constitutional Court would be impeded from taking the office of a justice of the Constitutional Court and thus the reconstitution of the Constitutional Court – one of the institutions of state power consolidated in the Constitution – under procedures established in the Constitution would be impeded.

The Constitution does not contain any provisions requiring that a person, whose candidature has been presented to justices of the Constitutional Court, should, prior to the voting on his candidature in the parliament, refuse his job, or the office that he is holding, or remove other incompatibilities with the office of a justice of the Constitution which are specified in the Constitution. It also needs to be emphasised that the appointed justice of the Constitutional Court, until he has taken an oath in the parliament under established procedure, does not hold the office of a justice of the Constitutional Court. At that time the office of the justice of the Constitutional Court is held by the justice of the Constitutional Court whose term of office is about to expire.

The Constitutional Court emphasised that while deciding whether Article 2 of Resolution of the parliament no. X-131 "On the Appointment of Justices of the Constitutional Court of the Republic of Lithuania" of 15 March 2005 in the aspect that by this Article R. K. Urbaitis was appointed as a justice of the Constitutional Court without his prior dismissal from the office of a justice of the Supreme Court is not in conflict, according to the procedure of adoption, with Articles 112.5 and 115.4 of the Constitution which were indicated by the petitioner, it must be noted that Articles 112.5 and 115.4 of the Constitution do not regulate the relations linked with appointment of justices of the Constitutional Court: Article 112.5 of the Constitution provides that a special institution of judges provided for by law shall advise the President of the Republic concerning the appointment of judges, as well as their promotion, transference, or dismissal from office, while under Article 115.4 of the



Constitution, judges of courts of the Republic of Lithuania shall be dismissed from office in accordance with the procedure established by law upon election to another office or upon transference to another place of work upon their consent. Meanwhile, Article 2 of Resolution of the parliament no. X-131 "On the Appointment of Justices of the Constitutional Court of the Republic of Lithuania" of 15 March 2005 was designated to appointment of R. K. Urbaitis as a justice of the Constitutional Court. Thus, Article 2 of Resolution of the parliament no. X-131 "On the Appointment of Justices of the Constitutional Court of the Republic of Lithuania" of 15 March 2005 regulated relations of different nature than Articles 112.5 and 115.4 of the Constitution.

The Constitutional Court also emphasised that the special institution of judges provided for by law (the Council of Courts, under the Law on Courts) which is provided for in Article 112.5 of the Constitution does not enjoy, under the Constitution, any powers to adopt any decisions related with appointment of justices of the Constitutional Court. Thus, this institution, under the Constitution, does not enjoy powers to advise on dismissal from office of any judge of the Republic of Lithuania in the case where this judge has been appointed as a justice of the Constitutional Court by the parliament.

Based on the aforementioned arguments, the Constitutional Court concluded that Resolution of the parliament no. X-131 "On the Appointment of Justices of the Constitutional Court of the Republic of Lithuania" of 15 March 2005, the Decree of the President of the Republic of Lithuania no. 237 "On Presentation to the Parliament of the Republic of Lithuania Concerning Dismissal of R. K. Urbaitis from the Office of a Justice of the Supreme Court of Lithuania" of 17 March 2005 and the Resolution of the Parliament of the Republic of Lithuania no. X-138 "On the Dismissal of R. K. Urbaitis from the Office of a Justice of the Supreme Court of Lithuania" of 17 March 2005 was not contrary to constitutional provisions or principles.

#### *Languages:*

Lithuanian, English (translation by the Court).



#### *Identification:* LTU-2005-2-005

**a)** Lithuania / **b)** Constitutional Court / **c)** / **d)** 23.08.2005 / **e)** 19/02 / **f)** On prolonging the terms of monetary compensation payment for real property / **g)** *Valstybės Žinios* (Official Gazette), 152-5605, 30.12.2005 / **h)** CODICES (English, Lithuanian).

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

3.10 **General Principles** – Certainty of the law.  
5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

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

Compensation, for real property, availability / Property, restitution.

#### *Headnotes:*

The fact that the state resolved that the denied rights of ownership must be restored, also the fact that a law regulating matters of restitution was adopted and that implementation of restoration of ownership rights was begun, mean that the state undertook an obligation to restore the rights of ownership by the ways and under conditions and procedures established in the law also within the terms provided for in the law. Alongside, a duty was implied to the state (its institutions) to allot the necessary funds and other financial and material resources (*inter alia* in order to pay the monetary compensation for the real property bought out by the state).

#### *Summary:*

I. The petitioner, the Supreme Administrative Court of Lithuania applied to the Constitutional Court with a petition, requesting it to investigate whether Article 7.1 and 7.2 of the Law on the Amount, Sources, Terms and Procedure of Payment of Compensation for the Real Property Bought Out by the State, and on the Guarantees and Preferences Which are Provided For in the Law on the Restoration of Citizens' Rights of Ownership to the Existing Real Property were in conflict with Articles 23.1, 23.3 and 29 of the Constitution.

The petitioner based its position on the following arguments. The principle of inviolability of property established in Article 23.1 of the Constitution means that the subject of the ownership rights has the right to freely possess, use and dispose of his property, also that he has the right to demand that other persons should not violate his or her rights. This provision of the Constitution also consolidates the



duty of the state to ensure the most favourable regime for implementation of the rights of ownership. By the law that was adopted by the parliament (*Seimas*) on 23 December 1999, upon amendment of the norms whereby the government can independently establish the terms and procedure of payment of monetary compensation, also, upon postponement of the terms of payment of monetary compensation, the guarantees established to the owners in Article 7 of the law to retrieve their property under the most favourable terms and procedure were prejudiced. Under Article 23.3 of the Constitution, property may only be seized for the needs of society in accordance with the procedure established by law and shall be justly compensated. Just compensation includes not only compensation of equal value for such property, but also for the period of time during which it is compensated. Changing the term establishing the period of compensation payment, by prolonging it, as well as limitation of the right to receive annual compensation in equal portions each quarter of the year, by establishing an indefinite procedure for the compensation payment, restricts the right of the owner to possess, use and dispose of this property, nor does it guarantee just compensation and thus it violates the principles of equal rights of subjects of the ownership right and protection of legitimate expectations. Upon amending Article 7.1 and 7.2 of the law and upon prolonging the terms of compensation payment, the possessor of the compensation finds himself in an unequal situation, in which he is discriminated against, in regard to another owner – a person to whom the real property has been returned in kind. Therefore, in the opinion of the petitioner, Article 7.1 and 7.2 of the law were in conflict with the principle of equal rights of persons, which is enshrined in Article 29 of the Constitution.

II. The Constitutional Court held that the fact that the state resolved that the denied rights of ownership have to be restored, also the fact that a law regulating restitution relations was adopted and that implementation of restoration of ownership rights was begun meant that the state undertook an obligation to restore the rights of ownership by the ways and under conditions and procedures established in the law, also within the terms provided for in the law. Alongside, a duty was implied to the state (its institutions) to allot the necessary funds and other financial and material resources (*inter alia* in order to pay the monetary compensation for the real property bought out by the state).

The Constitutional Court emphasised that while regulating the restoration of the rights of ownership to the existing real property, the legislator must take account of the constitutional principles of protection of property, as well as of the fact that in the course of

restoring the rights of ownership to the existing real property it is necessary to protect also the other values entrenched in the Constitution, *inter alia* the striving for an open, just and harmonious civil society and to ensure that while restoring the ownership rights of certain persons, the owners, one does not violate the rights and legitimate interests of other persons as well as those of society as a whole. In the process of restoration of the rights of ownership to the existing real property one must seek to attain a balance between the rights of the persons to whom the rights of ownership are being restored and those of society as a whole.

The Constitutional Court stressed that the legislator enjoys the discretion to legislatively establish the ways, conditions and procedure of restoration of the rights of ownership to the existing real property. In order to fulfill the obligations undertaken by the state to restore the rights of ownership to the existing real property within the ways, conditions and procedures established in the law, *inter alia* in order to pay the monetary compensation for real property bought out by the state, the funds of the State Budget and other state resources are used. The burden of the obligations undertaken by the state falls upon the entire society whose members are also the persons to whom the rights of ownership are restored. Thus, by establishing the ways, conditions and procedure of restoration of the rights of ownership to the existing real property, the state cannot undertake financial and other obligations of the size that would be unbearable to society and the state, which would put a disproportionately big financial or other burden on the society, which could incite social tension and conflict, which would not permit or impair the state to ensure other constitutional values, or which would not permit or impair the state to discharge the functions that are prescribed to it by the Constitution. The obligations undertaken by the state to restore the rights of ownership to the existing real property must be linked with financial and material capabilities of the state; the terms of restoration of the rights of ownership to the existing real property must be realistic – they must be such that the state might properly fulfil the undertaken obligations until the established time.

The Constitutional Court emphasised that under the Constitution, the State must keep the undertaken obligations and fulfil them properly and in time. Laws on restoration of the rights of ownership to the existing real property must be supported by financial, material and other resources of the state. In this constitutional case the Constitutional Court also emphasised that the fact that the state decided that the denied rights of ownership must be restored, also the fact that a law regulating restitution relations was

adopted and the implementation of the restoration of ownership rights was begun, created a legitimate expectation to the persons who had the right to restore their rights of ownership that they would be able to implement such their right by the ways, under conditions and procedure and within the terms established by the law. Alongside, a duty appeared to the state to legislatively regulate the restoration of the rights of ownership to the existing real property so that the said expectation could be implemented in reality.

The Constitutional Court noted that the necessity to clearly establish what portion of the allotted monetary compensation and when (within what period) must be paid to the persons who enjoy the right to receive this compensation must be considered as a legal guarantee that the state will fulfil the obligations which it has undertaken within the terms established in the law and that the constitutional ownership rights of the person will not be violated. The Constitutional Court also emphasised that after the authorised state institution adopts the decision to restore the rights of ownership to a person, the said person acquires the rights of ownership, which are protected and defended by Article 23 of the Constitution.

The Constitutional Court held that Article 7.1 of the law and the provision “the monetary compensation shall be paid <...> under procedure and conditions established by the government” of Article 7.2 of the law to the extent that it does not establish the criteria under which the government could establish the terms (periodicity) of the payment of the portions of the allocated monetary compensation were in conflict with Articles 5.1, 5.2, 23.1, 23.2 and 128.2 of the Constitution, and the constitutional principles of separation of powers and of a state under the rule of law.

The Constitutional Court also held that under Article 107.1 of the Constitution, a law (or part thereof) may not be applied from the day of official promulgation of the decision of the Constitutional Court to the effect that the act in question (or part thereof) is in conflict with the Constitution. Thus, after a ruling of the Constitutional Court comes into force, whereby the law (or part thereof) is recognised as conflicting with the Constitution, various uncertainties might appear in the legal system, *lacunae legis* – gaps in the legal regulation – or even a vacuum. In order to evade this, one must correct the legal regulation in time so that the gaps in the legal regulation as well as other uncertainties could be removed and that the legal regulation might become clear and harmonious. The Constitutional Court held that if this Ruling of the Constitutional Court was officially published after its public promulgation at the

hearing of the Constitutional Court certain provisions of the Law on the Amount, Sources, Terms and Procedure of Payment of Compensation for the Real Property Bought Out by the State, and on the Guarantees and Preferences Which are Provided For in the Law on the Restoration of Citizens’ Rights of Ownership, which have been recognised as being in conflict with the Constitution by this Ruling of the Constitutional Court, could not be applied from the date of official publishing of this Ruling of the Constitutional Court. In such a case, there would appear such uncertainties and gaps in the legal regulation of restoration of the rights of ownership to existing real property due to which the restoration of the rights of ownership to the existing real property would be disturbed in essence or even temporarily discontinued.

Taking account of the fact that a certain time period is needed in order to make the changes and/or amendments to the laws and that the fulfilment of the state’s financial obligations to the persons to whom the rights of ownership to the existing real property are restored, is related to the formation of the State Budget and corresponding redistribution of state financial resources, this Ruling of the Constitutional Court is to be officially published in the *Valstybės Žinios* (Official Gazette) on 30 December 2005 (although this decision was taken on 23 August 2005).

#### *Languages:*

Lithuanian, English (translation by the Court).



# Moldova

## Constitutional Court

### Important decisions

*Identification:* MDA-2005-2-004

**a)** Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 19.07.2005 / **e)** 16 / **f)** Constitutionality of Article 452.1 of the Criminal Procedure Code / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

*Keywords of the systematic thesaurus:*

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

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.

*Keywords of the alphabetical index:*

Criminal Procedure Code / Lawyer, representation, obligatory / Judgment, final, appeal, extraordinary, lawyer, obligatory representation.

*Headnotes:*

Under Article 452.1 of the Criminal Procedure Code, the Principal Public Prosecutor and the persons mentioned in Article 401 may, through a lawyer, appeal to the Supreme Court of Justice, once ordinary remedies have been exhausted, for the annulment of final court decisions.

The Constitutional Court ruled that the provision challenged which related to the right to lodge an extraordinary appeal, only through a lawyer, against final court decisions once ordinary remedies have been exhausted, violates both the principle of free access to justice and the rights of the defence (Articles 20 and 26 of the Constitution) and reduces without justification the free exercise of fundamental human rights and freedoms.

*Summary:*

A case was lodged with the Court by a Member of Parliament, who requested verification of the constitutionality of the provisions of Article 452.1 of the Criminal Procedure Code.

He challenged the provisions of Article 452 according to which defendants, parties who have suffered damage, plaintiffs and parties bearing civil liability may appeal to the Supreme Court of Justice for annulment once ordinary remedies have been exhausted, but only through a lawyer. The said provisions violate the principle of free choice of form of defence and contravene Articles 20 and 26 of the Constitution, Article 6.3.c ECHR and Article 14.3 of the International Covenant on Civil and Political Rights.

According to Article 54 of the Constitution, no laws suppressing or violating fundamental human rights and freedoms may be adopted in the Republic of Moldova. The exercise of certain rights and freedoms may be restricted only under the laws which meet generally accepted principles of international law and which are necessary in the interests of national security, territorial integrity, the economic welfare of the country or public order, to prevent mass disorder and offences, to protect citizens' rights, freedoms and dignity, to prevent the disclosure of confidential information or to guarantee the authority and impartiality of the judicial system.

Under the terms of Article 452.1 of the Criminal Procedure Code, it is necessary, before making an extraordinary appeal to the Supreme Court, to obtain the agreement of a specialist lawyer. Thus it may be affirmed that the right of access to justice is subject to a condition precedent – the lawyer's agreement – entailing an unjustified reduction in the individual exercise of fundamental rights and freedoms.

The rights of the defence are guaranteed fundamental rights, which every person may exercise independently and freely.

Criminal procedure legislation does not specify the cases in which the assistance of an officially assigned defence counsel is granted to convicted persons.

In accordance with Article 70 of the Criminal Procedure Code, only suspects and defendants are entitled to the assistance of an officially assigned defence counsel.

Thus a convicted person without the means of paying a lawyer will be unable to lodge an appeal for annulment.

The Constitutional Court ruled that the provision challenged relating to the right to lodge an extraordinary appeal, only through a lawyer, against irrevocable court decisions once ordinary remedies have been exhausted violates both the principle of free access to justice and the rights of the defence (Articles 20 and 26 of the Constitution) and reduces without justification the free exercise of fundamental human rights and freedoms.

The Court declared unconstitutional the words "through a counsel" in Article 452.1 of the Criminal Procedure Code.

#### *Languages:*

Romanian, Russian.



## Norway Supreme Court

### Important decisions

*Identification:* NOR-2005-2-001

a) Norway / b) Supreme Court / c) / d) 10.05.2005 / e) 2004/1376 / f) / g) to be published in *Norsk Retstidende* (Official Gazette) / h) CODICES (Norwegian).

*Keywords of the systematic thesaurus:*

3.19 **General Principles** – Margin of appreciation.  
5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

*Keywords of the alphabetical index:*

Property, acquisition, condition / Concession, compensation, determination.

*Headnotes:*

The legislator can regulate the more detailed conditions for the acquisition of property, without violating Article 105 of the Constitution, which does not protect the right to become an owner. Article 1 Protocol 1 ECHR does not protect a purchaser who is denied a concession – or who is granted a concession on condition that part of the land is transferred.

Until a concession is granted, the purchaser's right is conditional. In these circumstances, the condition in the concession does not represent a compulsory surrender of a proprietary right that could entitle the purchaser to compensation for expropriation, and the value of the land must therefore be fixed in accordance with its customary value.

*Summary:*

I. The case concerns the principles for valuation that are applicable when part of a plot of land used as a holiday home was required to be sold to the State pursuant to conditions contained in a concession (licence).

A. purchased the property Sandholmen – an island outside Grimstad with an area of approximately 29 decares – in 1992 for NOK 1.5 million. The purchase was subject to a concession, and concession was granted on the condition that the property – with the exception of a 10 decares beach around the building – would be separated off and transferred to the Directorate for Nature Management on behalf of the State, for the benefit of the common good. A. instigated legal proceedings before the Nedenes District Court and claimed that the condition in the concession was invalid. The claim was dismissed.

The parties could not agree on the purchase price for the land, and on 17 July 2002, the Sand District Court fixed the value at NOK 90,000. A. petitioned for a reappraisal to the Agder Court of Appeal, which, at reappraisal proceedings on 2 July 2003, came to the same conclusion. The District Court and the Court of Appeal valued the land at its market value, and found that there were no grounds for granting compensation for the reduction in value that the surrender of land had caused to the remaining property (the difference principle). A. appealed the reappraisal to the Supreme Court and claimed that the Court of Appeal had erred in its application of law. A. claimed that the condition in the concession was an expropriational intervention that entitled A. to full compensation pursuant to Article 105 of the Norwegian Constitution. Furthermore, the assessment of compensation was in breach of Article 1 Protocol 1 ECHR concerning peaceful enjoyment of property, and Article 40 of the EEA Agreement on the free movement of capital and the anti-discrimination principle in Article 4.

II. The appeal was dismissed (dissent 4-1).

The majority of the Supreme Court recalled that the legislator could regulate the more detailed conditions for the acquisition of property, since Article 105 of the Constitution does not protect the right to become an owner. A. had voluntarily entered into an agreement, the implementation of which was subject to a concession.

As a general rule, a purchaser who is denied a concession – or who is granted a concession on condition that part of the land is transferred – is not protected by Article 1 Protocol 1 ECHR. In any event, the State had not exceeded its wide margin of discretion with regard to the measure of compensation when it awarded compensation equivalent to the value of the land to be transferred. Nor was there any breach of the EEA Agreement. The majority pointed out, amongst other things, that the case concerned a property in Norway that was purchased by a Norwegian national and there were no transnational factors that could bring EEA law into play.

The minority of the Supreme Court held that the Concession Act does not contain provisions that regulate how compensation shall be calculated in the event of an order to transfer property pursuant to a condition in a concession and that the question, in these circumstances – within the bounds that are laid down by Article 1 Protocol 1 ECHR – must be solved on the basis of general legal principles, the assumed presumptions of the legislator and free jurisprudential considerations and bearing in mind the views on the importance of private property rights that are inherent in Article 105 of the Constitution. In light of such views on the legal basis for the measure of compensation, the minority held that compensation for the order to surrender land should be calculated in accordance with the principles applicable to compensation in the event of expropriation. Consequently, not only the value of the surrendered land should be included in the assessment, but also the reduction in value that the remaining property had suffered.

*Languages:*

Norwegian.



*Identification:* NOR-2005-2-002

**a)** Norway / **b)** Supreme Court / **c)** / **d)** 24.06.2005 / **e)** 2005/260 / **f)** / **g)** to be published in *Norsk Retstidende* (Official Gazette) / **h)** CODICES (Norwegian).

*Keywords of the systematic thesaurus:*

3.20 **General Principles** – Reasonableness.  
5.3.13.22 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Presumption of innocence.

*Keywords of the alphabetical index:*

Penal Code, interpretation / Liability, criminal, conditions, strict / Child, sexual assault, age, knowledge, lack.



*Headnotes:*

A strict and literal application of Section 195 of the Penal Code, with the consequence that an offender who in every respect is in good faith in his belief that the victim is over 14 years of age may also be criminally liable, is in violation of Article 6.2 ECHR. Strict conditions of criminal liability are only acceptable within reasonable bounds bearing in mind the interests that are at stake.

*Summary:*

Section 195 of the Penal Code provides that any person who sexually assaults a child below 14 years of age shall be liable to imprisonment for a term not exceeding 10 years, but not less than one year if the assault was sexual intercourse. It is irrelevant for the question of criminal liability that the person who commits the assault believes that the victim is over 14 years of age even if he is in good faith on this point. Age is a strict condition of criminal liability. The position in Section 196 of the Penal Code is different. This provision criminalises sexual assault of children below 16 years of age and provides that the offender cannot be punished if he believed that the victim was over 16 years of age and no negligence can be attributed to the offender in this respect.

The plenary case before the Supreme Court concerned the question of whether the strict rule in Section 195 of the Penal Code, which provides that mistake as regards the child's age shall not exclude criminal liability, is in violation of the presumption of innocence in Article 6.2 ECHR.

The Supreme Court found that Article 6.2 ECHR imposes limits on the power to impose criminal liability where there is no fault on the part of the offender. Strict conditions of criminal liability are only acceptable within reasonable bounds bearing in mind the interests that are at stake. The Supreme Court found that a strict and literal application of the Penal Code Section 195, with the consequence that an offender who in every respect is in good faith in his belief that the victim is over 14 years of age may also be criminally liable, is in violation of the European Convention on Human Rights.

This was also the finding of the Gulating Court of Appeal in the case in question, which concerned sexual intercourse with a girl aged 13 years and 3 months. The Court of Appeal had quashed the District Court's conviction on the grounds that the District Court had failed to consider whether the accused had been in good faith regarding the victim's age.

The appeal by the Public Prosecution against the Court of Appeal's application of law was dismissed. The decision was unanimous, although two justices gave different reasons for their verdicts.

*Languages:*

Norwegian.

*Identification:* NOR-2005-2-003

**a)** Norway / **b)** Supreme Court / **c)** / **d)** 29.06.2005 / **e)** 2004/1734 / **f)** / **g)** to be published in *Norsk Retstidende* (Official Gazette) / **h)** CODICES (Norwegian).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Tax, employer, failure to report earnings, liability / Tax, rate, determination, regulation.

*Headnotes:*

The rules relating to the determination of tax in the event of a summary joint settlement must be deemed to be substantive rules and not technical rules of assessment.

The imposition of liability on the employer for failure to report earnings on the basis of Regulation of 20 November 1997 could imply that extra burdens might be associated to the failure to report earnings several years earlier, and is thus contrary to Article 97 of the Constitution, prohibiting retrospective effect of law.

*Summary:*

The case concerns the tax assessment for the company A. for the income years 1990, 1992 and 1993. There were two main issues before the Supreme

Court – the allocation of deductions for the hire of vessels and indirect expenses for operations on the Norwegian Continental Shelf, and determination of the rate of tax where the company was assessed and taxed by way of a summary joint settlement, see the Tax Assessment Act Section 9-5 no. 8 and Government Regulation of 20 November 1997 no. 1181.

A. carries out pipeline laying operations with two specially constructed vessels. The company has limited tax liabilities to Norway. The general rule according to case law is that indirect expenses shall be spread across all the days of the year – the 365-day rule. A. claimed that the so-called season exception (which was established in the Supreme Court case recorded in *Retstidende* 2002, page 718) was applicable, but the claim was dismissed. The Supreme Court referred to the fact that the two vessels had also been in operation to a large degree through the winter, either in the North Sea or on contracts outside the North Sea. Sailing time in order to carry out contracts on other continents did not give grounds for departing from the 365-day rule either. Nor was there any information that indicated that actual sailing days in connection with contracts outside the North Sea could be attributed to operations in Norway.

A. had underreported income for its employees for the income years 1992 and 1993. The Government Regulation of 20 November 1997 no. 1181 on summary joint settlement laid down standard rules for determining the employer's liability in the event of failure to report earnings. These rules provided that the rate of tax should generally be fixed at 50% but could exceptionally be fixed at 35%. These Regulations had not been passed when the Tax Assessment Board made its assessment in 1996, and the Tax Assessment Board applied a taxable rate of 28%. A. appealed against the basis of assessment of liability and was successful on this point. However, the Tax Appeal Board and all subsequent instances held that the calculation of A' liability should be based on the new Government Regulation and therefore applied a tax rate of 35%.

A. claimed that Section 95 no. 8.3 of the Tax Assessment Act did not empower the Government to fix the tax rate in the Regulations, and referred to statements in the preparatory works to the Act. This claim was dismissed. A. also claimed that the transitional provisions did not apply. This claim was also dismissed because the order had been made in the first instance when the Regulation entered into force. However, the Supreme Court accepted A' claim that the application of the tax rate in the Regulation could constitute a breach of

Article 97 of the Constitution. The rules relating to the determination of tax in the event of a summary joint settlement must be deemed to be substantive rules and not technical rules of assessment. The situation here is different from the cases reported in *Norsk Retstidende* 1996, page 1415 (*Bulletin* 1996/3 [NOR-1996-3-007]) and *Norsk Retstidende* 2001, page 762 (*Bulletin* 2001/2 [NOR-2001-2-004]). The question in this case concerned the imposition of liability on the employer for failure to report earnings, which could imply that extra burdens could be associated to the failure to report earnings several years earlier. Although the purpose was not to impose additional burdens on the employer, this would quite often be the result of the rates laid down in the Regulation. The Court also expressed the view that the way in which the transitional provision was formulated could lead to random or arbitrary results.

The Supreme Court found that the tax rates in the Regulation of 20 November 1997 could have implied an increased liability for A. which was contrary to Article 97 of the Constitution. The tax assessment on this point was therefore quashed and the Court ordered that the summary joint settlement should be carried out in accordance with the principles that applied before the Regulation entered into force.

#### Languages:

Norwegian.



# Poland

## Constitutional Court

### Statistical data

1 May 2005 – 31 August 2005

Number of decisions taken:

- Final judgments: 20
- Cases discontinued: 19 (14 fully, 5 partially – When the Tribunal is delivering a final judgment it may at the same time partially discontinue the case regarding a given point. Partial discontinuation may also occur in a form of a separate procedural decision).

Decisions by procedure:

- Abstract review *ex post facto*: 8 judgments, 3 cases discontinued (1 fully, 2 partially)
- Questions of law referred by a court: 5 judgments, 4 cases discontinued (1 fully, 3 partially)
- Constitutional complaints: 8 judgments, 12 cases discontinued (12 fully, 0 partially)

### Important decisions

*Identification:* POL-2005-2-007

a) Poland / b) Constitutional Tribunal / c) / d) 21.06.2005 / e) P 25/02 / f) / g) *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2005, no. 124, item 1043; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005/A, no. 6, item 65 / h) CODICES (Polish, English).

*Keywords of the systematic thesaurus:*

- 3.9 **General Principles** – Rule of law.
- 3.11 **General Principles** – Vested and/or acquired rights.
- 3.16 **General Principles** – Proportionality.
- 3.18 **General Principles** – General interest.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.3.13.4 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Double degree of jurisdiction.

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

*Keywords of the alphabetical index:*

Expropriation, compensation / Company, share, sale, obligatory, judicial protection.

*Headnotes:*

The principle of the protection of acquired rights is implicit in the rule of law principle (Article 2 of the Constitution). As such, it enshrines the will to guarantee individuals' legal security and to enable them to plan their future actions rationally, whilst at the same time prohibiting the arbitrary abolition or limitation of individual rights.

When reviewing the permissibility of imposing limitations on the protection of acquired rights, it is necessary to consider the following: firstly, whether such limitations are based on constitutional values; secondly, whether it is possible to achieve the given constitutional value without infringing acquired rights; thirdly, whether the constitutional values requiring a limitation on the protection of acquired rights may, in the given situation, be accorded priority over the values representing the bases for such protection; fourthly, whether the legislator has undertaken the essential steps to guarantee individuals the conditions to adapt to the new regulation.

The fact that an individual did not foresee the possibility of a change in the law does not mean that such a change will automatically infringe the principle of protecting acquired rights.

Expropriation (Article 21.2 of the Constitution) falls within the sphere of public law and envisages a compulsory deprivation of ownership in favour of the State Treasury or another public legal entity. Private law provisions envisaging the involuntary transfer of an ownership right from the hitherto owner to another person or persons should not be reviewed on the basis of the above article.

Article 21.2 of the Constitution provides for greater protection of ownership, permitting expropriation solely "for just compensation". "Just compensation" means fair, that is to say, equivalent, compensation. It should restore the owner to the same proprietary situation as that which pertained prior to expropriation. Under no circumstances may compensation be decreased by the manner in which it is calculated, nor by the procedure under which it is paid.

The values set out in Article 31.3 of the Constitution (dealing with proportionality) express all aspects of public interest as a general determining factor of the limits of an individual's rights and freedoms (security of the State, public order, protection of the natural environment, protection of health, protection of public morals and protection of rights and freedoms of other persons). To determine whether the principle of proportionality has been infringed, one has to ask whether an appropriate relationship exists between the aim intended to be served by the challenged legal provision and the means leading to the achievement of this aim. It is possible to derive from Article 31.3 three requirements to be fulfilled by a provision limiting the exercise of constitutional rights and freedoms: indispensability, functionality and proportionality.

The right to appeal against a decision (by virtue of Article 78 of the Constitution) contains legal measures initiating review by a higher instance organ, i.e. ordinary appellate measures which are of an essentially devolutionary nature. This principle allows, however, for statutory exceptions. Nevertheless, statutory resolutions concerning court proceedings must take into account the requirement that court proceedings must have at least two instances (see Article 176.1 of the Constitution). The latter guarantee relates only to cases which fall, from beginning to end, within the jurisdiction of the judiciary.

### *Summary:*

I. The compulsory purchase of shares (also known as "squeeze-out") was introduced to the Polish legal system by the Commercial Companies Code 2000 (hereinafter referred to as "the Code"). Article 418.1 of the Code envisaged that the aforementioned procedure should apply to shareholders representing less than 5% of the company's share capital. Compulsory purchase could be performed by no more than five shareholders collectively holding no less than 90% of the company's share capital. A company resolution authorising compulsory purchase must be adopted by a 90% majority of votes cast, unless the company's corporate constitution envisages stricter requirements. Furthermore, Article 418.2 required the resolution authorising the purchase to specify the shares subject to compulsory purchase, the shareholders who have committed to purchase them and the amount of shares acquired by each purchaser. The price to be paid for compulsorily purchased shares shall be determined by an auditor (see Article 418.3, read in conjunction with Article 417 of the Code). In the event of a difference of opinion between the shareholders and the auditor, Article 312.8 of the Code permits the initiation of court proceedings to resolve the dispute. However, the legislator excluded the possibility of appealing against the court's decision in this matter.

The proceedings were initiated by a question on the law by the Courts and by an application from the Ombudsman.

II. The Tribunal ruled that the provisions challenged, understood as not excluding the right of a shareholder prejudicially affected by the compulsory purchase of shares to challenge a resolution authorising such purchase, did not infringe the constitutional provisions indicated by the initiators of the proceedings. Two judges submitted a joint concurring opinion.

Article 418 of the Code regulates the involuntary transfer of ownership between private legal entities. Whilst this does not amount to expropriation, it involves similar consequences, namely the deprivation of ownership. This fact should be taken into account by the legislator, at least to the same extent as in cases of expropriation for public purposes.

In the present case, the interests of a joint stock company (in this context the interests of the majority shareholders), as well as the company's right to develop and pursue efficient economic activity, conflict with the rights of minority shareholders. Accordingly, mechanisms for protecting the latter are crucial, especially as regards providing an equivalent for a lost property right. This is achieved by the appropriate valuation of compulsorily purchased shares, performed on the basis of Article 418 of the Code.

Although the Code does not require that the reasons for compulsory purchase be stated in the resolution authorising purchase, minority shareholders are not deprived of the right to court protection. On the basis of Article 422 of the Code (motion to quash a resolution) a shareholder whose shares have been compulsorily purchased may claim that the resolution infringes good custom or the company's constitution, or is intended to affect him prejudicially. Such a shareholder may also challenge the resolution on the basis of Article 425 of the Code (motion to declare a resolution invalid).

A shareholder whose shares have been compulsorily purchased has the right to have a court review the auditor's valuation of the shares, under Article 312.8 of the Code. This constitutes an alternative mechanism for protecting such a shareholder's interests, alongside the possibility of challenging a resolution adopted in a general meeting before the Commercial Court (Article 422.1 and 422.2.2 of the Code).

Appointment of the auditor is the first stage in the proceedings. The interested shareholder may appeal



to the Registry Court against the auditor's decision. The issue of share valuation is not, therefore, considered by the court from its outset to conclusion. Accordingly, Article 176.1 of the Constitution is not infringed.

#### Cross-references:

- Judgment U 1/86 of 28.05.1986, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1986, item 2;
- Judgment K 1/90 of 08.05.1990, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1990, item 2;
- Judgment K 14/91 of 11.02.1992, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1992/I, item 20; *Special Bulletin Leading Cases 1* [POL-1992-S-001];
- Judgment K 26/97 of 25.11.1997, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1997, no. 5-6, item 64; *Bulletin* 1997/3 [POL-1997-3-024];
- Judgment K 41/97 of 08.12.1998, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 7, item 117; *Bulletin* 1998/3 [POL-1998-3-023];
- Judgment K 23/98 of 25.02.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 2, item 25; *Bulletin* 1999/1 [POL-1999-1-005]
- Judgment SK 12/98 of 08.06.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 5, item 96;
- Judgment K 5/99 of 22.06.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 5, item 100;
- Judgment K 8/98 of 12.04.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 4, item 110;
- Judgment SK 29/99 of 15.05.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 5, item 96; *Bulletin* 2000/2 [POL-2000-2-014];
- Judgment K 5/01 of 29.05.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 4, item 87;
- Judgment SK 29/01 of 25.02.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002/A, no. 3, item 26;
- Judgment SK 23/01 of 16.04.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 5, item 96; *Special Bulletin Human Rights Limitations* [POL-2002-H-001];
- Judgment P 13/01 of 12.06.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002/A, no. 4, item 42; *Bulletin* 2002/2 [POL-2002-2-019];

- German Federal Constitutional Court, 1 BvI 16/60 of 07.08.1962, *BVerfGE*, no. 14, item 263;
- German Federal Constitutional Court, 1 BvR 68/95 of 23.08.2000, *BVerfGE* 2002, no. 4, item 447;
- Judgment of the Court of Appeal in Paris, 1<sup>ère</sup> chambre, Section CBV of 16.05.1995, *Rev. Soc.* 535.

#### Languages:

Polish, English, German (summary).





# Portugal

## Constitutional Court

### Statistical data

1 May 2005 – 31 August 2005

Total: 197 judgments, of which:

- Preventive monitoring: 2 judgments
- Abstract *ex post facto* review: 4 judgments
- Referendum: 1 judgment
- Appeals: 150 judgments
- Complaints: 21 judgments
- Electoral matters: 1 judgment
- Political parties and coalitions: 14 judgments
- Political parties' accounts: 3 judgments
- Disqualifications of holders of political office: 1 judgment

### Important decisions

*Identification:* POR-2005-2-005

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 10.05.2005 / **e)** 246/05 / **f)** / **g)** *Diário da República* (Official Gazette), 117 (Series I-A), 21.06.2005, 3893-3901 / **h)** CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

- 4.5.2 **Institutions** – Legislative bodies – Powers.  
 4.8.8.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Principles and methods.  
 4.8.8.2.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Implementation – Distribution *ratione materiae*.

*Keywords of the alphabetical index:*

Hospitalisation, costs / Region, regional interest, criterion / Norm, constitutional, application over time.

*Headnotes:*

Whether a provision of ordinary law may be unconstitutional from the organisational and procedural

standpoint is judged according to the constitutional rules in force at the time of its adoption, all subsequent modifications of the standard by which constitutionality is determined being immaterial in principle. Since the question at issue belongs to the legislative competence, it is inferred that the standard for determining the constitutionality of the provisions in question is the one applicable at the date of issuance of the provisions *sub judice*, being the body of law which governed the legislative power of autonomous regions prior to that resulting from the sixth revision of the Constitution. The subsequent constitutional amendments are therefore not of relevance for determining the constitutionality (in organisational terms) of a regional enactment.

The fact that matters specifically concerning the regions are designated by statute does not exempt a substantive evaluation according to the particulars of each case. However, the instant case does not involve a specifically regional interest – the issue of patients' stay in a hospital after receipt of their discharge does not concern the Autonomous Region of Madeira alone, and does not take any special form within that region.

*Summary:*

A group of members of parliament applied to the Constitutional Court to evaluate and declare, with general binding effect, the unconstitutionality and illegality of the provisions embodied in a regional legislative enactment (passed by the legislative assembly of the Autonomous Region of Madeira on 24 February 2003) essentially intended to regulate the hospital stay of patients having obtained their discharge. This is a problem relating to both the health and social security spheres. The regime as established seeks to discourage the use of hospital services after patients receive their discharge, that is use of the services for purposes other than those for which they were instituted (their overloading requires patients and their nearest relations to contribute to the costs of hospitalisation, payable to the Regional Health Service).

It is therefore essential to verify whether the stated issues come within the scope of specifically regional interest under the terms of the Constitution (according to the version preceding the sixth revision). Although health and social security are not expressly included in the list of matters of specifically regional interest set out in the Constitution, they do appear in the list provided for in Article 40 of the Regional Statute. The list set out in Article 228 of the Constitution is not in fact exhaustive since it permits other matters to be designated "of specific interest" in the Regional Statutes, provided that such matters are of exclusive

concern to the region or take a special form within the region. But the mere fact that health and social security are among the matters classified as being of “specific interest” by the Regional Statute of Madeira does not in itself suffice to meet the criterion of specifically regional interest, considering that according to Portuguese constitutional case-law and legal theory, the statutory enumeration of the subjects of specific interest is only indicative. It signifies nothing but the State’s recognition (given that the political and administrative statutes are approved by State legislative enactments) of the possible regional specificity of certain situations.

In the present case, the point was to ascertain whether the Autonomous Region of Madeira had a specific interest in legislating in the sphere of health and social security. Such specific interest, prior to the sixth constitutional revision, was one of the prerequisites or criteria of regional legislative authority. Thus the case-law designating the specific interest of the regions as an independent parameter for the assignment of legislative competence (albeit invariably in accordance with the Constitution and the general laws of the Republic, and in matters not the sole province of the organs of sovereignty) still stood. It was one of the devices employed by the Constitution to regulate the system of division of powers between the State and the regional bodies.

All the available evidence showed that the problem of patients’ stay in a hospital after receipt of their discharge was neither especially serious in the Autonomous Region of Madeira compared to the national situation, nor did it assume a special configuration there. The Court therefore concluded that there was no specific regional interest which would enable the legislative assembly of the Autonomous Region of Madeira to legislate with regard to hospital stay after granting of discharge.

#### *Supplementary information:*

The determination of the constitutionality of the enactment in question firstly raises a problem as to the time sequence of constitutional norms, in that the Constitutional Law leading to the sixth revision of the Constitution took effect during the period between publication of the impugned regional legislative decree and the present judgment.

One of the modifications brought in by this constitutional revision is simplification of the parameters establishing the boundaries within which regional legislative power can be exercised, accompanied by a widening of legislative powers for the autonomous regions. The changes are essentially as follows:

- a. the category of general laws of the Republic (whose fundamental principles used to govern regional enactments) has disappeared;
- b. the requirement of specific regional interest in affairs regulated by the regions has been eliminated (in so far as it creates prerequisites or criteria for their legislative authority).

The autonomous regions’ legislative authority nevertheless continues to be supervised with regard to all the fundamentals of regional self-government provided for in Article 225 of the Constitution. It is moreover confined to the regional context and to the affairs specified in each region’s political and administrative statute. Respecting the exclusive area of legislative power secured to the organs of sovereignty still remains as the condition under which the autonomous regions’ legislative authority is exercised. As to Parliament’s relative reserved legislative power, the regions, subject to parliamentary authorisation, may deal with the matters contained in the Constitution except where it provides otherwise.

Two distinct constitutional systems have operated in succession. It has to be ascertained how the sixth constitutional revision – giving rise to the extension of the autonomous regions’ legislative authority – affects the constitutionality of the provisions at issue. The answer to the question put to the Court presupposes that the defects of unconstitutionality which might vitiate these provisions, and especially the nature of such defects, be considered, because the time sequence of constitutional norms produces a variety of effects that hinge on whether the impugned provision of ordinary law is unconstitutional at an organisational (or procedural) or a substantive level.

#### *Languages:*

Portuguese.



#### *Identification: POR-2005-2-006*

a) Portugal / b) Constitutional Court / c) Third Chamber / d) 08.06.2005 / e) 306/05 / f) / g) *Diário da República* (Official Gazette), 150 (Series II), 05.08.2005, 11186-11190 / h) CODICES (Portuguese).

*Keywords of the systematic thesaurus:*

- 3.5 **General Principles** – Social State.  
 3.9 **General Principles** – Rule of law.  
 3.17 **General Principles** – Weighing of interests.  
 5.3.1 **Fundamental Rights** – Civil and political rights  
 – Right to dignity.  
 5.3.44 **Fundamental Rights** – Civil and political  
 rights – Rights of the child.  
 5.4.18 **Fundamental Rights** – Economic, social and  
 cultural rights – Right to a sufficient standard of living.

*Keywords of the alphabetical index:*

Maintenance, dependent child / Minimum subsistence  
 / Pension, protective guarantee / Pension, reduction /  
 Child, protection and assistance.

*Headnotes:*

The provision allowing a portion of a parent's disability pension to be allocated to payment of maintenance to an underage child, thereby depriving the pensioner of adequate income for his essential needs, is contrary to the principle of human dignity (embodied in the principle of rule of law).

In the present case, the point at issue is the extent to which the parent's disability pension (and not some other source of income) can be "attached" in order to fulfil the obligation to provide for an underage child (and not any other maintenance obligation), but here regard cannot be had solely to the principle of human dignity given that contempt of the right to receive maintenance directly affects the living conditions of the entitled person and, for children at least, entails the risk of imperilling, if not the right to life, at least the right to a decent life.

The obligation of support by which parents are bound (one of those constituting parents' duty to assist their underage children) cannot be reduced to the mere payment of a sum of money when it comes to determining the constitutionality of the arrangements made for the effective performance of that duty. For a defaulting parent it is a matter not only of discharging a debt but also of fulfilling a duty which has its own constitutional definition as a fundamental duty and provision of support as its prime element.

*Summary:*

In the challenged decision, it was held that apart from the disability pension fixed at 189.54 €, the appellant (drug-addicted, with no paid employment) had no other known income. Consequently, the compulsory allocation of the amount necessary for payment of the

maintenance owing to the underage child would reduce the remaining income to 89.54 € and place the pensioner's subsistence at risk. The impugned provision, construed as imposing this allocation (without specifying any exempted minimum amount) would thus be unconstitutional in violating the principle of human dignity enshrined in Article 1 of the Constitution.

The criterion for determining the portion of the parent's income that cannot be allocated to coercive payment of the maintenance owing to the child does not depend on the national minimum wage level; moreover, until the children's essential needs are fulfilled, the income retained by the parents must not exceed the amount necessary to meet their subsistence needs. The material problem of ascertaining whether and above what threshold this allocation of the disability pension drawn by the person liable for maintenance is to be considered constitutionally inadmissible must be weighed against the safeguarding of the right to a subsistence level compatible with a minimum standard of decency or corresponding to a minimum sufficient for survival. In the present case, the aspect open to challenge, because a minimum amount exempt from forced allocation was not determined, was the negative dimension of the subsistence guarantee, namely the recognition of a right not to be deprived of the means considered essential for maintaining the income absolutely necessary to live at a minimum standard of decency. In addition, regard must be added to the fact that coercive payment of the allowance owing to the child was impossible in this case and entailed payment of welfare benefits in the ambit of the State's responsibility to protect children (Article 69 of the Constitution).

The criterion of the minimum wage having been rejected, the legal system offers another positive reference value that can be used as a criterion indicating the limit of "exemption from attachment" for this purpose: the "social integration income" corresponding to the application, in its positive dimension, of the minimum subsistence guarantee. It comprises a benefit included in the solidarity category under the public social security system and an integration programme in order to grant individuals and their families forms of assistance suited to their personal circumstances, helping to fulfil their essential needs and assisting occupational, social and community integration in a progressive manner.

*Supplementary information:*

The Court has already been called upon to determine the constitutionality of the provisions permitting the attachment of income derived from social welfare

pensions or from occupational income not exceeding the national minimum wage (Judgments 62/02, 177/02 and 96/04). According to this case-law, the Court has taken the national minimum wage as a reference figure for income (derived from social welfare pensions or employment) whose attachment is deemed incompatible with the principle of human dignity. Children are the direct beneficiaries of this fundamental duty. The provision of support is an integral part of a paramount duty which, although it can be implicitly inferred from other passages in the Constitution [recognition of the family as a fundamental element of society (Article 67); protection of children from abandonment in any form (Article 69)], is expressly recognised as a corollary to children's fundamental right to be supported by the parents.

#### *Languages:*

Portuguese.



#### *Identification:* POR-2005-2-007

**a)** Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 08.07.2005 / **e)** 376/05 / **f)** / **g)** *Diário da República* (Official Gazette), 159 (Series II), 19.08.2005, 11950-11967 / **h)** CODICES (Portuguese).

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

1.3.5.8 **Constitutional Justice** – Jurisdiction – The subject of review – Rules issued by federal or regional entities.

4.8.7.3 **Institutions** – Federalism, regionalism and local self-government – Budgetary and financial aspects – Budget.

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

Parliament, group / Political party, subsidy / Region, autonomous, powers.

#### *Headnotes:*

Only since 1979 have the subsidies paid to political parties been regarded as a means of financing the pursuit of their specific aims, and it was not until after 1998 that the subsidies acquired the exclusive character of a means of funding the activity of political

parties, hence the performance of all their social and political functions.

Parliamentary groups have gained a legal and political significance in that their functions have turned them into indispensable instruments for ensuring the proper functioning of modern legislative assemblies. Indeed, the legislative or other work done by parliaments is entirely conceived on the basis of parliamentary groups.

Concerning the legal nature of parliamentary groups, even if these are considered to be “organs of the political parties” (or “independent public entities”, “public law associations” or “private law associations vested with public functions”), and to be legally associated as party organs and as State organs, it must be acknowledged that their activity serves a variety of functions. Accordingly public funding, besides allocating the resources needed to carry out most of their party-political activities, should allow this very process to further specifically parliamentary activity – technically, substantively and legally distinct.

It is evident from all consideration of the nature of parliamentary groups that the performance of parliament's functions is made possible and effective through the decisive contribution of their activity in a legislative assembly. Moreover, even if parliamentary groups and representations have a relationship of political dependence with the parties, they are invariably recognised as possessing a functional independence within the parliamentary institution based on parliamentary powers in their own right.

#### *Summary:*

I. The Minister of the Republic for the Autonomous Region of Madeira had requested a preventive verification of the constitutionality of the provisions made in the regional legislative decree on “Modification of the institutional structure of the legislative assembly”, considering that the sums of money allocated in accordance with those provisions constituted subsidies paid by the legislative assembly of the Autonomous Region of Madeira to the parties represented within it. The Minister contended that:

- a. the subsidies took the form of public funding of parties as they were for the pursuit of party objectives;
- b. such funding should comply with the rule prohibiting regional parties;
- c. insofar as they constituted funding of political parties and had direct bearing on their legal and constitutional status, the sums of money referred



to in the provisions at issue were a matter within the exclusive remit of the national parliament;

- d. it was in any event doubtful that there existed any regional peculiarities or specificities warranting such a significant difference in treatment between the parliamentary groups of the regional legislative assembly and those of the national parliament and consequently justifying a departure from the conditions required by the principle of equality;
- e. nor did the regional enactment at issue contain any patent substantive justification for legislative provision not on an equal footing with that which obtained at a national level and not contemplating such positive discrimination as might be desirable for political parties with limited parliamentary representation.

As to the payment of subsidies by the legislative assembly, the arrangement whose constitutionality was challenged had the following characteristics:

- a. a subsidy paid to parties with only one sitting member and to parliamentary groups to enable them to pay for the use of offices staffed by selected, appointed, licensed and qualified personnel, taking the form of an annual amount separate from expenditure on social charges for the staff members of the offices of parties and parliamentary groups, which expenditure was defrayed directly by the regional legislative assembly;
- b. a monthly subsidy paid to the parliamentary delegations in respect of expenses incurred for assistance, contacts with the electorate and other activities carried out under the respective mandates.

II. The Constitutional Court did not find the impugned provisions at variance either with the constitutional framework defining the machinery of self-government and administrative autonomy, particularly as concerned the legislative powers which had been assigned to the autonomous regions, or with the principle of equality. Furthermore, given the constitutional legislator's decision to vest legislative assemblies of autonomous regions and, correspondingly, their component parliamentary groups, with the power of a legislative body as provided by the Constitution for the national parliament "subject to the necessary adaptations", naturally affected by the political and administrative statute of self-government granted to the regions, it must be accepted that the legislator of the autonomous regions had a degree of discretion for normative and constitutive purposes.

However, since regulation of the matters at issue was essentially dependent on the policy options taken by

the constitutionally empowered legislator in establishing the levels of the subsidies, founded on the legislator's assessment of the scope for collecting revenue and defraying official expenses or of the expediency of borrowing, from the standpoint of proportionality, the Constitutional Court's review in these matters could only be at a manifest level.

In conclusion, the Constitutional Court decided not to declare unconstitutional the provisions at issue, made in the regional legislative decree on "Modification of the institutional structure of the legislative assembly" passed by the legislative assembly of the Autonomous Region of Madeira on 17 May 2005.

#### *Languages:*

Portuguese.



#### *Identification:* POR-2005-2-008

**a)** Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 13.07.2005 / **e)** 384/05 / **f)** / **g)** *Diário da República* (Official Gazette), 181 (Series II), 20.09.2005, 13605-13624 / **h)** CODICES (Portuguese).

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

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

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

5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.

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

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

Extradition / Constitutional norm, application over time / Death penalty, nominal possibility / Death penalty, obtaining assurances against imposition.

#### *Headnotes:*

Judicial procedure for extradition is directly linked with the personal freedom of the person to be extradited. This is not only because after extradition he may be subject to a prison sentence or incur the penalty to



which he has already been sentenced, but also, and as a consequence, because extradition causes his forced departure from the country.

The rule to observe for the application over time of constitutional norms relating to authorisation of extradition should be to consider the terms of the Constitution in force at the date of submission of the extradition request. The constitutional norms adopted subsequently are applicable only if they are more favourable to the person being extradited. Accordingly, the date chosen is that of the extradition request, not the date when the crimes giving rise to the extradition request were committed. If constitutional norms adopted after submission of the extradition request and permitting extradition in circumstances previously prohibited by the Constitution were applied, this would infringe the constitutional principles of legal certainty and due process in criminal law matters.

Portugal agrees to extradite persons charged with crimes for which a sentence of life imprisonment is nominally prescribed, subject to fulfilment of the following conditions, stipulated cumulatively:

- i. the requesting State is reciprocally bound by an international convention to accept extradition requests from Portugal (obviously submitted in respect of crimes carrying penalties other than life imprisonment, non-existent in Portugal) for crimes of the same class as those in its extradition request; and
- ii. guarantees that life imprisonment will not be imposed are provided. It therefore follows from the constitutional norm that in cases involving extradition for crimes carrying a penalty of life imprisonment, the reciprocity rule, set out in an international convention (moreover, it constitutes the legally commonplace concept of the principle of reciprocity) must always be applied. It suffices to meet the conditions imposed on the requesting State. Furthermore, where the adequacy of guarantees is concerned, they must be binding on the requesting State in international public law. However, the international undertaking of States does not arise solely from the signature of bilateral or multilateral conventions but may also arise from unilateral acts.

The judicial nature of extradition procedure (Article 33.7 of the Constitution) signifies that the adequacy of the guarantee is to be determined by the court with jurisdiction to authorise extradition, not the political or administrative authorities of the requesting State. In this matter the Constitutional Court's action is confined to the aspects whose review bears directly

on the constitutional requirements. The Constitutional Court must always bear in mind that its function is not to determine the constitutionality of judicial rulings as such, but only the constitutionality of the prescriptive criteria on which they are founded.

### *Summary:*

I. The Indian Union had asked the Portuguese Republic, in accordance with the International Convention for the Suppression of Terrorist Bombings (hereinafter referred to as the New York Convention of 1998), to extradite its national Abu Salem Abdul Qayoom Ansari to be tried for several crimes, some of which carried the death penalty and a sentence of life imprisonment as nominally prescribed penalties.

In the opinion of the State Counsel General, the request was admissible because for crimes punishable by a sentence of death (nominally prescribed), Section 34-C of the 1962 Indian Extradition Act required the Indian Union to commute the sentence to life imprisonment, and because the Indian authorities had given adequate guarantees for the crimes liable to life imprisonment (direct commutation or through commutation by law of the death penalty) that the penalty would not be enforced. However, the request was deemed inadmissible with regard to those crimes that were subject to limitation according to Portuguese law, and to those punishable by life imprisonment and which did not fall within the scope of the New York Convention of 1998. The Minister of Justice, relying on this background, pronounced the extradition request admissible by decision of 28 March 2003. The Lisbon Court of Appeal, in a judgment dated 4 February 2004, decided to authorise the extraditable person's extradition to the Indian Union for trial on charges of crimes listed in the application submitted by the prosecution, with the exception of those crimes punishable by death or by life imprisonment. In a subsequent decision of 27 January 2005, the Supreme Court of Justice authorised extradition to the Indian Union for trial on all the charges specified in the prosecution's application. The extraditable person appealed against this decision to the Constitutional Court.

II. As well as determining several procedural questions, the Court held that in the specific matter of the conditions laid down by the Constitution for extradition of foreign nationals for crimes punishable in the requesting State by nominally prescribed sentences of death or life imprisonment, it should only consider whether the interpretation contained in the challenged decision was in keeping with the Constitution. Thus it was required to verify in the present case the conditions placed by its case law on the admissibility of extradition for crimes nominally

punishable by death. According to this case law, the Constitution prohibits extradition for crimes for which the death penalty is legally possible in accordance with the criminal law and criminal procedure of the requesting State. It is therefore incompatible with all guarantees which the requesting State might supply to the effect that capital punishment will not be carried out or will be replaced by another penalty, unless the requesting State signifies the legal impossibility of its application. In this context, the interpretation contained in the challenged decision, according to which it would be legally impossible – from the standpoint of a law-based State – for the Indian courts to impose the death sentence on the extraditable person, fulfils the condition placed by the Court's case law on the admissibility of extradition for crimes carrying the death penalty, nominally prescribed. Consequently, the interpretation and application of Article 9.3 of the New York Convention of 1998 do not infringe any constitutional principle or norm, and specifically Article 33.6 of the Constitution.

As for the crimes for which life imprisonment was nominally prescribed, whether directly commuted or through commutation pursuant to Section 34-C of the Indian Extradition Act, the question of determining the appropriate constitutional parameter might be raised. Article 33 had in fact been amended by the 2004 revision, but the purpose of the amendment was simply to clarify the meaning of the expression "under conditions of reciprocity laid down by an international convention" appearing in the earlier version. At all events, the new wording of the Constitution was not considered any more favourable to the extraditable person.

Furthermore, the Court upheld the opinion that extradition for a crime punishable by life imprisonment was not contingent on the fact of it being legally impossible for the courts of the requesting State to impose this penalty. Even if its imposition was legally possible, the provision of a guarantee that the sentence would not be carried out sufficed to allow the granting of extradition. Such a guarantee could not be purely political, but must be valid in international public law (inclusive of diplomatic guarantees) and legally commit the requesting State vis-à-vis the requested State. Besides, once carried into effect (specifically, through commutation of the life prison sentence to a sentence of limited duration by the organ of the requesting State with constitutionally established jurisdiction to commute), the guarantee must be legally binding on the courts of the requested State. In the case in point, the Supreme Court of Justice, having identified and interpreted the constitutional and statutory arrangements of the Indian Union, had concluded that if the extraditable person was sentenced to life

imprisonment, the guarantee offered by the Deputy Prime Minister and the Minister of Home Affairs, in accordance with the constitutional rules governing co-operation and interdependence between the President of the Indian Union and the members of the Government, placed the requesting state under a legal and international obligation to commute the sentence in question to one of imprisonment not exceeding 25 years. This guarantee was binding on the current and the future Presidents and Governments alike.

In conclusion, and regarding the substantive issue, the Constitutional Court did not consider it unconstitutional to interpret the provision made in Article 9.3 of the International Convention for the Suppression of Terrorist Bombings (New York Convention of 1998) in the sense that Portugal was obliged to extradite the appellant to the Indian Union for crimes contemplated in Article 2 thereof and carrying a nominally prescribed death sentence, given that the execution of the sentence was a legal impossibility pursuant to Section 34-C of the Indian Extradition Act. The same could be said of crimes punishable by a nominally prescribed sentence of life imprisonment, given that the obligation to extradite was subject to the rule of reciprocity laid down by an international convention also subscribed to by Portugal, and that the requesting State had offered a legally and internationally binding guarantee that a prison sentence exceeding 25 years would not be imposed.

*Languages:*

Portuguese.



# Romania

## Constitutional Court

### Important decisions

*Identification:* ROM-2005-2-002

**a)** Romania / **b)** Constitutional Court / **c)** / **d)** 06.07.2005 / **e)** 375/2005 / **f)** Decision on the reform of property law and the justice system and certain ancillary measures / **g)** *Monitorul Oficial al României* (Official Gazette), 591/08.07.2005 / **h)** CODICES (French).

*Keywords of the systematic thesaurus:*

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

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

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

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

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

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

*Keywords of the alphabetical index:*

Judge, status / Prosecutor, retirement, obligatory / Judge, retirement, obligatory / Retirement, right, fundamental / Retirement, obligation.

*Headnotes:*

1. The rule that judges and public prosecutors elected to the Judicial Service Commission may not continue to serve as judges or public prosecutors during their elected term of office means, in effect, that they lose this status and that the Commission ceases to represent the judiciary and becomes a purely administrative body.

2. The fact that members of the Judicial Service Commission are required to choose between their management functions in courts or prosecutors' departments and membership of the Commission violates the principle that judges and prosecutors are irremovable.

3. The termination or shortening of the terms of office of judges or public prosecutors with management functions violates the principle of separation of powers enshrined in Article 1.4 of the Constitution, and the principle that prosecutors and judges are irremovable.

4. The fact that judges and prosecutors must retire on reaching the standard public sector retirement age, even when they do not satisfy the other retirement criteria, amounts to discrimination against them by comparison with other groups, and violates the principle of irremovability enshrined in Article 125.1 of the Constitution and in international texts on judges.

5. The fact that members of the national legal service retired on grounds of age may not continue to work as judges or prosecutors, combining their professional income and pensions, constitutes discrimination:

- between judges and prosecutors in receipt of service pensions and other pensioners;
- between judges and prosecutors in receipt of service pensions who engage in another professional activity, and judges and prosecutors in receipt of service pensions who do not.

*Summary:*

A group of 101 deputies and 64 senators, and the Court of Cassation, applied to the Constitutional Court, challenging the constitutionality of the Act on reform of property law and the justice system and certain ancillary measures.

They argued that the Act was unconstitutional because it violated the procedure for adopting laws, and the constitutional provisions on property, the independence of the judiciary and the irremovability of judges and public prosecutors.

Having regard to the allegations of unconstitutionality, the arguments advanced, and the provisions of Article 147.2 of the Constitution and Sections 11.1.A.a and 18 of Act no. 47/1992 on the organisation and functioning of the Constitutional Court, the Court ruled that the phrase "other than those of judge or public prosecutor", inserted in Section 81.8 of Act no. 303/2004 on the status of judges and public prosecutors, was unconstitutional, since it discriminated against judges and public prosecutors in receipt of service pensions. It further ruled that Section IV.1.6.7 of Part XVII of the Act was unconstitutional, since it was incompatible with the principle of irremovability of judges and prosecutors set out in Article 125.1 of the Constitution.

Concerning Part XV of the Act, which amended and amplified Act no. 317/2004 on the Judicial Service Commission, the Court noted that Section 24.2 was incompatible with the clear and binding requirement, in Article 133.2.a of the Constitution, that nine members of the Commission be judges, and five public prosecutors, i.e. persons specifically discharging those functions. The intention here was to make sure that the Commission comprised active members of the judiciary and prosecution service, who knew the problems from the inside, and would ensure that the Commission performed the task, entrusted to it by Article 133.1 of the Constitution, of guaranteeing independence of the judiciary.

Article 24.4 also violated that article of the Constitution, which placed no restriction on election to the Judicial Service Commission of judges or prosecutors with management functions in courts or prosecutors' departments. This being so, the Act itself ought not to make such a distinction.

Terminating the management functions of judges elected to the Judicial Service Commission was also incompatible with the principle of irremovability set out in Article 125.1 of the Constitution, which made it impossible to change, without their consent, the status of judges or prosecutors during their term of office.

Section II.1.2 of Part XV modified the 6-year term of office of Commission members, provided for in Article 133.4 of the Constitution, and prohibited them from performing management functions in courts and prosecutors' offices.

The provisions of the Constitution were mandatory and, under rule of law principles, binding on everyone, including parliament when enacting laws. Consequently, parliament could not shorten the term of office of members of the Judicial Service Commission without violating the Constitution, regardless of whether it did so by express provision or, as in the case of Section II.1 of the impugned Act, by a provision which had this effect when implemented.

The new provision also violated the principle of irremovability of judges and prosecutors, whether they opted for membership of the Judicial Service Commission and surrendered their earlier functions, or whether they chose to retain those functions and were thus debarred from serving on the Commission.

As for Part XVII, which amended and amplified Act no. 303/2004 on the status of judges and prosecutors, Section IV.1.6.7 was incompatible with the principle of irremovability enshrined in Article 125.1 of the Constitution, which guaranteed their independence by protecting them against being

dismissed or demoted for no legitimate reason, or being transferred by delegation, secondment or even promotion to serve against their will on some other body.

This principle applied throughout a judge's or prosecutor's term of office, both in those and in managerial capacities, and that term of office might not be shortened or extended without his or her consent.

Parliament was free to pass a new law, altering the periods of managerial duty provided for in the present one, but only for future terms of office, not current ones, since this would violate the principle that laws might not apply retrospectively. Similarly, judges and prosecutors currently occupying managerial positions had – under the rules which applied when they were appointed – a five-year term, and some had served for less than the three year term provided for in the current rules. The current rules terminated or, when three years had not been served, shortened the terms of office of all judges and prosecutors occupying management posts.

This measure, which exceeded the powers of the Parliament and had unacceptable effects on the judiciary, was also incompatible with Article 1.4 of the Constitution.

The Court noted that the new rules introduced by Section 82 obliged judges and prosecutors to retire on reaching the standard public sector retirement age, even when they did not satisfy all the other retirement criteria.

The prohibition on their remaining in office once they had reached the standard public sector retirement age was discriminatory and contrary to the principle enshrined in Article 16.1 of the Constitution, if their situation was compared with that of other groups covered by the general principles of the public-sector pension scheme, on which the rules in Act no. 19/2000 were based. According to these principles, which were in line with the Constitution, retirement was a fundamental right, not an obligation, and was taken on request, not imposed by law.

Reasonable alternatives to the standard retirement age could be set for certain professions, including those of judges and public prosecutors. In most countries, judges and prosecutors could remain in office up to the age of 68 or 70.

The Court found that application of the standard retirement age of 57 years and 6 months for women, and 62 years and 7 months for men, to judges and prosecutors violated the principles of independence



and irremovability enshrined in Articles 124.3 and 125.1 of the Constitution, since it removed them from office, whether or not they satisfied other retirement criteria, and regardless of their personal and professional capacity to continue serving.

The new rule was incompatible with Article 155.5 of the Constitution, which stated that judges in the Court of Cassation were to “continue their activity until the term of office for which they were appointed expires”.

Article 155.5 made irremovability a universal principle. Even if a constitutional amendment or new law altered the normal term of office, serving judges and prosecutors remained in office until the term for which they had been appointed expired.

Section 82 of Act no. 303/2004 was also incompatible with:

- the fundamental principles of independence of the judiciary;
- the Universal Statute of the Judge;
- Recommendation R (94) 12 of the Committee of Minister of the Council of Europe on the independence, efficiency and role of judges.

For the same reasons, the provisions of Section 82 of Act no. 303/2004, which applied in the same way to staff of the Constitutional Court, were unconstitutional.

The Constitutional Court found that the phrase “other than those of judge or public prosecutor” (new Section 81.8), which prevented judges or prosecutors who were forced to retire on reaching the upper age limit from continuing to serve and combine the resultant income with their pensions, discriminated firstly between judges and prosecutors in receipt of service pensions and other pensioners, and secondly between the different categories of judge and prosecutor referred to in the Act.

There was nothing to stop parliament from ruling that pensions and salaries might not be combined, provided that the measure applied equally to everyone, and that there were legitimate reasons for any differences in treatment between occupations.

#### *Supplementary information:*

In Decision no. 419 of 18 July 2005, published in the Romanian Official Gazette (*Monitorul Oficial*), Part I, no. 653 of 22 July 2005, the Constitutional Court found that the provisions on the Act on reform in property law and the justice system and certain ancillary measures, which had been declared unconstitutional in Constitutional Court Decision

no. 375/2005, had been brought into line with that decision by the texts adopted at the joint session of the Romanian Houses of Parliament on 13 July 2005. In Decision no. 419, the Court also found that Section 82 of Act no. 303/2004 on the status of judges and prosecutors, as adopted at the same joint session of the Romanian Houses of Parliament, was constitutional, since the phrase “statutory retirement age” referred to future legislation, and judges and prosecutors already in office when its decision was published could remain in office on the conditions specified in Section 64 of Act no. 303/2004, which was in force on that date.

#### *Languages:*

Romanian.





# Slovakia

## Constitutional Court

### Statistical data

1 May 2005 – 31 August 2005

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 1
- Decisions on the merits by the Court panels: 141
- Number of other decisions by the plenum: 3
- Number of other decisions by the panels: 217

### Important decisions

*Identification:* SVK-2005-2-002

**a)** Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 23.06.2005 / **e)** PL. ÚS 9/04 / **f)** / **g)** *Zbierka zákonov Slovenskej republiky* (Official Gazette), 320/2005; *Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

*Keywords of the systematic thesaurus:*

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

2.3.7 **Sources of Constitutional Law** – Techniques of review – Literal interpretation.

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

4.5.7.2 **Institutions** – Legislative bodies – Relations with the executive bodies – Questions of confidence

*Keywords of the alphabetical index:*

Government, confidence, vote / Government, criticism / Parliament, member, powers of control / Parliament, member, supervision of government authorities.

*Headnotes:*

The nature of the government application requesting adjudication as to the conformity of the Act on Parliamentary Rules of Procedure with the Constitution

of the Slovak Republic turned upon whether members of parliament, when they are dissatisfied with the response to a formal question which they have posed to the government, (referred to here as an “interpellation”) are entitled to connect the voting on the interpellation with a vote of confidence or a vote of non-confidence in the government.

After the interpellation, neither a confidence nor a non-confidence vote can take place in connected voting under a parliamentary initiative against the government or one of its members. After an interpellation only the government is entitled to request the parliament to express confidence.

*Summary:*

I. The Government of the Slovak Republic submitted an application to the Constitutional Court of the Slovak Republic to commence proceedings regarding conformity of legal norms. Prior to the submission, the following circumstances had occurred.

A member of parliament for the opposition in the National Council of the Slovak Republic requested parliament to vote on a resolution to the effect that it considered the response of the Minister of Education insufficient. She proposed to connect the voting on this resolution with the vote of confidence in relation to the Minister, and in support of this, she presented the signatures of 33 members of parliament. She interpreted the Constitution and especially the Act on Parliamentary Rules of Procedure literally, in such a way that the Coalition was obliged to express confidence (as opposed to “opposition non-confidence”) in its Minister. In the end, the National Council did not vote as to confidence in the Minister, but the government asked the Constitutional Court to adjudicate as to the conformity of the Act on Parliamentary Rules of Procedure with the Constitution.

In its application, the government challenged the words “the interpellated official or a group of at least one fifth of the total number of members of parliament” and “or one of its members” of provision of Section 130.6 of the Act on Rules of Procedure of the National Council (the National Council takes its standpoint to the response to the interpellation by a resolution which the person who has asked the question considers insufficient. A motion may be presented by the government, the interpellated official or a group of at least one fifth of the total number of members of parliament, to connect the vote on the resolution with a vote on confidence in the government or one of its members) as contradicting with Article 1.1 first sentence of the Constitution (state governed by the rule of law) in terms of Articles 80, 113, 114.2, 114.3 of the Constitution.

The government put forward this argument because, in its opinion, the provision of the Act on Rules of Procedure expanded the content of Article 80.2 of the Constitution, whilst the contested provision of the Act would serve to enable the parliamentary debate on the response to the interpellation to be connected with the non-confidence vote in relation to the government, depending on whether the members of parliament were satisfied with the response to the interpellation. If the Act extends the right that belongs to only one constitutional body (the government) to other subjects (an interpellated or one fifth of the members of parliament), it is contrary to the Constitution and its systematic interpretation. The government's contention was based on the literal interpretation of the word "confidence" in Article 80.2 of the Constitution.

II. The Constitutional Court stated that the Constitution should be interpreted systematically. The Constitution enables a member of parliament of the National Council to file an interpellation to the government, one of its members or to the head of any other central state administration authority. A member of parliament has a right to get a response from an interpellated official. The right of a member of parliament to file an interpellation is a part of the control of competence by the National Council of the government. The constitutional approach towards the responsibility of the government and its members is based upon the requirement that the government and its members should have the confidence of the National Council during their term of office. The National Council has some control mechanisms to safeguard the responsibility of the government and its members, and the application of these measures has certain constitutional consequences. For instance, if the National Council exercises its right to express non-confidence in the government or one of its members, the President of the Republic is duty-bound to dismiss the government or one of its members.

The Constitutional Court reasoned that right of the government to request the National Council to express confidence according to Article 114.2 and 114.3 of the Constitution is an integral part of the responsibility of the government towards the National Council. The Constitutional Court agreed with the government that the difference of terms confidence and non-confidence in the Constitution has its reason.

The Constitutional Court understood that there are arguments for extensive interpretation of the Article 80.2 of the Constitution. Nevertheless, the Constitutional Court concluded that the term "confidence" in the Article 80.2 of the Constitution must be interpreted literally, because any other interpretation may cause application problems.

Connecting the voting on the interpellation with a vote of confidence towards the government is a legal means to strengthen the legitimacy of the government when debating about the answer to an interpellation signalises a loss of confidence towards the government or a member of government.

Because of the literal interpretation of Article 80.2 of the Constitution, the Constitutional Court altered the provision of the Act on Parliamentary Rules of Procedure. Henceforth, only the government will be entitled to propose the connection of the vote on insufficient response to interpellation (against the government or an individual minister) with the issue of its existence. The Constitutional Court underlined that if the government request to connect voting on the interpellation with vote on confidence, the National Council has to accept this motion without separate voting. The government, the plenum of the Constitutional Court and the dissenting judge concurred in the opinion that it was unreasonable that a vote of confidence should be taken under the proposal of the individual to whom a formal question had been posed (usually a minister). Therefore "the interpellated official" had to be removed from Section 130.6. If the Constitutional Court interprets the confidence enshrined in Article 80.2 of the Constitution simply as a confidence, it has to remove the concept of confidence in a member of government ("or one of its members") from Section 130.6 of the Rules of Procedure. The government cannot request a vote of confidence in relation to one of its members.

Section 130.6 of the Rules of Procedure after finding of the Constitutional Court reads: "the National Council takes its standpoint to the response to the interpellation by a resolution which the person who has asked the question considers insufficient. A motion may be presented by the government to connect the vote on the resolution with a vote on confidence in the government".

In the opinion of the dissenting Judge, Alexander Bröstl, the term "confidence" in Article 80.2 of the Constitution should be understood both as confidence and also as non-confidence. His attitude is based on a systematic and teleological interpretation. Parliamentary resolution on the initiative of a group of at least one fifth of the total number of members of parliament after debate about an answer to interpellation according to Article 80.2 of the Constitution may be connected with voting on confidence in the form of voting of non-confidence and the government may connect voting on answer to interpellation with voting on confidence to the government. The dissenting judge would alter the provision of the Act on Parliamentary Rules of Procedure to match this interpretation.

*Languages:*

Slovak.



## Slovenia

### Constitutional Court

#### Statistical data

1 May 2005 – 31 August 2005

The Constitutional Court held 22 sessions (9 plenary and 13 in chambers) during this period. There were 360 unresolved cases in the field of the protection of constitutionality and legality (denoted U- in the Constitutional Court Register) and 1208 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 May 2005). The Constitutional Court accepted 92 new U- and 461 Up- new cases in the period covered by this report.

In the same period, the Constitutional Court decided:

- 98 cases (U-) in the field of the protection of constitutionality and legality, in which the Plenary Court made:
  - 31 decisions and
  - 68 rulings;
- 30 cases (U-) cases joined to the above-mentioned for joint treatment and adjudication.

Accordingly the total number of U- cases resolved was 128.

In the same period, the Constitutional Court resolved 233 (Up-) cases in the field of the protection of human rights and fundamental freedoms (9 decisions issued by the Plenary Court, 224 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 (selection).

## Important decisions

*Identification:* SLO-2005-2-002

**a)** Slovenia / **b)** Constitutional Court / **c)** / **d)** 23.06.2005 / **e)** U-I-145/03 / **f)** / **g)** *Uradni list RS* (Official Gazette), 69/05 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

*Keywords of the systematic thesaurus:*

- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2 **Fundamental Rights** – Equality.
- 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
- 5.3.13.26 **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.

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

*Keywords of the alphabetical index:*

Contempt of court, penalty, excessive.

*Headnotes:*

The prohibition against contemptuous applications, according to Article 109 of the Civil Procedure Act (hereinafter: “ZPP”), does not limit the party’s right to make a statement before the court, which is guaranteed as a human right, as part of the right to the equal protection of rights in a procedure, pursuant to Article 22 of the Constitution. Thus, Article 109 of ZPP does not concern this right, but only the determination of the manner of its exercise. However, when the court applies the above-mentioned statutory provision, it must pay attention to all the above-mentioned aspects in every definitive case.

In this regard, it is necessary to consider, on the one hand, that the circumstance that the statement was made while defending one’s right before the court requires greater tolerance. On the other hand, it is necessary to take into consideration the special significance that trust in the judiciary and respect for the courts’ authority have for the judicial branch of power to be able to implement its tasks.

When punishment is in issue, according to Article 109 of ZPP, a particular judge is not a “victim”, and, by deciding upon Articles 11 and 109 of ZPP, they do not protect their personal honour and good reputation. If their honour and good reputation are in jeopardy they have the possibility to claim protection in accordance with criminal and tort law. In view of this objective and the definition of punishment according to Article 109 of ZPP (in conjunction with Article 11 of ZPP), it follows that the concern that the judge decides on a case in which they are a victim or an injured party is not substantiated (provided that the judge properly understands Article 109 of ZPP, and gives proper reasoning when ruling on punishment). Therefore, the challenged regulation is not inconsistent with the right to an impartial judge according to Article 23.1 of the Constitution.

The regulation of punishment in accordance with Article 11 of ZPP, particularly in view of the penalty of imprisonment, which for a natural person can be as much as 30 days and (*inter alia*) for a lawyer even 100 days, evidently reaches an extent such that it can be concluded that it concerns deciding on criminal

charges (for which all procedural and substantive guarantees concerning the criminal procedure and criminal offences must be ensured). It is clear that the regulation of punishment – not in itself but due to the magnitude of the penalties prescribed in Article 11 of ZPP (i.e. within the criminal procedure) – is not in conformity with the requirements of Article 23.1 of the Constitution and Article 6 ECHR, and concerning guarantees in the criminal procedure.

It is inconsistent with the Constitution insofar as it determines excessive penalties such that a conclusion can be made that it concerns ruling on criminal charges, which is why all the procedural guarantees concerning the criminal procedure (also according to Article 29 of the Constitution) should have been fulfilled.

What is of primary significance for the punishment of contemptuous applications is the symbolic meaning of punishment, which is to ensure an immediate response of the court to conduct that can jeopardise the course of judicial proceedings and the authority of the judiciary. As it is also the case that punishment for contemptuous applications pursuant to Article 109 of ZPP does not prevent criminal responsibility, which can be decided upon within a criminal procedure, there is no sound reason why the penalties prescribed in Article 11 of ZPP must be so high (and at the same time inappropriately high concerning the penalties that, given all the guarantees of the criminal procedure and a different intention of punishment, may be pronounced by the court for the criminal offence of contempt according to Article 169 of the Penal Code).

The concept of “contempt” has been sufficiently documented both in theory and in case law not only in the area of criminal matters but also in connection with claims for damages for pain and suffering due to a damage to one’s honour and good reputation. Thus, it is not possible to hold that it has not been well defined. The same applies to the definition of possible reasons for the exclusion of illegality.

### *Summary:*

I. The petitioners (attorneys at law) challenged Article 11 and Article 109 of the Civil Procedure Act (hereinafter CPA). The latter provision determines that a civil Court should punish the person who in their submission insults the court, a party and other participants in proceedings, according to the provisions of Paragraphs 3 to 7 of Article 11 of the same act. In the event of such contempt of Court, Paragraphs 3 to 7 of Article 11 prescribed a penalty of up to 300.00 Slovene tolar (1 EUR approx. 240 tolar) for natural persons, and up to 1.00.00 tolar for legal

entities, independent entrepreneurs, and attorneys. If they did not pay the penalty in due time, a penalty of imprisonment of up to 30 days for natural persons, and up to 100 days for independent entrepreneurs and attorneys was prescribed, and a 50 % increase in the penalty (fine) in the event of non-compliance was determined for legal entities.

II. First, by five votes against three, the Constitutional Court upheld Article 109 of the CPA. Second, it set aside a part of Article 11.3 (leaving as valid only that part determining that any person may be punished for contempt of Court by a penalty of (only) up to 300.00 tolar). Third, it also set aside other challenged paragraphs of Article 11 (the penalty of imprisonment and the provision that in the case of non-compliance the penalty (fine) for legal entities is increased by an additional 50 %).

At the beginning, the Constitutional Court reviewed whether the possibility of punishment according to Article 109 of the CPA, irrespective of the definitive system of sanctions pursuant to Article 11 of the CPA, is inconsistent with human rights. Concerning such, the petitioners claimed the violation of freedom of expression according to Article 39 of the Constitution. However, the Court held that the expression (either oral or in writing) of a party (or their representative) to judicial proceedings is in the function of effective implementation of constitutional procedural safeguards. Therefore, the Court did not review the challenged provisions directly in view of freedom of expression, but in the framework of the evaluation of the conformity of this regulation with the right to make a statement before the Court, determined in Article 22 of the Constitution.

The Court held that the challenged regulation limits a party’s right to make such statements only to the extent that the party must not make a statement in an inappropriate, insulting manner, to the benefit of defending their rights in proceedings. However, this does not limit the human rights themselves, but only determines the manner of their exercise. At that point, the Constitutional Court emphasised that the essential circumstance of the matter at issue was the fact that it concerned making a statement before the Constitutional Court, not a case of making a statement in the framework of artistic expression. In the latter case, the Constitution (according to the guaranteed freedom of expression according to Article 39.1 of the Constitution) ensures the protection of both the content and form of making a statement, which means that the limitation of a party in determining the form of expression can already be considered as a fetter on the human right. Making a statement before the court carries a different and special position: it is typical for judicial proceedings



that both the manner and form of carrying out procedural activities, including statements made before the Court, are regulated and subject to certain formal requirements.

The Constitutional Court held that the prohibition against the contempt of court determined in Article 109 of the CPA does not prevent a party from openly and arguably claiming the reasons which in their opinion refer to the illegality of a judicial decision. According to the Constitutional Court, the challenged article determines only the limits of the manner of giving a critique. Such critique can always be made in a manner that does not diminish the respect of the court or the entire judiciary. To support its position, the Court cited the case of *Nikula v. Finland*, 21.03.2002, *Reports of Judgments and Decisions* 2002-II, in which the European Court of Human Rights dismissed as unfounded the argument of the claimant that freedom of expression of an attorney in representing a client should never be limited by any measure. Holding that the matter concerned the determining and defining of a proper limit to such expression, the Constitutional Court, finally, dismissed the petitioners' arguments as to this point of the petition as unsubstantiated.

Having found that the prohibition and sanctioning of contemptuous applications in civil proceedings is not inconsistent with the right to make statements before the Constitutional Court, pursuant to Article 22 of the Constitution, the Constitutional Court went on to review the corresponding system of sanctions according to Paragraphs 3 to 7 of Article 11.

Concerning the already established positions of the Constitutional Court and in view of the case law of the European Court of Human Rights, the Constitutional Court took the position that it was evident that the regulation of punishment according to Article 11 of the CPA, in particular regarding the penalty of imprisonment (up to 30 days for natural persons, and up to 100 days for attorneys), amounted to a degree that substantiated the conclusion that it concerned deciding on criminal charges (for which all procedural and substantive safeguards concerning the criminal procedure and criminal offenses must be ensured). Thus, the Constitutional Court opined that it was evident that the system of punishment determined in Article 11 of the CPA, not in itself but due to the extent of the prescribed penalties, was not in conformity with the requirements determined in Article 23.1 of the Constitution (the right to judicial protection) and Article 6 ECHR, and concerning safeguards in the criminal procedure (Article 29 of the Constitution – legal guarantees in criminal proceedings, e.g. the right to have adequate time and facilities to prepare one's defence). Therefore, the

Court held that the challenged regulation was unconstitutional, not because any punishment within the criminal procedure is not possible, but because such severe penalties led to the conclusion that it was decided on the basis of criminal charges, and thus all procedural guarantees concerning the criminal procedure should have been ensured). Accordingly, the Constitutional Court set aside the mentioned paragraphs of Article 11 of the CPA. However, it did not strike out the provision concerning the penalty of up to 300.00 tolar, which, according to the Constitutional Court, does not amount to the degree requiring fulfillment of all the criteria of the criminal procedure, which is the case in the event of the penalty (which was set aside) of up to 1.00.00 tolar for attorneys.

Three judges dissented by arguing that the majority missed the point by evading the direct review of the conformity of the challenged provisions with Article 39 of the Constitution (freedom of expression). They argued that if the limitation of the constitutional right (freedom of expression) was reviewed, not only its manner of exercise, the strict test of proportionality should have been applied. In their opinion, this could lead to finding that Article 109 of the CPA was also inconsistent with the Constitution.

Legal norms referred to:

- Articles 2, 14.2, 22 and 23 of the Constitution (URS);
- Articles 21 and 43 of the Constitutional Court Act (ZUstS).

*Languages:*

Slovenian, English (translation by the Court).



## South Africa Constitutional Court

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### Important decisions

*Identification:* RSA-2005-2-007

**a)** South Africa / **b)** Constitutional Court / **c)** / **d)** 08.09.2005 / **e)** CCT 22/2004 / **f)** Du Toit v. Minister of Transport / **g)** / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

3.18 **General Principles** – General interest.

3.23 **General Principles** – Equity.

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

*Keywords of the alphabetical index:*

Expropriation, compensation / Compensation, amount, calculation / Compensation, fair / Evidence, financial loss / Expropriation, compensation, amount / Land, market value / Land, right of use / Market value, basis for compensation.

*Headnotes:*

The Constitution cannot be bypassed when there is relevant applicable legislation which has not been challenged. Compensation for expropriation can be determined first by considering the amount payable under the Expropriation Act 63 of 1975 and then measuring that amount against the just and equitable standards mentioned in Section 25.3 of the Constitution.

Where a right has a market value, the determination of financial loss will include the loss of that value.

*Summary:*

I. The matter dealt with the manner in which compensation for expropriation under the Expropriation Act should be calculated following expropriation in terms of the National Roads Act, 54 of 1971.

The Roads Board extracted approximately 80 000 cubic metres of gravel from the applicant's

land for the purposes of upgrading a road close to his farm. He believed the amount of compensation paid to him should have been calculated on the basis of the market value of his gravel and not only the financial loss suffered by him because of the use of his land by the Board. Therefore, he claimed he should have been paid R801.980 as compensation.

The High Court awarded the applicant compensation in the amount of R257.623, holding that this was a just and equitable compensation. The Minister then appealed to the Supreme Court of Appeal, which found that the applicant provided unreliable evidence of the market value of the gravel, and the possibility that he would suffer any financial loss from the expropriation was highly speculative, bearing in mind the limited market that existed for the gravel. It accordingly upheld the appeal and reduced the compensation to R6060, which it regarded as just and equitable compensation as required by Section 25 of the Constitution.

On appeal to the Constitutional Court, the applicant contended that he was entitled to what he regarded as the full value of the gravel taken, namely, R801.980, and not R6060, which was the amount calculated on the basis of his actual loss.

II. The Court was divided on precisely which sections of the Roads Act were applicable, as well as on the exact relationship between the Act and Section 25.3 of the Constitution which deals with compensation for expropriation.

Mokgoro J writing for the majority (Madala, Moseneke, Sachs, Skweyiya and Yacoob JJ concurring) emphasised that every act of expropriation and all compensation for expropriation must comply with Section 25 of the Constitution. She noted that the Act does not include the same range of relevant circumstances to determine compensation as does the Constitution. However, the Act had not been challenged and therefore could not be bypassed. She therefore found that applying the Act in conformity with the fundamental values of the Constitution entails considering what compensation is payable under the Act and then considering, with reference to relevant factors listed in Section 25.3, whether that amount is just and equitable.

Mokgoro J found that what was expropriated was the right to use the land which includes the right to extract gravel. She also agreed with the Supreme Court of Appeal's finding that the applicant had established neither the market value of his gravel nor his actual financial loss. She concluded that factors such as the current use of the property; the history of the acquisition and use of the property; the purpose of the expropriation and other relevant factors served to

confirm that there is no other basis on which the applicant could be justifiably compensated. She therefore held that the amount of compensation awarded by the Supreme Court of Appeal was just and equitable and reflected an equitable balance between public and private interests.

In a separate judgment, then Acting Chief Justice Langa (with the concurrence of Ngcobo, O'Regan and van der Westhuizen JJ) held that what was expropriated was both the applicant's gravel and the right to use his land. He stated that the suggestion of Mokgoro J that the Act can be reconciled with Section 25.3 by first undertaking the Act's approach to the calculation of compensation and then considering whether that calculation is consistent with the test set by the Constitution, is not permitted by the Constitution. The Constitution expressly avoided the approach to the calculation of compensation set out in the Act, and insists upon an approach where justice and equity is paramount, not a second level "review" test.

He agreed, however, that the applicant had no prospects of success upon appeal because the amount of compensation arrived at it was just and equitable within the meaning of the Constitution. He would therefore have dismissed the application for leave to appeal on that basis.

#### Cross-references:

- *Minister of Transport v. Du Toit* 2005 (1) SA 16 (SCA);
- *Du Toit v. Minister of Transport* 2003 (1) SA 586 (C);
- *Pointe Gourde Quarrying and Transport Company Limited v. Sub-Intendent of Crown Lands* [1947] AC 565 (PC);
- *Kangra Holdings (Pty) Ltd v. Minister of Water Affairs* 1998 (4) SA 330 (SCA) at 342l;
- *Ingledeu v. Financial Services Board*. In Re: *Financial Services Board v. Van Der Merwe and Another* 2003 (4) SA 584 (CC); 2003 (8) BCLR 825 (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);
- *Ex Parte Former Highland Residents*; In Re: *Ash and others v. Department of Land Affairs* [2000] 2 All SA 26 (LCC);
- *South African Roads Board v. Bodasing (NPD)* Case no. 948/94, 22.09.1995, unreported.

#### Languages:

English.



#### Identification: RSA-2005-2-008

a) South Africa / b) Constitutional Court / c) / d) 09.09.2005 / e) CCT 30/03 / f) S v. Basson / g) / h) CODICES (English).

#### Keywords of the systematic thesaurus:

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

3.8 **General Principles** – Territorial principles.

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

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

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

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

#### Keywords of the alphabetical index:

Appeal, on point of law / Bail proceedings, statements made during, admissibility at trial / Criminal procedure / Evidence, admissibility / Judge, bias, apprehension / Judge, bias, burden of proof / Judge, bias, reasonable suspicion / Jurisdiction, territorial / Prosecution, criminal, obligation / Recusal / Territorial law / War crime.

#### Headnotes:

An appeal lies against the appellate division if, in refusing leave to appeal from a trial court, it considers matters within the jurisdiction of the Constitutional Court the forum best placed to decide upon the fairness or unfairness of the admission of evidence is the trial court. Moreover, the decision to admit or exclude evidence is left to the discretion of the trial court, and appeal courts will interfere in a lower court's exercise of discretion only in limited circumstances. Section 319.1 of the Criminal Procedure Act, which allows reservation of a question of law by the state only upon the acquittal or

conviction of an accused should be construed to allow the state to appeal against an order dismissing or upholding an objection to a charge. Such a reading of the section brings it within constitutional bounds by recognising the right of the state to institute criminal proceedings and appeal adverse findings of law.

### *Summary:*

Respondent was charged in 1999 on 67 counts including murder, conspiracy to commit a variety of crimes, fraud and drug offences. Six of the charges relating to conspiracy to commit murder in countries other than South Africa were quashed by the trial court upon application by respondent. Respondent also successfully objected to the inclusion of the record of the bail application hearing as evidence in the main trial. The state's application for the recusal of the trial judge on grounds of bias and prejudice was dismissed.

After respondent was acquitted the state applied to the trial court in terms of Section 319.1 of the Criminal Procedure Act 51 of 1977 to reserve certain questions of law for consideration by the Supreme Court of Appeal (SCA). The SCA dismissed the application for reservation of questions of law.

The preliminary question whether the state's appeal lies against the trial court decision or the SCA's decision refusing leave to appeal to it arose. Difficulty arose from the legal principle that a decision of the SCA refusing leave to appeal is not itself appealable; but the SCA in considering whether to grant or refuse leave to appeal nevertheless considered the underlying constitutional issues. The Constitutional Court held that because the Constitution provides that the Constitutional Court is the court of final instance in all constitutional matters, any decision of the SCA that traverses constitutional issues must be appealable to it. The appeal was held to lie against the SCA.

The state's first ground of appeal was that the conduct of the trial judge during the proceedings displayed subconscious bias or gave rise to a reasonable apprehension of bias. The state argued that several remarks and incidents during the trial and several incorrect legal findings by the judge led to a reasonable apprehension of bias. The Court held that while some of the remarks were inappropriate, and some of the legal rulings or factual findings might have been mistaken, these had to be understood in the context of a marathon trial, where human error and frustration are understandable. The Court held that none of the incidents complained of, seen alone or cumulatively, gave rise to a reasonable apprehension of bias.

The state's second ground of appeal was that the decision to exclude the record of respondent's bail application hearing from evidence in the trial, on the basis that it would have been unfair to admit it, was wrong. The state argued that the trial court had not been at large to rule on the fairness or admissibility of the bail record at the outset of the trial, before the state had tendered any part of it as evidence. The Constitutional Court disagreed, holding that the forum best placed to decide upon the fairness or unfairness of the admission of evidence is the trial court. Moreover, the decision to admit or exclude evidence is left to the discretion of the trial court, and appeal courts will interfere in a lower court's exercise of discretion only in limited circumstances. The Court held this case not to fall within those circumstances.

The state appealed finally against the trial court's decision to quash six of the conspiracy charges. These charges all concerned alleged conduct which either falls within what are considered in international law to constitute war crimes or closely related to such conduct. The trial court had held that Section 18.2 of the Riotous Assemblies Act, the statutory provision from which the crime of conspiracy arises, envisages prosecution only for conspiracies to commit crimes that are themselves triable in South Africa. The six charges all related to conspiracies concluded in South Africa to commit crimes in other countries, including Namibia. The trial court held that since the target offences could not have been tried in South Africa, having been committed beyond the borders of South Africa, the charges of conspiracy disclosed no offence under the Riotous Assemblies Act. The SCA refused to reserve this question of law, holding that Section 319.1 of the Criminal Procedure Act allows reservation of a question of law by the state only upon the acquittal or conviction of an accused. Respondent was neither convicted nor acquitted on the six charges.

The Constitutional Court held that Section 319.1 should be construed to allow the state to appeal against an order dismissing or upholding an objection to a charge. Such a reading of the section brings it within constitutional bounds by recognising the right of the state to institute criminal proceedings and appeal adverse findings of law. Further, the SCA had failed to take account of South Africa's international law obligations to uphold and respect principles of international humanitarian law.

The Court held, having regard to certain provisions of the Riotous Assemblies Act and the Defence Act to which respondent was subject that there was a real and substantial connection between South Africa and the crimes to be committed in Namibia and elsewhere. The conspiracies were triable in South

Africa, and the trial court was wrong to conclude that the charges disclosed no offence. The order of the trial court quashing the six charges was set aside, leaving the state open to re-indict respondent.

*Languages:*

English.



## Switzerland

### Federal Court

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### Important decisions

*Identification:* SUI-2005-2-004

**a)** Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 24.11.2004 / **e)** 1A.152/2004 / **f)** Sulzer v. Municipal Council of Zurich, Council of State of the Canton of Zurich and Federal Council / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 131 I 12 / **h)** CODICES (German).

*Keywords of the systematic thesaurus:*

1.3.5 **Constitutional Justice** – Jurisdiction – The subject of review.

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

*Keywords of the alphabetical index:*

Civil right, determination / Civil right, concept / Real property, limitation / Property, protection, procedure / Road traffic, regulations.

*Headnotes:*

Section 98 of the Federal Law on judicial organisation; Article 26 of the Federal Constitution (guaranteeing the right to property); Article 6.1 ECHR. Traffic restrictions. Admissibility of an administrative law appeal to the Federal Court against a decision taken, upon appeal, by the Federal Council. Does a dispute in respect of traffic restrictions have a bearing on civil rights?

Admissibility, exceptionally, of an administrative-law appeal to the Federal Court not provided for in procedural law (grounds 1.1 and 1.2).

The owner of property adjoining a highway cannot rely on Article 26.1 of the Federal Constitution to object to traffic regulations where they do not make the use of the property for its intended purpose impossible or excessively complicated; a dispute arising in such a case does not have a bearing on civil rights within the meaning of Article 6.1 ECHR (ground 1.3).

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### *Summary:*

Mr Sulzer is the joint owner of a property in the old City of Zurich in which he operates a consultancy; there is a garage on the ground floor. Traffic regulations have been in force in the sector since 1972: in particular, traffic is prohibited between 7 p.m. and 5 a.m. and extended pedestrian zones place further restrictions on traffic.

In 1987 the police authority of the City of Zurich extended the pedestrian zone in the sector of the old city and in 1993 it incorporated the area in question within the traffic-free zone. All vehicular or motorcycle traffic is prohibited; access is permitted solely for the purposes of loading or unloading goods or picking up or dropping passengers between 5 a.m. and 12 noon; access is also permitted for hotel guests, taxis or holders of a written permit.

Following various objections and appeals, the Council of State of the Canton of Zurich eventually upheld the municipal decisions in 1999, Mr Sulzer's property remained in the traffic-free zone and the available derogations remained in force. Between 12 noon and 2 p.m., or 3 p.m., supervised barriers were set up and these enabled the restrictions to be monitored. The restrictions were confirmed by the Swiss Federal Council (Swiss Government), which rejected a further appeal by Mr. Sulzer.

Mr Sulzer lodged an administrative law appeal and requested the Federal Court to annul the decision of the Federal Council. He relied, in particular, on Article 6.1 ECHR and referred to the case-law of the Federal Court. The Federal Court did not proceed with the matter.

Section 98 of the Federal Law on judicial organisation precludes administrative law appeals against decisions of the Federal Council. However, the appellant claimed that as his civil rights within the meaning of Article 6.1 ECHR were affected, his appeal to the Federal Court must, exceptionally, be declared admissible.

According to the case-law of the European Court of Human Rights, the expression "civil dispute" is wide and goes beyond private law in the narrow sense. The question as to whether there is a dispute over civil rights and obligations is determined according to domestic law, taking into account the circumstances of the case. In particular, the dispute must be serious and its outcome must have a direct impact on civil rights; vague and indirect consequences are not sufficient. Disputes involving the exercise of property rights within the meaning of Article 26 of the Federal Constitution are of a civil nature. However, the

concept of civil rights and obligations is not unlimited. The Convention draws a distinction between those guarantees which require judicial review within the meaning of Article 6.1 ECHR and those which must be capable of forming the subject matter of an effective remedy before a national authority within the meaning of Article 13 ECHR.

Until recently the case-law accepted that the owner of a property adjoining a highway had no particular rights to use a road dedicated to general use and consequently was unable to challenge traffic restrictions on those roads by means of a public law action. However, recent case-law has recognised that the guarantee of the right to property also has de facto consequences and that an owner may therefore complain about restrictions which render the use of his property impossible or disproportionately difficult. However, the guarantee of the right to property does not protect the owner against any restriction on traffic that he might perceive to be disagreeable.

In the present case, the traffic restrictions turned out to be significant. However, it was not established that vehicular access to the appellant's property was indispensable to his enjoyment of the property. The sector in which the property is situated is served by a number of public transport services and there is a public car park nearby. There are derogations from the prohibition on traffic and special permits are available. There is no doubt that the police will issue such permits, taking account of the circumstances of the case. Accordingly, the appellant is not fundamentally affected by the restrictions on the use of his property. He is not, therefore, entitled to a judicial review, either by virtue of the guarantee of the right to property or under the terms of Article 6.1 ECHR. The administrative law appeal against the decision of the Federal Council was thus inadmissible.

### *Languages:*

German.



*Identification:* SUI-2005-2-005

a) Switzerland / b) Federal Court / c) First Public Law Chamber / d) 14.03.2005 / e) 1P.648/2004 / f) X. v. State Attorney and Criminal Court of the Canton of Zug / g) *Arrêts du Tribunal fédéral* (Official Digest), 131 I 185 / h) CODICES (German).

*Keywords of the systematic thesaurus:*

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

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

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:*

Abuse of right / Lawyer, presence at the hearing / Summons, to hearing, time-limit.

*Headnotes:*

Articles 29.2 and 32.2 of the Federal Constitution, Article 6.1, 6.3.b and 6.3.c ECHR; lawfulness of the summons to the hearing; rights of the defence in criminal proceedings.

Time-limit for summons to the hearing in a criminal appeal (ground 2.3).

Right to be represented by a lawyer in the hearing before the court; obligations of the judge where defending counsel is absent (review of the case-law; ground 3.2).

*Summary:*

Following a traffic accident, Ms X. was fined 1,500 Swiss francs (approximately 1.00 euros) by a sentence delivered on 6 January 2003. Upon application by Ms X. to set the order aside, the single judge of the Canton of Zug reduced the fine to 1,200 francs by judgment of 10 August 2004. At the hearing, Ms X.'s lawyer was present but Ms X. was absent.

Ms X. appealed against that judgment to the Criminal Court of the Canton of Zug on 1 September 2004. As the matter would become time-barred on

21 September 2004, the Criminal Court set the hearing for 13 September 2004 and invited Ms X. to attend; it also sent a copy of the summons to her lawyer, stipulating that according to the Code of Criminal Procedure of the Canton of Zug, the appeal would be deemed to have been withdrawn if Ms X. was absent without valid reason and that only a certificate issued by the cantonal doctor would be taken into consideration.

Ms X. was examined by the cantonal doctor, who declared that she was suffering from depression but would be capable of participating in a hearing for approximately one hour if she were accompanied by a person whom she was able to trust. The lawyer applied for the hearing to be adjourned until 23 or 24 September 2004. The Criminal Court proposed the dates of 15 or 16 September 2004. When the lawyer failed to respond, his application for an adjournment was dismissed.

At the sitting of the Criminal Court on 13 September, neither Ms X. nor her lawyer was present. By fax, the lawyer apologised for the absence of Ms X., who had been unable to find a trustworthy person to accompany her. The Criminal Court found that Ms X. was absent without reason and declared the appeal withdrawn.

Ms X. lodged a public law appeal and requested the Federal Court to set aside the decision of the Criminal Court. She claimed, in particular, that there had been a violation of her rights of defence according to the Federal Constitution and the European Convention on Human Rights. The Federal Court dismissed the public law appeal.

The right to be heard, as laid down generally in Article 29.2 of the Federal Constitution and, in criminal proceedings, in Article 32.2 of the Federal Constitution, requires that a lawful summons be sent to each party so that they are able to defend themselves effectively. According to Article 6.3.b ECHR, which puts the right to a fair trial in concrete form, everyone charged with a criminal offence is entitled to have adequate time and facilities to prepare his defence. In order to ascertain whether the period allowed to prepare for a hearing satisfies the requirements laid down in the Constitution and the Convention, it is necessary to take all the circumstances of the case into account, in particular the magnitude and the difficulties of the case, the nature of the proceedings and the situation of the persons concerned.

Ms X. and her lawyer received the summons to the sitting of the Criminal Court six days and seven days respectively before the date fixed. They had three

working days in which to prepare their defence. That period is rather short, in particular for the purpose of preparing for the cross-examination of witnesses. However, the case file was not voluminous and the prosecution waived the right to make submissions. Furthermore, the lawyer failed to respond to the proposal to adjourn the sitting by two or three days. On the other hand, the Criminal Court was able to take into consideration the fact that the proceedings were on the point of becoming time-barred and to adjourn the hearing accordingly. In the light of all of those circumstances, the Criminal Court did not violate the guarantees provided for in the Constitution and the Convention by fixing the date of the sitting on 13 September 2004.

#### Languages:

German.



#### Identification: SUI-2005-2-006

**a)** Switzerland / **b)** Federal Court / **c)** Second Public Law Chamber / **d)** 18.03.2005 / **e)** 2P.318/2004 / **f)** X. v. Department of the Interior and Administrative Court of the Canton of Solothurn / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 131 I 166 / **h)** CODICES (German).

#### Keywords of the systematic thesaurus:

- 5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
- 5.1.3.1 **Fundamental Rights** – General questions – Limits and restrictions – Non-derogable rights.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.4.18 **Fundamental Rights** – Economic, social and cultural rights – Right to a sufficient standard of living.

#### Keywords of the alphabetical index:

Abuse of right / Social assistance, entitlement, conditions / Social assistance, asylum seeker / Accommodation, allowance / Asylum, seeker, duty to cooperate.

#### Headnotes:

Article 7 of the Federal Constitution (human dignity) and Article 12 of the Federal Constitution (right to obtain assistance in situations of distress); right to emergency assistance and scope thereof.

From a constitutional aspect, may asylum seekers in respect of whom a decision not to proceed with an application has been taken be deprived of emergency assistance on the ground that they have failed to fulfil their duty to co-operate in the execution of the order to leave the country (grounds 1-7)?

Is an accommodation allowance of 13 Swiss francs per day paid by way of emergency assistance sufficient from the point of view of the Federal Constitution (ground 8)?

#### Summary:

The Federal Office for Refugees did not proceed with the application for asylum of X. (born in 1987), since the likelihood was that he was not of Cameroonian origin, as he claimed, but that he was from Nigeria. By decision of 8 April 2004, he was requested to leave Switzerland immediately. However, the applicant did not comply with that order. Since 4 June 2004 the Office of Municipalities and Social Security of the Canton of Solothurn has maintained X. for 143 days by providing emergency benefits amounting to 3,087 Swiss francs (approximately 2,000 euros).

On 29 October 2004, the Cantonal Department of the Interior decided that X. would no longer obtain emergency assistance and would receive only a final sum of 105 francs for 5 days. If he did not leave Switzerland within that period, he would no longer receive any maintenance whatsoever. A request for emergency assistance would be considered only if the applicant made an effort to return to his country of birth. An appeal against that decision was dismissed by the Administrative Court of the Canton of Solothurn, which denied, *inter alia*, that there had been a breach of Article 12 of the Federal Constitution, which gives the right to obtain assistance in situations of distress.

X. lodged a public law appeal and requested the Federal Court to set aside the judgment of the Administrative Court and to find that various provisions of cantonal law were unconstitutional. He referred in particular to the provisions of Articles 7 and 12 of the Federal Constitution on human dignity and the right to obtain assistance in situations of distress. The Federal Court declared the public law appeal admissible.

Social assistance for aliens whose applications for asylum have been rejected by decisions not to proceed with the application within the meaning of the Federal Law on asylum is determined by cantonal law. The order implementing the Law on social assistance of the Canton of Solothurn provides that persons in respect of whom a decision not to proceed with the application has been taken obtain only emergency assistance. It is stipulated in certain orders of the Council of State that emergency assistance is to be allowed for only 5 days and in principle in the form of an amount of 21 Swiss francs (approximately 14 euros), being 13 francs for accommodation and 8 francs for food and hygiene; additional allowances for clothing and medical services may be made.

Article 12 of the Federal Constitution ensures that anyone in a situation of distress who is not capable of looking after himself or herself is entitled to be assisted and to receive the means indispensable for leading a life consistent with human dignity. That fundamental right is governed by the principle of subsidiarity and does not guarantee a minimum income; it requires solely that the means essential for survival and to protect the individual from the indignity of being required to beg be granted. It is closely related to the human dignity guaranteed by Article 7 of the Federal Constitution and may be relied on both by Swiss citizens and by aliens, irrespective of their status. It was agreed that in the present case the applicant did not have sufficient means to live decently.

It was common ground that the appellant was required to leave the country and that he was not fulfilling his duty to co-operate as regards his identity and his origin or his duty to produce official papers. Those obligations continued to apply irrespective of the question of emergency assistance. However, they had no direct influence on the appellant's state of distress and could not be imposed as conditions of obtaining emergency assistance. Article 12 of the Federal Constitution granted the right to emergency assistance independently of the reasons for the distress.

Emergency assistance could not be restricted according to the criteria which allow fundamental rights to be generally limited (legal basis, public interest, proportionality), since the scope of that right coincides with the very core of the right. Nor was it possible to speak of an abuse of right on the part of the appellant; he needed emergency assistance in order to survive and therefore used it in accordance with the purpose of the constitutional guarantee, although that did not mean that the appellant's failure

to comply with his obligations and his conduct could not be regarded as provocative.

Ultimately, the fact that an alien required to leave the country failed to comply with his obligations did not provide a ground for restricting, or indeed refusing, emergency assistance. Article 12 of the Federal Constitution required that that assistance be granted when survival and human dignity were threatened. The judgment being appealed was therefore contrary to the Federal Constitution and must be set aside.

The appellant further claimed that the amount of 21 francs granted pursuant to the directives of the Council of State was not sufficient to ensure a decent life and therefore did not comply with the requirements of Article 12 of the Federal Constitution. He did not criticise the amount of 8 francs for food and hygiene, but only the amount of 13 francs for accommodation.

Emergency assistance might vary according to the circumstances of the case and might be granted in different forms. The needs of a person entitled to remain in Switzerland would differ from those of somebody required to leave the country, and the needs of young persons, adults or elderly persons would also be different. Comparison with the situation in other cantons was scarcely possible, as certain cantons had opted for collective accommodation. The deciding factor was that the appellant did not demonstrate that it was impossible to obtain accommodation at that price; the sum awarded was for emergency assistance and was thus not contrary to the Federal Constitution.

The appellant's allegation that the obligation to present himself to the authorities once per week represents an unconstitutional inconvenience is unfounded. Emergency assistance may be granted in the form of food or accommodation and in that case the person receiving assistance would in any event have to present himself.

*Languages:*

German.





## “The former Yugoslav Republic of Macedonia” Constitutional Court

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A revised version of the contribution to *Bulletin 2005/1* is available in version 2005/2 of the CODICES database.

### Important decisions

*Identification:* MKD-2005-2-004

a) “The former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 18.05.2005 / e) U.br.73/2004 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 42/2005, 07.06.2005 / h) CODICES (Macedonian).

*Keywords of the systematic thesaurus:*

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

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

*Keywords of the alphabetical index:*

Transparency, employment, without advertising, lack.

*Headnotes:*

Filling a job vacancy without advertising it means that some citizens are privileged and it is easier for them to become employed without there being transparency and mutual competition.

*Summary:*

Article 9 of the Labour Law deals with an employer who does not advertise when concluding and certifying a job contract.

The Court established that under Article 9 of the Labour Law, an employer may engage workers by means of posting a public announcement in the daily press at his own expense; announcement in the

service competent to mediate in the employment without compensation; with the mediation of the service for mediation for employment by means of sending people to be employed based on the records of unemployed people; engagement on the part of the employer himself without posting an announcement by concluding and certifying a job contract, and, through an agency for employment, mediation for a compensation from an employer, in accordance with this and other law.

Article 9 of the Labour Law defines the way in which an employer may engage employees. Among the various ways, this article of the Law allows for engagement of employees on the part of the employer himself without announcement by concluding and certifying a job contract.

The constitutional guarantee for the availability of jobs to everyone under the same conditions is one of the fundamental rights of the citizen which is, at the same time, a guarantee for his/her economic and social security and expresses the determination for each individual capable of working to exercise that right under certain conditions and objective possibilities and for any type of job.

In the opinion of the Court, the definition contained in Article 9 of the Labour Law for the engagement of employees by the employer himself without announcement, resulted in citizens being in an unequal position regarding job availability. Namely, the filling of a job vacancy without announcement means that some citizens are privileged and it is easier for them to become employed without there being transparency and mutual competition.

The employment, that is to say the filling of a vacant job without announcement by concluding and certifying a job contract, resulted in inequality between citizens and limitation of the right to availability of every job for those citizens who do not realize at all that there are vacant jobs, as a result of which there were held to be grounds for the Court to judge that Article 9 in the part contested does not conform with Articles 9 and 32 of the Constitution.

*Languages:*

English, Macedonian.





**Identification:** MKD-2005-2-005

a) "The former Yugoslav Republic of Macedonia" / b) Constitutional Court / c) / d) 15.06.2005 / e) U.br.31/2005 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 51/2005, 30.06.2005 / h) CODICES (Macedonian).

**Keywords of the systematic thesaurus:**

3.4 **General Principles** – Separation of powers.  
 3.9 **General Principles** – Rule of law.  
 3.10 **General Principles** – Certainty of the law.  
 3.13 **General Principles** – Legality.  
 5.3.38 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law.  
 5.4.2 **Fundamental Rights** – Economic, social and cultural rights – Right to education.

**Keywords of the alphabetical index:**

Education, secondary, graduation.

**Headnotes:**

Lack of clarity within the disputed article creates legal uncertainty contrary to the constitutional principle of the rule of law.

When the contested article is connected with the date of entry into force of the new curricula and programmes, that is to say, their adoption depends on the Minister's decision, the application of the law in this section depends on the will of the executive power.

**Summary:**

In a petition, an individual requested the Court to instigate proceedings for the appraisal of the constitutionality of Article 55 of the Law on Changing and Supplementing the Law on Secondary Education and the constitutionality and legality of The Book of Rules on the manner of taking examinations and the evaluation of the results of the students in the graduation examinations in gymnasium education and The Book of Rules on the manner of taking the examinations and the evaluation of the results of the students in the final examination in secondary vocational education.

The Court established that Article 55 of the Law on Changing and Supplementing the Law on Secondary Education changes Article 114 and it reads as follows:

"The provisions in Articles 26.2, 27, 28, 29.1, 29.2, 29.3 and 30.2 of this law, which relate to the state graduation examination, the school graduation examination and the final examination shall apply as of the entry into force of the new curricula and programmes".

The Court also established that on the basis of Article 38.2 of the Law on Secondary Education, the Minister of Education had adopted the disputed books of rules, which regulate the manner of taking the examinations and the evaluation of the results of the students in the school graduation examinations in the gymnasium education, that is, the manner of taking the examinations and the evaluation of the results of the students in the final examination in the secondary vocational education lasting for four, that is, three years.

Article 55 of the Law on Changing and Supplementing the Law on Secondary Education changes Article 114 to read as follows: "The provisions in Articles 26.2, 27, 28, 29.1, 29.2, 29.3 and 30.2 of this law, which refer to state graduation examination, school graduation examination and final examination shall apply from the date the new curricula and programmes entered into force."

Articles 26.2, 27, 28, 29.1, 29.2, 29.3 and 30.2, to which the contested article relates, are provisions in the Law on Changing and Supplementing the Law on Secondary Education with which a new paragraph 2 is added to Article 33, while the existing paragraph 2 is modified; Article 35 is changed completely; in Article 37 the word "school" is added before the word "graduation examination"; Article 38 is modified completely; in Article 39 the words "that is, educational profiles" are added after the word "professions" and a new paragraph 2 is added.

It was apparent that from a "legal-technical" viewpoint, the disputed article was unclear and created dilemmas as to which provisions of the law were concerned, which created legal uncertainty contrary to the constitutional principle of the rule of law.

Also, the contested article governs the application of the provisions referring to state graduation examinations, school graduation examinations and final examinations from the date of entry into force of the new curricula and programmes, which meant that their adoption depend on the Minister's decision, so that the application of the law in this part depended on the will of the executive power. In other words, this meant that the beginning of the application of the law would depend on the will of the executive power, that was, when it would adopt new curricula and programmes.

Accordingly, the Court found it unclear what the legislator meant by “new curricula and programmes”, that is to say, whether the phrase ‘new curricula and programmes’ implies curricula and teaching programmes under which students would begin and follow instructions in secondary education, or whether it implies curricula and programmes for taking the final examination (graduation examination), even more so because the Law used the terms: curricula, subjects, programmes, examination programmes, etc.

Given the contents of the disputed article and the dilemmas deriving from its lack of clarity, the Court judged that the whole article creates legal uncertainty as a result of which it is not in conformity with the constitutional principles of the rule of law, as well as with the constitutional principle of the division of powers into “legislative, executive and judicial”.

In view of the books of rules challenged, the Court judged that they had been adopted prior to the adoption of the new curricula and programmes, prior to the adoption of the examination programmes and prior to the adoption of the new Concept for graduation examination and final examination in public secondary education.

Also, the contested books of rules refer only to school graduation examination, that is final examinations, whilst the Law provides for taking state graduation examination or school graduation examinations, that is state graduation examinations or final examinations. That means that there was no act whatsoever that would govern the manner of taking examinations and of evaluating the results of students in state graduation examinations, although pursuant to the law, students are free to elect whether they will take state graduation examinations or school graduation examinations, that is state graduation examinations or final examinations.

Hence, the Court judged that the books of rules challenged had been adopted prior to the entry into force of the new curricula and programmes, that they refer to the graduation examination of students from the 2004/2005 school year who had followed the lectures according to other curricula and programmes and that there are no provisions for taking state graduation examinations, whereby students were denied the legally bestowed right to a choice, as a result of which the books of rules were not in conformity with the Law on Secondary Education.

Taking into consideration the contents of the books of rules disputed, as well as the fact that they were adopted in February 2005, so that students, contrary to their legitimate expectations, found out about the changes three months prior to taking the graduation

examinations, the Court judged that the books of rules are not in conformity with the Constitution regarding the legal certainty as an element of the principle of the rule of law, as well as with regard to the constitutional prohibition of the retroactive effect of laws and other regulations.

#### *Languages:*

English, Macedonian.



# Turkey

## Constitutional Court

### Important decisions

*Identification:* TUR-2005-2-005

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 31.03.2004 / **e)** E.2002/94, K.2004/45 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 14.05.2005, 25815 / **h)** CODICES (Turkish).

*Keywords of the systematic thesaurus:*

3.9 **General Principles** – Rule of law.  
 3.19 **General Principles** – Margin of appreciation.  
 4.5.2 **Institutions** – Legislative bodies – Powers.  
 5.2 **Fundamental Rights** – Equality.  
 5.3.23 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

*Keywords of the alphabetical index:*

Media, editor, criminal responsibility, effects / Media, journalist, criminal responsibility, regime.

*Headnotes:*

Because of the special characteristics of publication activities, the legislature has introduced different rules on general criminal liability for the responsible editors in chief of periodicals as opposed to those valid for journalists who are authors of articles, news or caricatures. This falls within the discretionary power of the legislature. Moreover, there is no doubt that the perpetrators of actions (i.e. the authors of the articles or of the news or caricaturists) have a different legal status from the editors in chief of periodicals.

*Summary:*

The Ankara 2nd Court of First Instance brought an action in the Constitutional Court alleging that the third sentence of Article 16.1 (amended by the Law 2950) of the Law on Press, 5680, was contrary to the Constitution.

Article 16.1 of the Law on Press stipulates that “the liability for offences committed by way of periodicals

lies with the author of the articles or of the news or caricaturists as well as with the responsible editors in chief of the periodical. However, the penalties requiring imprisonment to be applied to the responsible editors in chief of the periodicals shall be changed to a fine, without considering the duration of the imprisonment. The lowest limit of the amounts mentioned in Article 4.1 of the Law on the Execution of Penalties (647) shall be taken into account in the calculation of fines. The sanction of putting under surveillance shall not be imposed against the responsible editors in chief.” The Applicant Court alleged that the third sentence of the Article confers privilege upon the responsible editors in chief of the periodicals.

The principle of equality before the law does not mean that everybody shall be bound by the same rules. It is a natural consequence of the equality principle that individuals having the same legal status shall be bound by the same rules, while others having different legal status shall be bound by different rules. On the other hand, 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 them provided that it is in conformity with the general principles of the Constitution and with those of the criminal law.

The liability of the editors in chief of periodicals as provided in the contentious article is a special and exceptional one stemming from Article 16 of the Law on Press. Since the authors of the articles, the news or the caricaturists do not have the same status, the legislature may enact different rules for those groups of people as far as criminal liability is concerned.

The provision in question is therefore not contrary to the principles of equality and of the rule of law. The demand was unanimously rejected.

*Languages:*

Turkish.



*Identification:* TUR-2005-2-006

**a)** Turkey / **b)** Constitutional Court / **c)** / **d)** 06.05.2004 / **e)** E.2002/70, K.2004/56 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 01.06.2005, 25832 / **h)** CODICES (Turkish).

*Keywords of the systematic thesaurus:*

5.2 **Fundamental Rights** – Equality.

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

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

5.3.13.27 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to counsel.

*Keywords of the alphabetical index:*

Accused, special protection / Legal aid, without demand.

*Headnotes:*

Providing an advocate from Bar Associations for the accused or the detained upon their demand, and for vulnerable groups such as speech-impaired, deaf and handicapped persons without their demand is not contrary to the Constitution. The accused is under the threat of penalty and thus in particular need have defence. The principle of presumption of innocence renders the right to have a defence a fundamental requirement in order to arrive at a decision in criminal proceedings. For that reason, the rights of the accused are given priority in national and international documents. This does not impede the legislator from enacting provisions regarding the rights of aggrieved persons, as is the case for the accused and the detained.

*Summary:*

The Bursa 5th Court of First Instance brought an action before the Constitutional Court alleging that Article 138 of the Code of Criminal Procedures (amended by Law 3842) was contrary to the Constitution.

Under Article 138 of the Code of Criminal Procedures, if the accused or the detained declares that he/she is not in a situation to have an advocate appointed themselves, then an advocate is appointed for him/her from the Bar Association upon the request of the law-enforcement authorities or of the court. If the accused or the detained is under the age of eighteen or he/she is speech-impaired or deaf or handicapped to the degree that he or she is unable to defend himself or herself, then an advocate shall be appointed on behalf of him/her without demand.

The Court that referred the case to the Constitutional Court alleged that the provision of Article 138 of the

Code of Criminal Procedures confers more rights upon the defence than upon the aggrieved. The right to have a defence is assured for the accused or for the detained, while the aggrieved party in spite of his/her desire may not have an advocate appointed from the Bar.

Article 10.1 of the Constitution provides that “All individuals are equal without any discrimination before the law, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such considerations.”

The Constitutional Court stressed that the protection of the accused or detained person as provided in the article in question, is a special protection for persons who do not have the possibility of having an advocate or for those who are under the age of 18 or deaf or speech-impaired or handicapped. Therefore, this special protection must be taken into account in the constitutional review of the provision in point. The appointment of an advocate for a certain group of people without their demand is made after considering whether a special protection is needed or not for those people. From that point of view, the objected provision reinforces the right to fair trial and the right to defence.

The developments in contemporary criminal law are directed towards protecting the aggrieved party as well as the accused and the detained. Thus, there is no obstacle impeding the legislative power from bringing provisions regarding the rights of aggrieved parties. As a matter of fact, there are some provisions in the recently-drafted Code of Criminal Procedures regarding the rights of aggrieved parties.

Therefore, the demand was rejected. Justice H. Kilic had a dissenting opinion and the justices M. Erten and F. Sađlam had different reasonings.

*Languages:*

Turkish.

*Identification: TUR-2005-2-007*

a) Turkey / b) Constitutional Court / c) / d) 25.07.2005 / e) E.2004/2 (Political Parties – Reprimand), K.2005/4 / f) / g) *Resmi Gazete* (Official Gazette), 25.07.2005, 2897 / h) CODICES (Turkish).

*Keywords of the systematic thesaurus:*

4.5.10.3 **Institutions** – Legislative bodies – Political parties – Role.

*Keywords of the alphabetical index:*

Political party, extraordinary assembly, holding, procedure.

*Headnotes:*

In order to have an extraordinary general assembly meeting for political parties, one fifth of the existing members of the general assembly must have delivered their petitions to the Party, not one fifth of the total number of general assembly members. Once petitions have been deposited with the Party, it is possible to withdraw from the requests. However, once one fifth of the petitions of the existing members have been obtained, there is a binding effect on the Party as well as on the delegates; the Party is then bound to organise a requested extraordinary general assembly meeting.

*Summary:*

The Chief Public Prosecutor demanded from the Constitutional Court that the Republican People's Party (CHP) be given a reprimand because of the violation of Articles 14 and 104 of the Law on Political Parties (2820).

The Chief Public Prosecutor alleged that CHP had not extraordinarily convened its general assembly in spite of a call from an adequate number of its delegates under Article 14.6 of the Law on Political Parties.

The Party asserted that the call to convene the general assembly was not made since some of its delegates had withdrawn their demands and some had had no competence to make demands, and thus the adequate number, i.e. one fifth of the total number of delegates, had not been obtained as is provided in the Law and in the Party's Rules.

The Constitutional Court indicated that it should be clarified whether "the total number of delegates" or "the number of currently existing delegates" should be taken into account in order to extraordinarily convene the general assembly. Another question related to whether it was possible for the delegates to withdraw their petitions to the Party once they had deposited them at the Party Office.

In Article 14.6 of the Law 2820 it is stated that "... extraordinary meetings shall be held upon the necessity deemed by the president or by the "Board

of Central Decisions" or by the board of directors or by at least one fifth of the members of the general assembly". The Constitutional Court noted that according to Article 14.6, "the members of the general assembly" may demand an extraordinary meeting but not "the total number of members" of the general assembly. In the ninth paragraph of the same article, it is stated that the necessary qualification to convene the general assembly is "the majority of the total number of members of the general assembly" and the phrase "the total number" is clearly emphasised. In the Rules of the Party there is a similar provision.

Then, since it is not possible to take into account the total number of the members of the general assembly – if not stated clearly – the actual number of the members of the general assembly at the date of application should be taken into account in order for an extraordinary meeting to be held.

When the number of members of the general assembly at the application date was taken into account, it was understood that more than one fifth of the members had called for an extraordinary meeting.

On the other hand, between the dates of 6 June 2004 and 21 June 2004, the requests of 348 members had reached the Party Centre. Since 14 of them had legal obstacles, such as resignation, expulsion and similar reasons, the number had dropped to 334. Since only 11 members out of 78 had withdrawn from their request before the date 21 June 2004, (others' withdrawal had reached the Party Centre after that date) the validity of those withdrawals is legally indisputable. However, when those numbers were taken into account, it was understood that the request for an extraordinary meeting had been made by more one fifth of the members. This request had a binding effect on the members and on the Party. For that reason, even if some of the members had withdrawn their requests after one fifth had been reached, the Party would have to have convened the general assembly for an extraordinary meeting. Since, that imperative meeting had not been held by the competent party organs; therefore a decision of reprimand must be given to the Party in accordance with Article 104 of the Law on Political Parties.

*Languages:*

Turkish.





# United States of America Supreme Court

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## Important decisions

*Identification:* USA-2005-2-003

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 16.05.2005 / **e)** 03-1116, 03-1120, 03-1274 / **f)** *Granholm v. Heald* / **g)** 125 *Supreme Court Reporter* 1885 (2005) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

3.17 **General Principles** – Weighing of interests.  
 3.18 **General Principles** – General interest.  
 3.25 **General Principles** – Market economy.  
 4.8.8.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Principles and methods.

*Keywords of the alphabetical index:*

Commerce, interstate, discrimination / Market, free access.

*Headnotes:*

Laws of the federal units that discriminate against interstate commerce face a virtually *per se* rule of invalidity.

Laws of the federal units that discriminate against interstate commerce will be constitutionally valid only if such discrimination is necessary to achieve public policy objectives.

A constitutional provision prohibiting importation into federal unit of intoxicating liquors in violation of the laws of those federal units does not serve to insulate laws that discriminate against out-of-state producers from constitutional scrutiny.

*Summary:*

By means of direct-shipment laws, the states of Michigan and New York regulated the sale via the mails of wine from out-of-state producers to in-state purchasers. Under Michigan's law, in-state wineries were allowed to ship directly to in-state consumers,

subject only to licensing requirements, but all out-of-state wine was required to pass through in-state wholesalers and retailers before reaching consumers. New York's regulatory system had similar provisions, but allowed out-of-state wineries to gain the privilege of direct shipment if they established licensed in-state distribution operations. In addition, New York prohibited out-of-state wineries from obtaining "farm winery" licenses, which were available to in-state producers and which provided the most direct means of shipping to in-state consumers. These laws were enacted pursuant to the Twenty-first Amendment to the U.S. Constitution, which states in Section 2 that the "transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

In separate legal actions, residents of Michigan and New York filed lawsuits challenging the constitutionality of their states' direct shipment laws. In the New York lawsuit, the plaintiffs also included some out-of-state wineries. Both lawsuits contended that the direct shipment laws discriminated against interstate commerce in violation of the commerce clause in Article I, Section 8, Clause 3 of the U.S. Constitution, which states that the U.S. Congress shall have power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

In the Michigan case, the first instance federal court denied the complaint, but the Court of Appeals for the Sixth Circuit reversed. The Court of Appeals concluded that the Twenty-first Amendment did not immunize all state liquor laws from the requirements of the commerce clause, and that the state of Michigan had failed to demonstrate that the state could not meet its purported policy objectives through non-discriminatory means. In the New York case, the first instance federal court granted judgment to the plaintiffs, but the Court of Appeals for the Second Circuit, concluding that New York's laws were within the scope of a state's powers under the Twenty-first Amendment, reversed.

The United States Supreme Court accepted petitions for review in both of the cases and consolidated them. In a five to four decision, the Court affirmed the judgment of the Sixth Circuit Court of Appeals and reversed that of the Second Circuit Court of Appeals. The Court held that the laws of both states discriminated against interstate commerce by depriving their citizens of access to out-of-state markets on equal terms. State laws that discriminate against interstate commerce, the Court stated, face a "virtually *per se* rule of invalidity." In the instant case, the Court concluded, the laws in question violated the

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commerce clause because Michigan and New York had not demonstrated that discrimination was necessary to advance their purported goals such as reducing the risk of underage drinking and protecting against tax evasion. In addition, the Court ruled that the laws were not saved by Section 2 of the Twenty-first Amendment, because that provision does not allow states to regulate the direct shipment of products on terms that discriminate in favour of in-state producers.

#### *Supplementary information:*

The views of the four dissenting Justices were expressed in two separate opinions. Both dissenting opinions emphasised the view that the laws in question were insulated by the Twenty-first Amendment from scrutiny under the judicially-recognised non-textual prohibitions of the commerce clause, known as the “dormant” or “negative” commerce clause.

#### *Languages:*

English.



#### *Identification:* USA-2005-2-004

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 06.06.2005 / **e)** 03-1454 / **f)** Gonzales v. Raich / **g)** 125 *Supreme Court Reporter* 2195 (2005) / **h)** CODICES (English).

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

3.25 **General Principles** – Market economy.  
4.5.2 **Institutions** – Legislative bodies – Powers.  
4.8.8.1 **Institutions** – Federalism, regionalism and local self-government – Distribution of powers – Principles and methods.

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

Commerce, interstate / Drug, fight against / Marijuana, cultivation for personal medical use.

#### *Headnotes:*

Even if a party’s activity is local and non-commercial, such activity may, whatever its nature, be subject to federal regulation if the activity exerts a substantial economic effect on interstate commerce.

In assessing the scope of the federal legislature’s regulatory authority under the constitutional grant of power to regulate interstate commerce, the reviewing court need not determine whether the activities subjected to regulatory authority in a discrete case substantially affect interstate commerce in fact, but only whether the legislature had a rational basis for so concluding.

#### *Summary:*

In 1970, the U.S. Congress enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970 (the “1970 Act”). The objectives of the legislation were to conquer drug abuse and to control the legitimate and illegitimate trafficking in controlled substances. Among other measures, the 1970 Act classifies marijuana among those controlled substances for which the manufacture, distribution, or possession is a federal criminal offence.

In a 1996 referendum, voters of the state of California approved a proposal that later was codified as the Compassionate Use Act of 1996 (the “1996 Act”). The 1996 Act created an exemption from criminal prosecution for physicians, as well as for patients and primary caregivers who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician. According to the 1996 Act, a “primary caregiver” is a person who has consistently assumed responsibility for the housing, health, or safety of the patient.

In 2002, county deputy sheriffs and agents of the Federal Drug Enforcement Administration went to the home of Diane Monson, a California resident who suffers from a serious medical condition and who cultivated and ingested her own marijuana. After an investigation, the county officials determined that her use of marijuana was lawful as a matter of California law. After a three-hour standoff, however, the federal agents, acting pursuant to the 1970 Act, seized and destroyed all of Ms Monson’s marijuana plants.

Ms Monson and another California resident thereafter filed a lawsuit in federal court, seeking declaratory relief and an injunction prohibiting the enforcement of the 1970 Act to the extent that it prohibits them from possessing, obtaining, or manufacturing marijuana for their personal medical use. They claimed that

enforcement of the 1970 Act violated, among other provisions, the Commerce Clause in Article I, Section 8, Clause 3 of the U.S. Constitution, which states that the U.S. Congress shall have power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” They claimed that the 1970 Act, as applied to the intrastate, non-commercial cultivation and possession of marijuana for personal medical purposes as recommended by a patient’s physician pursuant to a valid state law, exceeded the authority of the federal legislature under the Commerce Clause.

The First Instance Court denied the plaintiffs’ motion for an injunction. The Court of Appeals, having concluded that the plaintiffs had demonstrated a strong likelihood of success on their claim, reversed that judgment and ordered the First Instance Court to issue a preliminary injunction.

The U.S. Supreme Court accepted review and, in a six to three decision, reversed the judgment of the Court of Appeals and ordered it to vacate the injunction. The Court concluded that Congress had a rational basis for determining that the exclusion of home-consumed marijuana from federal control would affect interstate price and market conditions, that Congress had included findings in the introductory sections of the 1970 Act that explained the appropriateness of including local activities with the Act’s scope, and that the fact that the 1970 Act regulated some purely intrastate activity was not significant. In regard to the last point, the Court noted that its case law has firmly established the power of Congress to regulate purely local activities that are part of an economic class of activities that have a substantial effect of interstate commerce.

#### *Supplementary information:*

The views of the three dissenting Justices were expressed in two separate opinions. In one of those opinions, Justice O’Connor, joined by two other Justices, criticised the majority for sanctioning an application of the 1970 Act that foreclosed a state’s experiment without requiring proof that the plaintiffs’ activity had a substantial effect on interstate commerce. In so doing, this opinion added, the Court was articulating a rule that gives the federal legislature an incentive to regulate broadly pursuant to the Commerce Clause, rather than with precision. In the other dissenting opinion, Justice Thomas expressed the view that the plaintiffs’ activity was not interstate commerce and therefore the federal legislature lacked the authority to regulate it.

California is one of eleven states that allowed the possession and use of marijuana for medical purposes.

#### *Languages:*

English.



#### *Identification: USA-2005-2-005*

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 23.06.2005 / **e)** 04-108 / **f)** Kelo v. City of New London, Connecticut / **g)** 125 *Supreme Court Reporter* 2655 (2005) / **h)** CODICES (English).

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

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:*

Property, taking / Public purpose / Public use, interpretation.

#### *Headnotes:*

A governmental taking of private property may not be employed simply to confer a private benefit on a particular private party.

Under the “public purpose” interpretation of the “public use” requirement for a valid taking of private property, the public authority is not required to demonstrate that the condemned land will be open for use by the general public.

In assessing the constitutional validity of a governmental taking of property, courts observe a longstanding policy of judicial deference to legislative judgments as to what public needs justify the use of the takings power.

*Summary:*

A group of nine real property owners, including Sesette Kelo, challenged the constitutionality of an economic development plan prepared and implemented by the city of New London, state of Connecticut. In 1990, the state of Connecticut designated the city as a “distressed municipality”, due to its high unemployment rate and declining number of residents. The purpose of the economic development plan was to rejuvenate the city’s economy, create more than 1,000 jobs, and increase taxes and other revenues. It centered on construction, all to be paid for by private financing, of a hotel, restaurants, retail and office buildings and residences, a marina for recreational and commercial uses, and other projects. In order to clear the development area for the new construction, the city in 2000 used the governmental power of eminent domain to condemn the plaintiffs’ properties, some of which were the plaintiffs’ residences. None of the properties had been determined to be blighted or otherwise in poor condition.

The plaintiffs, who had refused the city’s offers of compensation, based their legal challenge on the “takings” clause of the Fifth Amendment to the U.S. Constitution, which states that private property shall not “be taken for public use, without just compensation”. The takings clause is made applicable to the states by the Fourteenth Amendment to the U.S. Constitution. The plaintiffs claimed that the taking of their properties by the city was not for a “public use”. The First Instance Connecticut State Court issued an order prohibiting the city from taking some of the properties, but denied relief to the owners of some of the properties. Both sides in the dispute appealed to the Supreme Court of Connecticut, which held that all of the takings qualified as a public use and were constitutionally valid.

The United States Supreme Court accepted the plaintiffs’ petition for review of the decision of the Connecticut Supreme Court. In a five to four decision, the Court affirmed the Connecticut Supreme Court’s ruling. The Court concluded that although the city could not take the plaintiffs’ land simply to confer a private benefit on a particular private party, the takings in question would be undertaken pursuant to a carefully considered development plan which was not adopted to benefit a particular class of identifiable individuals. In addition, the Court stated that it long had interpreted “public use” to mean “public purpose”; therefore, under this broad interpretation, it was not consequential that the city was planning not to open much of the condemned land for use by the general public. According to the Court, the broad “public

purpose” interpretation reflects the longstanding policy of judicial deference to legislative judgments as to what public needs justify the use of the takings power. In the circumstances of the instant case, the Court concluded that the city’s plan, which was undertaken pursuant to a Connecticut statute that authorises the use of eminent domain to promote economic development, was entitled to such deference.

*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 Thomas.

*Languages:*

English.

*Identification: USA-2005-2-006*

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 27.06.2005 / **e)** 04-278 / **f)** Town of Castle Rock, Colorado v. Gonzales / **g)** 125 *Supreme Court Reporter* 2796 (2005) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

4.6.10 **Institutions** – Executive bodies – Liability.  
4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.  
5.3.17 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

*Keywords of the alphabetical index:*

Benefit, governmental / Entitlement, protected / Due process, procedural / Due process, substantive / Property, interest.

*Headnotes:*

The procedural component of due process provides a right to protection of a governmental benefit only if a claimant has a legitimate claim of entitlement to a property interest in the benefit.



The Constitution does not create property interests for sue process purposes; instead, such interests are created by existing rules or understandings that stem from an independent legal source, such as legislation.

A governmental benefit is not a protected entitlement under procedural due process if government officials have discretion to grant or deny the benefit.

Procedural due process does not provide a personal entitlement to enforcement of a judicial restraining order unless the applicable law has made enforcement of such orders mandatory.

### *Summary:*

Ms Jessica Gonzales sought and received a restraining order from a state court in the state of Colorado. The order commanded her estranged husband, Mr Simon Gonzales, “not to molest or disturb” the peace of Ms Gonzales or of any child, and required him to stay at least one hundred yards from the home in which Ms Gonzales and her three daughters, aged 7, 9, and 10, resided. Several weeks later, on 22 June 1999, beginning at about 17:00 or 17:30, Ms Gonzales repeatedly contacted the police of the Town of Castle Rock, Colorado, urging them to find and arrest Mr Gonzales, who had taken the girls as they played outside the house and took them away in his truck. The police did not act on the information conveyed by Ms Gonzales. Her last contact with the police was at 0:50 on 23 June. At approximately 3:20 that morning, Mr Gonzales arrived at the police station, firing a gun. The police shot back, killing him. They then found the bodies of the three girls, whom he apparently had murdered before arriving at the police station, in the back of his truck.

Ms Gonzales filed a lawsuit in federal court against the Town of Castle Rock, alleging that the municipality had violated the due process clause of the Fourteenth Amendment to the U.S. Constitution because its police department had “an official policy or custom of failing to respond properly to complaints of restraining order violations” and tolerated “the non-enforcement of restraining orders by its police officers.” The Fourteenth Amendment provides that a state shall not “deprive any person of life, liberty, or property, without due process of law.” Ms Gonzales claimed that Colorado law had given her an enforceable right to protection by instructing the police, in the court order, that “you shall arrest” or issue a warrant for the arrest of a violator. Therefore, she claimed that she had a property interest in police enforcement of the restraining order against her husband, and that the Town had deprived her of this property.

Due Process jurisprudence recognises the potential availability of two separate claims: a breach of a substantive duty and a breach of a procedural duty. In a 1989 decision, *DeShaney v. Winnebago County Department of Social Services*, the U.S. Supreme Court confronted a fact situation similar to that in the instant case. In *DeShaney*, local child-protection officials had failed to protect a child from beatings by his father that left him severely brain damaged. The Court ruled that the substantive component of the Due Process Clause does not require a state to protect the life, liberty, and property of its citizens against invasion by private actors. However, the Court declined to address the procedural due process question of whether state child protection statutes provided an entitlement to receive protective services. Therefore, in framing her claim in the instant case, Ms Gonzales sought to distinguish the *DeShaney* precedent by stating that the Town had breached a procedural constitutional duty, not a substantive one.

The first instance federal court granted a motion to dismiss Ms Gonzales’s complaint, concluding that, whether construed as presenting a substantive or procedural due process claim, it had failed to state a claim upon which relief could be granted. On appeal, the federal Court of Appeals affirmed the rejection of a substantive due process claim, but found that Ms Gonzales had alleged a cognizable procedural due process claim.

The United States Supreme Court, in a 7-2 decision, reversed the judgment of the Court of Appeals, holding that Ms Gonzales did not have a property interest in police enforcement of the restraining order against her husband. The Court ruled that the procedural component of the Due Process Clause does not protect everything that might be described as a government “benefit”. To have a property interest in a benefit, according to the Court, a person must have a legitimate claim of entitlement, created by existing rules or understandings stemming from an independent source such as state law, to it. In this regard, the Court ruled, a benefit is not a protected entitlement if officials have discretion to grant or deny it, and Colorado law had not made enforcement of restraining orders mandatory. Instead, although the Court acknowledged that the restraining order did mandate an arrest or issuance of an arrest warrant, it also observed that in Colorado a well-established tradition of police discretion had long co-existed with apparently mandatory arrest statutes. In sum, the Court concluded, the benefit that a third party might receive from the arrest of another person for a crime does not trigger protections under the Due Process Clause, a conclusion consistent with the Court’s stated reluctance to treat the Fourteenth Amendment as a “font of tort law”.



*Supplementary information:*

The views of the two dissenting Justices were expressed in a separate opinion, which centered on the conclusion that the state of Colorado had eliminated the discretion of police officers to deny enforcement of a restraining order. The dissenting opinion stated that it is clear that the elimination of police discretion was integral to Colorado's attempt to solve the problem of under-enforcement in domestic violence cases. In the 1990's, Colorado and some twenty-three other states, in response to increased concern about domestic violence, had made arrest mandatory for the violation of protective orders.

*Cross-references:*

- *DeShaney v. Winnebago County Department of Social Services*, 489 *United States Reports* 189, 109 *Supreme Court Reporter* 998, 103 *Lawyer's Edition Second* 249 (1989).

*Languages:*

English.

*Identification:* USA-2005-2-007

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 27.06.2005 / **e)** 03-1500 / **f)** Van Orden v. Perry / **g)** 125 *Supreme Court Reporter* 2854 (2005) / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

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:*

Religion, encouragement by the state / Religion, establishment.

*Headnotes:*

Constitutional prohibition against state establishment of religion is not violated simply because a form of communication has religious content or promotes a message consistent with religious doctrine.

Constitutional prohibition against state establishment of religion does not bar any and all governmental preference for religion over irreligion.

The constitutional limits to the display of religious messages or symbols must be assessed in individual cases on the basis of history, purpose, and context.

*Summary:*

On the grounds of the Texas state capitol in the city of Austin, state of Texas, is a granite monolith, six feet high and three and one-half feet wide, inscribed with the Ten Commandments. It was presented in 1961 to the state of Texas by a private social, civic, and patriotic organization, the Fraternal Order of Eagles. At the time of presentation, the Fraternal Order of Eagles stated that its goal was to highlight the role of the Ten Commandments in shaping civic morality, and that the monument would advance the organization's efforts to reduce juvenile delinquency. After accepting the monument, the state organization responsible for maintaining the capitol grounds selected the exact site for the monument, which is one of seventeen monuments and twenty-one historical markers that surround the capitol.

In 2001, Mr Thomas Van Orden, a Texas resident, sued numerous state officials in their official capacities, seeking a federal court declaration that the monument violates the Establishment Clause of the First Amendment to the U.S. Constitution and an injunction requiring the monument's removal. The Establishment Clause states that "Congress shall make no law respecting an establishment of religion." It is made applicable to the states by the Fourteenth Amendment to the U.S. Constitution.

The First Instance Federal Court ruled that the monument did not violate the Establishment Clause. The Court found that the state of Texas had a valid secular purpose in recognizing and commending the Fraternal Order of Eagles for their efforts to reduce juvenile delinquency. In addition, the court determined that a reasonable observer, mindful of the history, purpose, and context, would not conclude that the passive monument conveyed a message that the state of Texas was seeking to endorse religion. The Court of Appeals affirmed the first instance court's judgment.

The United States Supreme Court accepted the plaintiff's petition for review. In a five to four decision, the Court affirmed the judgment of the Court of Appeals. Chief Justice Rehnquist delivered an opinion joined by three other Justices. A fifth member of the Court filed a separate opinion, concurring in the judgment. In all, seven opinions were filed in the decision.

Justice Rehnquist's opinion observed that the Court's Establishment Clause jurisprudence pointed in two directions: one toward the strong role played by religion and religious traditions throughout the history of the United States, and the other toward the principle that governmental intervention in religious matters can itself endanger religious freedom. His opinion acknowledged that the Ten Commandments are religious and that the monument therefore had religious significance. However, the Court's jurisprudence shows that the Establishment Clause is not violated simply because a form of communication has religious content or promotes a message consistent with religious doctrine. Therefore, the Establishment Clause does not bar any and all governmental preference for religion over irreligion. Instead, the constitutional limits to the display of religious messages or symbols have been assessed in individual cases on the basis of fact-intensive inquiries into history, purpose, and context. In the instant case, according to Justice Rehnquist's opinion, the placement of the monument was a passive use of the Ten Commandments with dual significance, partaking of both religion and government.

#### *Supplementary information:*

The six separate opinions filed in the instant case, including three dissenting opinions two of which were joined by other dissenting Justices, presented a range of views on both the fact-intensive aspects of the case and the broader question of whether the Court should strive to adopt a consistently applicable test in Establishment Clause cases.

The judgment in the instant case was rendered on the same day as another U.S. Supreme Court decision on the Establishment Clause: *McCreary County, Kentucky v. American Civil Liberties Union*.

#### *Cross-references:*

- *McCreary County, Kentucky v. American Civil Liberties Union*, 125 *Supreme Court Reporter* 2722, 162 *Lawyer's Edition Second* 729 (2005).

#### *Languages:*

English.



#### *Identification: USA-2005-2-008*

**a)** United States of America / **b)** Supreme Court / **c)** / **d)** 27.06.2005 / **e)** 03-1693 / **f)** McCreary County, Kentucky v. American Civil Liberties Union / **g)** 125 *Supreme Court Reporter* 2722 (2005) / **h)** CODICES (English).

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

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:*

Religion, encouragement by the state / Religion, establishment.

#### *Headnotes:*

Determination as to whether the state's purpose was secular or religious is a sound basis for ruling on Establishment Clause complaints and may be dispositive of the constitutional inquiry.

In making a determination under the secular-purpose test, judicial evaluation of an asserted secular purpose may take the factual record of the evolution of the state's acts into account.

#### *Summary:*

In 1999, authorities in two counties in the state of Kentucky posted copies of the Ten Commandments in their county courthouses. A civil liberties organization, the American Civil Liberties Union, filed suit against the counties in federal court. The lawsuit sought an injunction against maintenance of the displays, on the ground that they violated the Establishment Clause of the First Amendment to the U.S. Constitution. The Establishment Clause states that "Congress shall make no law respecting an establishment of religion." It is made applicable to the states by the Fourteenth Amendment to the U.S. Constitution. Within a month of the lawsuit's filing, the legislative bodies of both counties passed nearly identical resolutions authorizing expanded displays. The resolutions stated that the Ten Commandments were the "precedent legal code" upon which the civil

and criminal codes of Kentucky were founded. The second displays included the Ten Commandments along with eight other historical documents, each with either a religious theme or excerpts highlighting religious elements.

In 2000, the first instance court ruled that both the original and second versions of the displays lacked a secular purpose, and issued a preliminary injunction ordering removal of the displays. Subsequently, both counties installed new displays consisting of the Ten Commandments, eight other documents (most of them different from those in the second displays), and statements about the historical and legal significance of each document. The first instance court issued a modified injunction that included the third displays. Concluding that the counties had a religious rather than a secular purpose, the court again ordered removal of the displays. The Court of Appeals affirmed the first instance court's judgment.

The United States Supreme Court accepted the counties' petition for review. In a five to four decision, the Court affirmed the judgment of the Court of Appeals. The Court first examined the counties' purpose, stating that a determination of the state's purpose is a sound basis for ruling on Establishment Clause complaints and may be dispositive of the constitutional inquiry. In addressing this question, the Court applied the secular legislative purpose test from a 1971 decision, *Lemon v. Kurtzman*, declining to accept the counties' argument that this test should be abandoned. Applying the *Lemon* test, the Court ruled that the counties had a religious purpose. In making this determination, the Court stated that its evaluation of the counties' claim of secular purpose could take the evolution of the displays into account.

#### *Supplementary information:*

The views of the four dissenting Justices were expressed in one separate opinion. The dissenting opinion stated, among other things, that a material difference exists between governmental acknowledgement of a single Creator and the establishment of a religion, that the Court had improperly converted the secular-purpose inquiry into a review of the full record in the case, and that the Court had not identified evidence of a purpose to advance religion that was inconsistent with the Court's Establishment Clause case law.

The judgment in the instant case was rendered on the same day as another U.S. Supreme Court decision on the Establishment Clause: *Van Orden v. Perry*.

#### *Cross-references:*

- *Lemon v. Kurtzman*, 403 *United States Reports* 602, 91 *Supreme Court Reporter* 2105, 29 *Lawyer's Edition Second* 745 (1971).

#### *Languages:*

English.



# Inter-American Court of Human Rights

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## Important decisions

*Identification:* IAC-2005-2-001

**a)** Organization of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 02.07.2004 / **e)** / **f)** Herrera Ulloa v. Costa Rica / **g)** Secretariat of the Court / **h)** CODICES (English).

*Keywords of the systematic thesaurus:*

3.3.3 **General Principles** – Democracy – Pluralist democracy.

3.16 **General Principles** – Proportionality.

3.18 **General Principles** – General interest.

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

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

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

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

5.3.23 **Fundamental Rights** – Civil and political rights – Rights in respect of the audiovisual media and other means of mass communication.

5.3.24 **Fundamental Rights** – Civil and political rights – Right to information.

*Keywords of the alphabetical index:*

Freedom of expression, aspects, individual, social / Media, freedom of the written press / Media, journalism, restriction / Libel, through the press.

*Headnotes:*

Those under the American Convention's protection have not just the right and freedom to express their own thoughts, but also the right and the freedom to seek, receive and impart information and ideas of all kinds. Hence, freedom of expression has an individual and a social dimension. It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on

the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.

In its individual dimension, freedom of expression goes further than the theoretical recognition of the right to speak or to write. It also includes and cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible. In this sense, the expression and dissemination of ideas and information are indivisible concepts. This means that restrictions that are imposed on dissemination represent, in equal measure, a direct limitation on the right to express oneself freely.

In its social dimension, freedom of expression is a means for the interchange of ideas and information among persons. It includes the right of each person to seek to communicate his own views to others, as well as the right to receive opinions and news from others.

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.

Without effective freedom of expression, in all its forms, democracy is enervated, pluralism and tolerance begin to break down, the mechanisms for citizen oversight and complaint are unable to function properly, and the groundwork is laid for authoritarian systems to take root in society.

Within this context, journalism is the primary and principal manifestation of freedom of expression of thought. The practice of journalism, therefore, requires that the individual engage responsibly in activities that are indistinguishable from or inextricably intertwined with the freedom of expression guaranteed in the Convention.

It is essential that journalists who work in the media should enjoy the necessary protection and independence to exercise their functions to the fullest, because it is they who keep society informed, an indispensable requirement to enable society to enjoy full freedom and for public discourse to become stronger.

Freedom of expression is not an absolute right; instead, it may be subject to restriction. Abusive exercise of the right to freedom of expression shall be subject to subsequent imposition of liability. However, beyond what is strictly necessary, such restrictions are not to limit the full scope of freedom of expression or become direct or indirect methods of prior censorship. In order to determine subsequent liabilities, three requirements must be met:

1. the restrictions must be previously established by law;
2. they must be intended to ensure the rights or reputation of others or to protect national security, public order, or public health or morals; and
3. they must be necessary in a democratic society.

The “necessity” and, hence, the legality of restrictions imposed under Article 13.2 ACHR on freedom of expression, depend upon a showing that the restrictions are required by a compelling governmental interest. Hence if there are various options to achieve this objective, that which least restricts the right protected must be selected. Given this standard, it is not enough to demonstrate, for example, that a law performs a useful or desirable purpose; to be compatible with the Convention, the restrictions must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 ACHR guarantees. Implicit in this standard, furthermore, is the notion that the restriction, even if justified by compelling governmental interests, must be so framed as not to limit the right protected by Article 13 ACHR more than is necessary. That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it. The restriction must be proportionate to the legitimate interest that justifies it and must be limited to what is strictly necessary to achieve that objective. It should interfere as little as possible with effective exercise of the right to freedom of expression.

For the sake of public debate, a little more latitude should be allowed, under Article 13.2 ACHR, for statements made about public officials or other public figures when matters of public interest are involved. That kind of unfettered debate is essential for a truly democratic system to function properly. This in no way means that the honor of public officials or public figures should not be protected by the courts; what it means is that the protection accorded must be commensurate with the principles of democratic pluralism.

The differing standard of protection is not based on whether the subject is a public figure or private

citizen; instead, it is based on whether a given person’s activities are matters that fall within the domain of public interest.

Every State is internationally responsible for any action or omission committed by any of its branches of power or organs in violation of internationally recognised rights.

States have the responsibility to embody in their legislation, and ensure proper application of, effective remedies and guarantees of due process of law before the competent authorities, which protect all persons subject to their jurisdiction from acts that violate their fundamental rights or that lead to the determination of the latter’s rights and obligations.

The right to appeal a judgment is an essential guarantee that must be respected as part of due process of law, so that a party may turn to a higher court for revision of a judgment that was unfavorable to that party’s interests. The right to file an appeal against a judgment must be guaranteed before the judgment becomes *res judicata*. The aim is to protect the right of defense by creating a remedy to prevent a flawed ruling, containing errors unduly prejudicial to a person’s interests, from becoming final.

The right to appeal a judgment, recognised in the Convention, is not satisfied merely because there is a higher court than the one that tried and convicted the accused and to which the latter has or may have recourse. For a true review of the judgment, in the sense required by the Convention, the higher court must have the jurisdictional authority to take up the particular case in question.

Any person subject to a proceeding of any nature before an organ of the State must be guaranteed that this organ is impartial and that it acts in accordance with the procedure established by law for hearing and deciding cases submitted to it. The right to be tried by an impartial judge or court is a fundamental guarantee of due process.

Any violation of an international obligation that has caused damage creates a new obligation, which is to adequately redress the wrong done.

### *Summary:*

On 28 January 2003, the Inter-American Commission on Human Rights filed an application with the Court against the State of Costa Rica, for the Court to decide whether Costa Rica unduly restricted journalist Mauricio Herrera Ulloa’s right to freedom of expression by his criminal prosecution and the



criminal and civil penalties imposed due to the criminal conviction of Mr Herrera Ulloa on four counts of defamation. On 19, 20 and 21 May, and 13 December 1995, the newspaper *La Nación* had carried a number of articles by journalist Mauricio Herrera Ulloa that partially reproduced several articles from the Belgian press. The Belgian press reports had attributed certain illegal acts to Félix Przedborski, Costa Rica's honorary representative to the International Atomic Energy Agency in Austria.

In its Judgment of 2 July 2004, the Court held that the State violated the right to freedom of thought and expression protected under Article 13 ACHR of the American Convention on Human Rights, in relation to Article 1.1 ACHR, as well as Article 8.1 ACHR, in relation to Article 1.1 ACHR, and Article 8.2.h ACHR, in relation to Articles 1.1 ACHR and 2 ACHR, to the detriment of Mr Mauricio Herrera Ulloa. The Court ordered the State, *inter alia*, to nullify the 12 November 1999 ruling of the Criminal Court of the First Judicial Circuit of San José and all the measures it orders; within a reasonable period of time, adjust its domestic legal system to conform to the provisions of Article 8.2.h ACHR, in accordance with Article 2 ACHR; pay non-pecuniary damages to Mr Mauricio Herrera Ulloa in the amount of US\$ 20,000.0, and pay Mr Mauricio Herrera Ulloa the sum of US\$ 10,000.0 to defray the expenses of his legal defense in litigating his case before the inter-American system for the protection of human rights.

#### Languages:

Spanish, English.



#### Identification: IAC-2005-2-002

**a)** Organization of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 05.07.2004 / **e)** / **f)** 19 Tradesmen v. Colombia / **g)** Secretariat of the Court / **h)** CODICES (English).

#### Keywords of the systematic thesaurus:

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

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

4.7.11 **Institutions** – Judicial bodies – Military courts.

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.

5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.

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

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

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

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

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.

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

#### Keywords of the alphabetical index:

State, responsibility, international / Human rights violation, state, tolerance / Forced disappearance / Treatment or punishment, cruel and unusual / Military prosecution, constitutionality / Jurisdiction, dispute / Obligation, state / Obligation, positive / Investigation, effective, requirement / Integrity, physical, right.

#### Headnotes:

It is a basic principle of the law on the international responsibility of the State, embodied in international human rights law, that this responsibility may arise from any act or omission of any State agent, body or power, independent of its hierarchy, which violates internationally enshrined rights. An illegal act that violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified), can lead to the international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

In order to establish that a violation of the rights embodied in the Convention has occurred, it is not necessary to determine, as it is under domestic criminal law, the guilt of the perpetrators or their intention, nor is it necessary to identify individually the agents to whom the violations are attributed. It is sufficient to demonstrate that public authorities have supported or tolerated the violation of the rights established in the Convention.

Forced disappearance constitutes an unlawful act that gives rise to a multiple and continuing violation of a number of rights protected by the Convention; it is a crime against humanity. Forced disappearance also means that the obligation to organise the apparatus of the State in such a manner as to guarantee the rights recognised in the Convention has been disregarded.

Creating a threatening situation or threatening an individual with torture may, at least in some circumstances, constitute inhuman treatment.

The right to life plays a fundamental role in the American Convention as it is the essential for the exercise of the other rights. When the right to life is not respected, all the other rights are meaningless. States have the obligation to guarantee the creation of the conditions required in order to ensure that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it.

Compliance with Article 4 ACHR, in relation to Article 1.1 ACHR, requires not only that no person be deprived of their life arbitrarily (negative obligation), but also that States adopt all appropriate measures to protect and preserve the right to life (positive obligation), under their obligation to ensure the full and free exercise of the rights of all those subject to their jurisdiction. This active protection of the right to life by the State involves not only its legislators, but all State institutions and those who must safeguard security, whether they are the police forces or the armed forces. Therefore, States must adopt all necessary measures, not only to prevent, try and punish the deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces.

Under democratic rule of law, military criminal jurisdiction should have a very restricted and exceptional scope and be designed to protect special juridical interests associated with the functions assigned by law to the military forces. Hence, it should only try military personnel for committing crimes or misdemeanors that, due to their nature, harm the juridical interests of the military system. When the military courts assume jurisdiction over a matter that should be heard by the ordinary courts,

the right to the natural judge is violated as is, *a fortiori*, due process; this, in turn, is intimately linked to the right to access to justice itself.

The judge in charge of hearing a case must be competent, independent and impartial.

The State has the obligation to avoid and combat impunity, which the Court has defined as the absence of any investigation, pursuit, capture, prosecution and conviction of those responsible for the violations of rights protected by the American Convention. The State has the obligation to combat that situation with all available legal means, because impunity leads to the chronic repetition of human rights violations and to the total defenselessness of the victims and their next of kin. Only if all circumstances of the violation involved are clarified, can it be considered that the State has provided the victims and their next of kin with an effective remedy and complied with its general obligation to investigate and punish, allowing the victim's next of kin to know the truth, not only about the whereabouts of his remains, but also about what happened to the victim.

The purpose of international human rights law is to provide the individual with the means to protect internationally recognised human rights before the State (its bodies, agents and all those who act in its name). In the international jurisdiction, the parties and the matter in dispute are, by definition, different from those in the domestic jurisdiction.

The active protection of the right to life and of the other rights embodied in the American Convention is contained in the State obligation to ensure the free and full exercise of the rights of all those subject to its jurisdiction and requires that the State must adopt the necessary measures to punish the deprivation of life and other human rights violations, and also to prevent its own security forces or third parties acting with their acquiescence violating any of those rights.

The obligation to investigate must be carried out in a serious manner and not as a mere formality preordained to be ineffective. The investigation conducted by the State to comply with this obligation must be objective and assumed by the State as an essential legal obligation, not as a measure taken by private interests that depends upon the procedural initiative of the victim or his next of kin or upon evidence provided privately, without an effective search for the truth by public authorities.

Article 8.1 ACHR, together with Article 25.1 ACHR confers on the next of kin of the victims the right that the death of the latter will be investigated effectively by the State authorities; that proceedings will be filed

against those responsible for these unlawful acts; and, if applicable, that the pertinent punishments will be imposed, and the losses that the said next of kin have suffered will be repaired.

The right to access to justice is not exhausted by the processing of domestic proceedings, but it also ensures the right of the victim or his next of kin to learn the truth about what happened, and for those responsible to be punished, in a reasonable time.

To consider whether the State respected the principle of reasonable time in the domestic proceedings to carry out an investigation, it is necessary to point out that the proceedings end when a final and firm judgment is delivered on the matter and that, particularly in criminal matters, the reasonable time must cover the whole proceeding, including any appeals that may be filed.

Three elements should be taken into account in determining whether the time in which the proceeding was conducted was reasonable:

- a. the complexity of the case;
- b. the procedural activity of the interested part, and
- c. the conduct of the judicial authorities.

A prolonged delay may, in some cases, constitute a violation of the right to a fair trial. The State must explain and prove why it has required more time that would be reasonable, in principle, to deliver final judgment in a specific case, according to the said criteria.

The formal existence of remedies is not sufficient; these must be effective, in other words, they must provide results or responses to the violations of rights included in the Convention. Those remedies that, owing to the general conditions of the country or even the particular circumstances of a case, are illusory cannot be considered effective.

Article 25.1 ACHR incorporates the principle of the effectiveness of the procedural protection mechanisms or instruments designed to ensure those rights. States Parties have an obligation to provide effective judicial remedies to the victims of human rights violations (Article 25 ACHR), remedies that must be substantiated in accordance with the rules of due process of law (Article 8.1 ACHR), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognised by the Convention to all persons subject to their jurisdiction.

The right to mental and moral integrity of the direct victims' next of kin can be violated, owing to the

additional suffering they have endured as a consequence of the circumstances arising from the violations perpetrated against the direct victims, and owing to the subsequent acts or omissions of the State authorities in dealing with the facts; for example, with regard to the search for the victims or their remains, and also with regard to how the latter have been treated.

When an unlawful act occurs, which can be attributed to a State, this gives rise immediately to its international responsibility for violating the international norm, with the consequent obligation to cause the consequences of the violation cease and to repair the damage caused.

### *Summary:*

On 24 January 2001, the Inter-American Commission on Human Rights filed an application with the Court against the State of Colombia for the Court to decide whether the State violated Article 4 ACHR (Right to Life) and Article 7 ACHR (Right to Personal Freedom), as a result of the detention, disappearance and execution on 6 October 1987, of [19] tradesmen [...] on 18 October 1987, in the municipality of Puerto Boyacá, Department of Boyacá, in the Magdalena Medio region, by a 'paramilitary' group that operated in the municipality of Puerto Boyacá masterminded by and with the support of Colombian Army officers. The Commission also requested the Court to decide whether the State had violated Article 5 ACHR (Right to Humane Treatment), Article 8.1 ACHR (Right to a Fair Trial) and Article 25 ACHR (Judicial Protection), to the detriment of the said alleged victims and their next of kin, and also to determine whether Colombia failed to comply with the provisions of Article 1.1 ACHR (Obligation to Respect Rights) thereof, with regard to the last two of the abovementioned articles.

In its Judgment of 5 July 2004, the Court held that the State violated the rights to personal liberty, humane treatment and life embodied in Articles 7, 5 and 4 ACHR, in relation to Article 1.1 ACHR thereof, to the detriment of the 19 tradesmen; the rights to a fair trial and to judicial protection embodied in Articles 8.1 and 25 ACHR, in relation to Article 1.1 ACHR, to the detriment of the 19 tradesmen and their next of kin; and the right to humane treatment embodied in Article 5 ACHR, in relation to Article 1.1 ACHR, to the detriment of the next of kin of the 19 tradesmen. The Court ordered the State to investigate effectively, in a reasonable time, the facts of this case, in order to identify, prosecute and punish all the masterminds and perpetrators of the violations committed against the 19 tradesmen, for the criminal and any other effects that may arise from the investigation into the facts, and the result of this measure shall be disseminated publicly; conduct, within a reasonable

time, a genuine search during which it makes every possible effort to determine with certainty what happened to the remains of the victims and, if possible, return them to their next of kin; erect a monument in memory of the victims and, in a public ceremony in the presence of the next of kin of the victims, shall place a plaque with the names of the 19 tradesmen; organise a public act to acknowledge its international responsibility for the facts of this case and to make amends to the memory of the 19 tradesmen, in the presence of the next of kin of the victims, and in which members of the highest State authorities must take part; provide, free of charge, through its specialised health institutions, the medical and psychological treatment required by the next of kin of the victims; establish the necessary conditions for the members of the family of the victim, Antonio Flórez Contreras, who are in exile, to return to Colombia, if they so wish, and shall cover the costs they incur as a result of their return; pay special attention to guaranteeing the lives, safety and security of the persons who made statements before the Court and their next of kin, and shall provide them with the necessary protection from any persons, bearing in mind the circumstances of this case; pay the total amount of US\$ 55,000 for loss of income to each of the 19 victims; and pay the total amount of US\$ 2,000 for the expenditure incurred by the next of kin of several tradesmen when trying to discover their whereabouts; pay the total amount of US\$ 80,000 in compensation for non-pecuniary damage caused to each of the 19 victims; pay compensation for non-pecuniary damage caused to the next of kin of the victims; and pay for costs and expenses.

#### *Languages:*

Spanish, English.



#### *Identification:* IAC-2005-2-003

**a)** Organization of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 02.09.2004 / **e)** / **f)** “Juvenile Reeducation Center” v. Paraguay / **g)** Secretariat of the Court / **h)** CODICES (English).

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

- 2.1.1.4.10 **Sources of Constitutional Law** – Categories – Written rules – International instruments – American Convention on Human Rights of 1969.
- 5.1.3.1 **Fundamental Rights** – General questions – Limits and restrictions – Non-derogable rights.
- 5.1.4 **Fundamental Rights** – General questions – Emergency situations.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
- 5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
- 5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.
- 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
- 5.3.44 **Fundamental Rights** – Civil and political rights – Rights of the child.

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

State, responsibility, international / Detention, as a preventive measure / Detention, conditions / Treatment or punishment, cruel and unusual / Obligation, positive / Investigation, effective, requirement / Integrity, physical, right / Rehabilitation, right / Compensation, right / *Effet utile*, principle.

#### *Headnotes:*

The State's obligations under Article 19 ACHR go well beyond the sphere of strictly civil and political rights. The measures that the State must undertake, particularly given the provisions of the Convention on the Rights of the Child, encompass economic, social and cultural aspects that pertain, first and foremost, to the children's right to life and right to humane treatment.

All persons detained have the right to live in prison conditions that are in keeping with their dignity as human beings and the State must guarantee their right to life and their right to humane treatment. The State has a special role to play as guarantor of the rights of those deprived of their freedom. Given this unique relationship and interaction of subordination between an inmate and the State, the latter must undertake a number of special responsibilities and initiatives to ensure that persons deprived of their liberty have the conditions necessary to live with dignity and to enable them to enjoy those rights that may not be restricted under any circumstances or



those whose restriction is not a necessary consequence of their deprivation of liberty and is, therefore, impermissible. Otherwise, deprivation of liberty would effectively strip the inmate of all his rights, which is unacceptable.

The right to humane treatment is a fundamental right that the American Convention protects by specifically prohibiting, *inter alia*, torture and cruel, inhuman, or degrading punishment or treatment; it also lists the right to humane treatment among those nonderogable rights that may not be suspended during states of emergency. The right to life and the right to humane treatment require not only that the State respect them (negative obligation) but also that the State adopt all appropriate measures to protect and preserve them (positive obligation).

The standard applied to classify treatment or punishment as cruel, inhuman or degrading must be higher in the case of children.

A State that has ratified a human rights treaty must make the necessary amendments to its domestic laws to ensure proper compliance with the obligations it has undertaken. The American Convention establishes the general obligation of each State party to adapt its domestic laws to the Convention's provisions, so as to guarantee the rights therein protected. This general obligation of a State party means that the provisions of domestic law must be effective (principle of *effet utile*)."

While procedural rights and their corollary guarantees apply to all persons, in the case of children exercise of those rights requires, due to the special condition of minors, that certain specific measures be adopted for them to effectively enjoy those rights and guarantees.

The essence of Article 7 ACHR is the protection of the liberty of the individual from arbitrary or unlawful interference by the State and the guarantee of the detained individual's right of defense. The protection of freedom safeguards both the physical liberty of the individual and his personal safety, in a context where the absence of guarantees may result in the subversion of the rule of law and deprive those detained of the minimum legal protection.

A child's right to personal liberty must of necessity take the best interests of the child into account; it is the child's vulnerability that necessitates special measures of protection.

Preventive detention must strictly conform to the provisions of Article 7.5 ACHR: it cannot be for longer than a reasonable time and cannot endure for longer

than the grounds invoked to justify it. Failure to comply with these requirements is tantamount to a sentence without a conviction, which is contrary to universally recognised general principles of law. When preventive detention is ordered for children, the rule must be applied with even greater rigor, since the norm should be measures that are alternatives to preventive imprisonment. The purpose of these alternative measures is to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

The primary purpose of international protection of human rights is to defend the individual against the arbitrary exercise of State power."

Any violation of an international obligation that has caused damage creates a new obligation, which is to adequately redress the wrong done.

### Summary:

On 20 May 2002, the Inter-American Commission on Human Rights filed an application with the Court against the State of Paraguay for the Court to decide whether the State had violated, in relation to its obligation under Article 1.1 ACHR (Obligation to Respect Rights), Article 4 ACHR (Right to Life) by virtue of the deaths of inmates who perished as a result of a fire at a juvenile reeducation center, and by virtue of the death of Benito Augusto Adorno, who died of a bullet wound sustained at the center. The Commission also asked the Court to decide whether the State had violated Article 5 ACHR (Right to Humane Treatment), in relation to its obligation under Article 1.1 ACHR, by virtue of the injuries and smoke inhalation that minors sustained in three fires at the center. The Commission also petitioned the Court to find that the respondent State had violated Article 5 ACHR (Right to Humane Treatment), Article 7 ACHR (Right to Personal Liberty), Article 19 ACHR (Rights of the Child), Article 8 ACHR (Right to a Fair Trial) and Article 25 ACHR (Judicial Protection), all in relation to Article 1.1 ACHR, to the detriment of all juveniles incarcerated at the center at any time in the period between 14 August 1996 and 25 July 2001, and those juvenile inmates subsequently remanded to the country's adult prisons. The Commission's contention was that the center embodied a system that was the antithesis of every international standard pertaining to the incarceration of juveniles. Specifically, those conditions involved a combination of: overpopulation, overcrowding, lack of sanitation, inadequate infrastructure, and a prison guard staff that was both too small and poorly trained. The Commission also alleged that children were remanded to adult prisons and that the vast majority of the juveniles transferred to adult prisons were in pretrial detention.



The Court analyzed the issues pertaining to a life with dignity, health, education and recreation in its considerations with regard to Articles 4 and 5 ACHR, in relation to Articles 19 ACHR and 1.1 ACHR and Article 13 of the Protocol of San Salvador.

In its judgment of 2 September 2004, the Court held that the State violated the rights to life and to humane treatment, recognised in Articles 4.1, 5.1, 5.2 and 5.6 ACHR and, where the victims were children, also in relation to Article 19 ACHR, to the detriment of all the inmates at the center between 14 August 1996 and 25 July 2001; the right to life, recognised in Article 4.1 ACHR and, where the victims were children, also in relation to its Article 19 ACHR, to the detriment of the 12 deceased inmates; the right to humane treatment, recognised in Article 5.1 and 5.2 ACHR to the detriment of the children injured as a result of the fires; and the right to humane treatment recognised in Article 5.1 ACHR to the detriment of the identified next of kin of the deceased and injured inmates. Additionally, the Court declared that the State failed to comply with its duty to adopt domestic legislative measures and violated the right to a fair trial recognised, respectively, in Articles 2 and 8.1 ACHR to the detriment of all the children interned at the center in the period from 14 August 1996 to 25 July 2001; violated the right to judicial protection, recognised in Article 25 ACHR to the detriment of the 239 inmates named in the writ of generic *habeas corpus*, and ordered the State to pay for costs and reparations to the beneficiaries identified in the same.

#### Languages:

Spanish, English.



#### Identification: IAC-2005-2-004

**a)** Organization of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 18.11.2004 / **e)** / **f)** De La Cruz Flores vs. Peru / **g)** Secretariat of the Court / **h)** CODICES (English).

#### Keywords of the systematic thesaurus:

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

- 2.1.1.4.10 **Sources of Constitutional Law** – Categories – Written rules – International instruments – American Convention on Human Rights of 1969.
- 3.10 **General Principles** – Certainty of the law.
- 3.13 **General Principles** – Legality.
- 3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.
- 3.22 **General Principles** – Prohibition of arbitrariness.
- 5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.
- 5.1.3.1 **Fundamental Rights** – General questions – Limits and restrictions – Non-derogable rights.
- 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
- 5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.
- 5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.
- 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
- 5.3.38.1 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Criminal law.
- 5.4.19 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

#### Keywords of the alphabetical index:

Confidentiality, medical / Detainee, rights / Detention, conditions / Detention, isolation / Medical assistance / Rehabilitation, right / Compensation, right.

#### Headnotes:

The elaboration of criminal categories involves a clear definition of the criminalised conduct, establishing its elements, and the factors that distinguish it from behaviors that are either not punishable or punishable but not with imprisonment.

The principles of legality and non-retroactivity govern the actions of all the State's bodies in their respective fields, particularly when the exercise of its punitive power is at issue.

For the sake of legal certainty, it is necessary that the punitive norm exist and be known, or could be known before the occurrence of the act or omission that violates it, and which it is intended to penalise. The definition of an act as an unlawful act and the determination of its legal effects must precede the conduct of the individual who is alleged to have violated it; before a behavior is defined as a crime, it is not unlawful for penal effects. If this were not so,

individuals would not be able to adjust their behavior according to the laws in force, which express social reproach and its consequences. These are the grounds for the principle of the non-retroactivity of an unfavorable punitive norm.

According to the principle of freedom from *ex post facto* laws, the State may not exercise its punitive power by applying penal laws retroactively that increase sanctions, establish aggravating circumstances or create aggravated types of offenses. The principle is also designed to prevent a person being penalised for an act that, when committed, was not an offense or could not be punished or prosecuted.

Doctors have a right and an obligation to protect the confidentiality of the information to which, as doctors, they have access.

All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. Moreover, the State, which is responsible for detention establishments, must ensure that prisoners are confined in conditions that respect their rights.

The prohibition of torture and cruel, inhuman or degrading treatment is absolute and non-derogable, even in the most difficult circumstances, such as war, threat of war, the fight against terrorism and any other crime, martial law or state of emergency, civil war or commotion, suspension of constitutional guarantees, internal political instability or any other public disaster or emergency.

Prolonged isolation and compulsory incommunication represent, in themselves, forms of cruel and inhuman treatment, harmful to the psychological and moral integrity of the individual and of the right of all those detained to respect for their inherent dignity as human beings. Indeed, isolation from the exterior world produces moral and psychological suffering in the person detained, placing him in a particularly vulnerable situation and increasing the risk of aggression and abuse of power in prisons.

The State has the obligation to provide regular medical examinations and care to prisoners, and also adequate treatment when this is required. The State must also allow and facilitate prisoners being treated by the doctor chosen by themselves or by those who exercise their legal representation or guardianship.

Any violation of an international obligation that has caused harm, gives rise to an obligation to provide adequate reparation for this harm.

### *Summary:*

On 11 June 2003, the Inter-American Commission on Human Rights brought the case before the Inter-American Court of Human Rights. In its Judgment of 18 November 2004, the Court held that the State violated the principle of legality by convicting Mrs De La Cruz Flores applying a law that did not define the behavior which she had allegedly committed; by not specifying which of the behaviors established in Article 4 of Decree Law no. 25 475 had been committed by the alleged victim in order to be found guilty of the crime; for penalising a medical activity, which is not only an essential lawful act, but which is also the doctor's obligation to provide; and for imposing on doctors the obligation to report the possible criminal behavior of their patients, based on information obtained in the exercise of their profession. Accordingly, the Court held that the rights established in Articles 9 and 5 ACHR, in relation to Article 1.1 ACHR were violated to the detriment of Mrs De La Cruz Flores.

Additionally, the Court held that the detention of Mrs De La Cruz Flores, arising from a trial that culminated in a conviction that violated the principle of legality was unlawful and arbitrary, and the respective proceedings were contrary to the right to a fair trial. Accordingly, the Court considered that Articles 7 and 8 ACHR, in relation to Articles 9 and 1.1 ACHR, were violated to the detriment of Mrs De La Cruz Flores.

Finally, the Court found that Mrs De La Cruz Flores was subjected to cruel, inhuman and degrading treatment due to her being held incommunicado, in unhealthy conditions, and without receiving proper medical care or regular family visits. Thus, the Court found that Article 5 ACHR, in relation to Article 1.1 ACHR, was violated to the detriment of Mrs De La Cruz Flores, Danilo and Ana Teresa Blanco De La Cruz, the victim's children; Alcira Domitila Flores Rosas widow of De La Cruz, the victim's mother; and Alcira Isabel, Celso Fernando and Jorge Alfonso De La Cruz Flores, the victim's siblings.

With regard to reparations, the Court ordered, *inter alia*, that the State shall observe the right to freedom from *ex post facto* laws embodied in Article 9 ACHR and the requirements of due process in the new trial of María Teresa De La Cruz Flores; pay damages to the victims; provide medical and psychological treatment to the victim through the State's health services, including the provision of free medication; reincorporate Mrs De La Cruz Flores into the activities that she had been performing as a medical professional in public institutions at the time of her detention; provide Mrs De La Cruz Flores with a grant

that allows her to receive professional training and updating; re-enter María Teresa De La Cruz Flores on the respective retirement register; publish in the official gazette and in another daily newspaper with national circulation the section entitled "Proven Facts" and operative paragraphs 1-3 of the declaratory part of this judgment, and pay for costs and expenses.

#### Languages:

Spanish, English.



#### Identification: IAC-2005-2-005

a) Organization of American States / b) Inter-American Court of Human Rights / c) / d) 19.11.2004 / e) / f) Plan de Sanchez Massacre v. Guatemala / g) Secretariat of the Court / h) CODICES (English).

#### Keywords of the systematic thesaurus:

1.4.14 **Constitutional Justice** – Procedure – Costs.  
 1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.  
 2.1.1.4.10 **Sources of Constitutional Law** – Categories – Written rules – International instruments – American Convention on Human Rights of 1969.  
 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.  
 5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.  
 5.3.13.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts.  
 5.3.17 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

#### Keywords of the alphabetical index:

State, responsibility, international / Torture / Treatment or punishment, cruel and unusual / Investigation, effective, requirement / Integrity, physical, right / Rehabilitation, right / Rehabilitation, measure, positive, obligation / Damages, non-pecuniary, award / Truth, right to know.

#### Headnotes:

When an unlawful act occurs, which can be attributed to a State, this gives rise immediately to its international responsibility for violating the international norm, with the consequent obligation to cause the consequences of the violation to cease and to repair the damage caused.

Whenever possible, reparation of the damage caused by the violation of an international obligation requires full restitution (*restitutio in integrum*), which consists in the re-establishment of the previous situation. If this is not possible, as in the instant case, the international Court must determine a series of measures to ensure that, in addition to guaranteeing respect for the violated rights, the consequences of the violations are remedied and compensation paid for the damage caused. It is also necessary to add any positive measures the State must adopt to ensure that the harmful acts, such as those that occurred in this case, are not repeated."

Non-pecuniary damage can include the suffering and hardship caused to the direct victims and to their next of kin, the harm of objects of value that are very significant to the individual, and also changes, of a non-pecuniary nature, in the living conditions of the victims. Since it is not possible to allocate a precise monetary equivalent to non-pecuniary damage, it can only be compensated in two ways in order to make integral reparation to the victims. First, by the payment of a sum of money that the Court decides by the reasonable exercise of judicial discretion and in terms of fairness. Second, by performing acts or implementing projects with public recognition or repercussion.

International case law has established repeatedly that the judgment constitutes, *per se*, a form of reparation.

Non-pecuniary damages are damages that have public repercussions.

Impunity contravenes a State's obligation to conduct an effective investigation, harms the victims, and encourages the chronic repetition of the human rights violations in question.

The victims of human rights violations and their next of kin have the right to know the truth. This right to the truth has been developed by international human rights law and its recognition is an important measure of reparation.

Costs and expenses are included in the concept of reparation embodied in Article 63.1 ACHR, because

the measures taken by the victim in order to obtain justice at the domestic and the international level imply expenditure that must be compensated when the State's international responsibility has been declared in a judgment against it.

### Summary:

On 31 July 2002, the Inter-American Commission on Human Rights filed an application against the State of Guatemala before the Inter-American Court, for the Court to declare that the State was internationally responsible for violations to the rights to humane treatment, judicial protection, a fair trial, equal protection, freedom of conscience and religion, and property, in relation to the obligation to respect rights, which are embodied in Articles 5, 8, 25, 24, 12, 21 and 1.1 ACHR. In the application, the Commission alleged there had been a denial of justice and other acts of intimidation and discrimination affecting the rights to humane treatment, freedom of conscience and religion, and property of the survivors, and the next of kin of the victims of the massacre of 268 individuals, mostly members of the Maya indigenous people of the village of Plan de Sánchez, Municipality of Rabinal, Department of Baja Verapaz, perpetrated by members of the Guatemalan Army and civilian collaborators, under the guidance of the Army, on Sunday, 18 July 1982.

In its Judgment on Reparations of 19 November 2004, the Court held that the judgment constituted, *per se*, a form of reparation, and ordered the State to investigate effectively the facts of the Plan de Sánchez Massacre in order to identify, prosecute and punish the perpetrators and masterminds; organise a public act, in both Spanish and Maya-Achí, to acknowledge its responsibility for the events that occurred in this case, to make reparation to its victims, and publicise it in the media; publicly honor the memory of those executed in the Plan de Sánchez massacre carried out by State agents on 18 July 1982; translate the American Convention on Human Rights into Maya-Achí, if this has not been done already, and also the judgment on merits delivered by the Court on 29 April 2004, and this judgment; provide the necessary resources to publicise these texts in the municipality of Rabinal and deliver them to the victims in this case; publish, within one year from notification of this judgment, at least once, in the official gazette and in another daily newspaper with national circulation, in Spanish and in Maya-Achí, the section entitled Proven Facts in Chapter V, and the first to fourth operative paragraphs of the judgment on merits delivered by the Court on 29 April 2004, and also Chapter VII, entitled Proven Facts (without the footnotes), and the first declaratory point and the first to ninth operative

paragraphs of this judgment; pay the amount established in paragraph 104 of this judgment to maintain and improve the infrastructure of the chapel in which the victims pay homage to those executed in the Plan de Sánchez massacre; provide, free of charge, through its specialised health institutions, the medical treatment required by the victims, including, *inter alia*, any necessary medication; create a specialised program of psychological and psychiatric treatment, which must also be provided free of charge; provide adequate housing to the surviving victims who reside in the village of Plan de Sánchez; implement the following programs in the communities of Plan de Sánchez, Chipuerta, Joya de Ramos, Raxjut, Volcanillo, Coxojabaj, Las Tunas, Las Minas, Las Ventanas, Ixchel, Chiac, Concul and Chichupac:

- a. study and dissemination of the Maya-Achí culture in the affected communities through the Guatemalan Academy of Mayan Languages or a similar organization;
- b. maintenance and improvement of the road systems between the said communities and the municipal capital of Rabinal;
- c. sewage system and potable water supply;
- d. supply of teaching personnel trained in intercultural and bilingual teaching for primary, secondary and comprehensive schooling in these communities, and
- e. the establishment of a health center in the village of Plan de Sánchez with adequate personnel and conditions, and also training for the personnel of the Rabinal Municipal Health Center so that they may provide medical and psychological care to those who have been affected and who require this kind of treatment; make the payments for pecuniary damage to each of the victims in this case; and make the payment for non-pecuniary damage to each of the victims in this case; make the payment for costs and expenses incurred in the international proceedings.

### Languages:

Spanish, English.





# Court of Justice of the European Communities and Court of First Instance

## Important decisions

*Identification:* ECJ-2005-2-012

a) European Union / b) Court of First Instance / c) Fourth Chamber / d) 09.07.2003 / e) T-224/00 / f) Archer Daniels Midland Company and Archer Daniels Midland Ingredients Ltd v. Commission of the European Communities / g) *European Court Reports* II-00865 / h) CODICES (English, French).

*Keywords of the systematic thesaurus:*

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

4.17.1.3 **Institutions** – European Union – Institutional structure – Commission.

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

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

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

*Keywords of the alphabetical index:*

Competition, obstacle, powers of the European Commission, limits / Evidence, lawfulness.

*Headnotes:*

Concerning the right to respect for private life laid down by Article 8 ECHR, the Community judicature has acknowledged the existence of a general principle of Community law ensuring protection against intervention by the public authorities in the sphere of the private activities of any person, whether natural or legal, which is disproportionate or arbitrary. It is in light of that principle that the Court of Justice and the Court of First Instance must review the exercise of the Commission's investigatory powers under Regulation no. 17.

Compliance with that general principle implies, amongst other things, that any intervention by the public authorities must have a legal basis and be justified on grounds laid down by law. However, there is no provision in Regulation no. 17 that addresses the question whether clandestine audio and video recordings may be made and used (see paragraphs 340-341).

*Summary:*

I. In 1995, following a secret investigation by the Federal Bureau of Investigation (FBI), searches were carried out in the United States at the premises of several companies operating in the lysine market. Thus ADM Company and Kyowa, Cheil and Ajinomoto Co. Inc. were charged with having formed a cartel to fix lysine prices and to allocate sales of lysine between June 1992 and June 1995. Pursuant to agreements concluded with the United States Department of Justice, those undertakings were fined several hundred thousand or indeed several tens of millions of dollars by the court dealing with the matter. In addition, three executives of ADM Company were sentenced to terms of imprisonment and fined for their part in the cartel.

It was against that background that Ajinomoto, on the basis of Commission Notice 96/C 207/04 on the non-imposition or reduction of fines in cartel cases offered to cooperate with the Commission in establishing the existence of a cartel in the lysine market and its effects in the European Economic Area and that, at the close of the procedure, the Commission adopted the decision forming the subject-matter of the action for partial annulment giving rise to the present case, namely Decision no. 2001/418/EC of 7 June 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the Agreement on the European Economic Area, finding the existence of a series of agreements covering the entire EEA on prices, sales volumes and the exchange of individual information on volumes of sales of synthetic lysine for the period July 1990 to June 1995.

The applicants maintained, in particular, that the decision was vitiated by a number of breaches of essential procedural requirements to the detriment of ADM Company. They relied, *inter alia*, on the inadmissibility of certain of the evidence obtained by the Commission, especially clandestine video or audio recordings made by the FBI during its investigation. In the applicants' submission, the Commission's use of those recordings when determining the amount of the fine infringed the fundamental right to respect for private life laid down in Article 8 ECHR.



II. After recalling that respect for the general principle of Community law that ensures protection against intervention by the public authorities in the sphere of the private activities of any person, whether natural or legal, which is disproportionate or arbitrary means, in particular, that any intervention by the public authorities must have a legal basis and be justified on grounds laid down by law, and that it is in the light of that principle that the Court of Justice and the Court of First Instance review the exercise of the Commission's investigatory powers under Regulation no. 17, the Court of First Instance observed that that regulation contains no provision on the possibility of making and using clandestine video or audio recordings.

The Court held, however, that even on the assumption that the evidence in issue must thus be disregarded, the Commission's findings remained founded, as other evidence examined in relation to other pleas had also been taken into account by the Commission in support of its conclusions on that point.

#### *Languages:*

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



#### *Identification:* ECJ-2005-2-013

a) European Union / b) Court of Justice of the European Communities / c) / d) 10.07.2003 / e) C-11/00 / f) Commission of the European Communities v. European Central Bank (ECB) / g) *European Court Reports* I-07147 / h) CODICES (English, French).

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

- 3.16 **General Principles** – Proportionality.
- 4.10.6 **Institutions** – Public finances – Auditing bodies.
- 4.17.1 **Institutions** – European Union – Institutional structure.
- 4.17.3 **Institutions** – European Union – Distribution of powers between institutions of the Community.

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

Fraud, fight / European Community, European Central Bank, fight anti-fraud / European Community, European Anti-Fraud Office, skills.

#### *Headnotes:*

1. Regulation no. 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) must be interpreted as being intended to apply *inter alia* to the European Central Bank. The expression 'institutions, bodies, offices and agencies established by, or on the basis of, the Treaties' in Article 1.3 of the regulation must be interpreted as including the Bank. Regardless of the distinctive features of its status within the Community legal order, the European Central Bank was indeed established by the Treaty, as is apparent from the actual wording of Article 8 EC. It does not follow from either the preamble to, or the provisions of, Regulation no. 1073/1999 that the Community legislature intended to draw any distinction between the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties, in particular by excluding those bodies, offices or agencies which have resources distinct from the Community budget. The seventh recital to the regulation specifically draws attention to the need to extend the scope of OLAF's internal investigations to 'all' the institutions, bodies, offices and agencies (see paragraphs 63-67).

2. Although it is true, first, that a decision adopted by the Community institutions which has not been challenged by its addressee within the time-limit laid down by Article 230.5 EC becomes definitive as against that person and, second, that the general principle, to which Article 241 EC gives expression and which has the effect of ensuring that every person has or will have had the opportunity to challenge a Community measure which forms the basis of a decision adversely affecting him, does not in any way preclude a regulation from becoming definitive as against an individual in regard to whom it must be considered to be an individual decision and who could undoubtedly have sought its annulment under Article 230 EC, a fact which prevents that individual from pleading the illegality of that regulation before the national court, those principles nevertheless do not in any way affect the rule laid down by Article 241 EC, which provides that any party may, in proceedings in which a regulation of the kind referred to in Article 241 EC is at issue, plead the grounds specified in Article 230.2 EC in order to invoke before the Court of Justice the inapplicability of that regulation.

Therefore, in an action for annulment of a decision adopted by a Community body, based on the latter's failure to comply with Regulation no. 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), that body cannot be denied the right to invoke the possible illegality of that regulation, given that its legislative nature has not been challenged by any of the parties and that, more particularly, it has not been claimed that the regulation should be treated as a decision or that the body in question would, in such a case, be the addressee thereof (see paragraphs 74-78).

3. The expression "financial interests of the Community" in Article 280 EC must be interpreted as encompassing not only revenue and expenditure covered by the Community budget but also, in principle, revenue and expenditure covered by the budget of other bodies, offices and agencies established by the Treaty. The expression is peculiar to Article 280 EC and is different from the terms used in other provisions of Title II of Part Five of the Treaty, which refer invariably to the "budget" of the European Community. Furthermore, that expression seems wider than the expression "items of revenue and expenditure of the Community" found *inter alia* in Article 268 EC. Lastly, the fact that a body, office or agency owes its existence to the Treaty suggests that it was intended to contribute towards the attainment of the European Community's objectives and places it within the framework of the Community, so that the resources that it has at its disposal by virtue of the Treaty have by their nature a particular and direct financial interest for the Community.

The European Central Bank, pursuant to the Treaty, falls within the Community framework and its resources and their use are thus of evident financial interest to the European Community and its objectives. Therefore, the expression "financial interests of the Community" in Article 280 EC also covers the resources and expenditure of the Bank (see paragraphs 89-93, 95).

4. By introducing into Article 280 EC the statements in paragraphs 1 and 4, the draftsmen of the Treaty of Amsterdam clearly intended to step up the fight against fraud and irregularities affecting the financial interests of the European Community, in particular by expressly conferring on the Community the specific task of "combating", like the Member States, such fraud and irregularities by adopting "measures" which act as a "deterrent" and afford "effective protection in the Member States". The fact that Article 280.1 EC specifies that the measures are to be taken in accordance with that article does not mean that the scope of the Community's competence in this sphere is to be determined exclusively by reference to the

remaining paragraphs of Article 280 EC, in particular paragraph 4. Article 280.4 EC must be construed as providing a fuller explanation of the Community's competence and specifying certain of the conditions on which it is exercised.

In that context, the fact that Article 280.4 EC refers in particular to the need to afford effective and equivalent protection in the Member States cannot be taken to mean that the draftsmen of the Treaty of Amsterdam implicitly intended to make any action taken by the Community subject to a supplementary restriction as basic as a prohibition on combating fraud and other irregularities affecting its financial interests by adopting legislative measures covering the institutions, bodies, offices and agencies established by, or on the basis of, the Treaties. Quite apart from the fact that such a restriction of the Community's competence is not apparent from the wording of Article 280 EC, it would scarcely be compatible with the objectives pursued by that article. If the protection of the European Community's financial interests is to be rendered effective, it is essential that the deterrence of, and the fight against, fraud and other irregularities operate at all levels at which those interests are liable to be affected by such phenomena and it is often the case that phenomena fought in that way simultaneously involve actors at various levels (see paragraphs 100-104).

5. The obligation laid down by Article 105.4 EC to consult the European Central Bank on any proposed act in its field of competence is intended essentially to ensure that the legislature adopts the act only when the body has been heard, which, by virtue of the specific functions that it exercises in the Community framework in the area concerned and by virtue of the high degree of expertise that it enjoys, is particularly well placed to play a useful role in the legislative process envisaged.

That is not the case as regards the prevention of fraud detrimental to the financial interests of the Community, an area in which the Bank has not been assigned any specific tasks. The fact that Regulation no. 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) may affect the Bank's internal organisation does not mean that the Bank should be treated differently from the other institutions, bodies, offices and agencies established by the Treaties (see paragraphs 110-111).

6. It is clear from the wording of Article 108 EC that the outside influences from which that provision seeks to shield the European Central Bank and its decision-making bodies are those likely to interfere with the performance of the "tasks" which the Treaty and the Statute of the European System of Central

Banks assign to the Bank. Article 108 EC seeks, in essence, to shield the Bank from all political pressure in order to enable it effectively to pursue the objectives attributed to its tasks, through the independent exercise of the specific powers conferred on it for that purpose by the Treaty and the Statute. By contrast, recognition that the Bank has such independence does not have the consequence of separating it entirely from the European Community and exempting it from every rule of Community law. There are no grounds which *prima facie* preclude the Community legislature from adopting, by virtue of the powers conferred on it by the Treaty and under the conditions laid down therein, legislative measures capable of applying to the European Central Bank (see paragraphs 134-136).

7. Neither the fact that the European Anti-Fraud Office (OLAF) was established by the Commission and is incorporated within the Commission's administrative and budgetary structures on the conditions laid down in Decision 1999/352, nor the fact that the Community legislature has conferred on such a body external to the European Central Bank powers of investigation on the conditions laid down in Regulation no. 1073/1999 concerning investigations conducted by OLAF is *per se* capable of undermining the Bank's independence.

The rules put in place by the regulation reflect the settled intention of the Community legislature to subject the powers conferred on OLAF, first, to guarantees intended to ensure OLAF's complete independence, in particular from the Commission, and, second, to strict observance of the rules of Community law, including, in particular, the Protocol on the Privileges and Immunities of the European Communities, human rights and fundamental freedoms and the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities. The exercise of those powers is subject to various specific rules and guarantees, whilst the purpose for which they may be used is clearly delineated. The system of investigation set up by Regulation no. 1073/1999 is specifically intended to permit the investigation of suspicions relating to acts of fraud or corruption or other illegal activities detrimental to the financial interests of the European Community and a decision by OLAF's Director to open an investigation cannot be taken unless there are sufficiently serious suspicions in that respect. The internal investigations which OLAF may carry out must also be carried out under the conditions and in accordance with the procedures provided for in decisions adopted by each institution, body, office and agency. Thus it is conceivable that matters specific to the performance of its tasks will, where

appropriate, be taken into account by the Bank when it adopts such a decision and it is incumbent on the Bank to establish that any restrictions in that regard are necessary (see paragraphs 138-141, 143).

8. Regulation no. 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) cannot be declared inapplicable with regard to the European Central Bank on the ground of a breach of the principle of proportionality.

The Community legislature does not make a manifest error of assessment in considering it necessary, for the purposes of strengthening the prevention of, and the fight against, fraud, corruption and other irregularities detrimental to the financial interests of the European Community, to set up a control mechanism centralised within one particular organ, specialised and operated independently and uniformly with respect to the various institutions, bodies, offices and agencies established by, or on the basis of, the Treaties: that is so notwithstanding the existence of control mechanisms specific to those institutions, bodies, offices and agencies. In that regard, the investigative function conferred on OLAF is different, as regards its specific nature and its specific subject-matter, from general control tasks such as those entrusted to the Court of Auditors, as regards examination of the operational efficiency of the Bank, and to external auditors, as regards the auditing of its accounts. As regards the functions assigned to the Directorate for Internal Audit and the Bank's Anti-Fraud Committee by Decision 1999/726 on fraud prevention the Community legislature can take the view that disparate control mechanisms adopted within the institutions, bodies, offices or agencies established by, or on the basis of, the Treaties, with the existence of such control mechanisms and the procedures followed by them being left to the discretion of those entities, do not constitute a solution presenting a degree of effectiveness equivalent to that which might be expected of a system designed to centralise the investigative function within one and the same specialised and independent body (see paragraphs 158-160, 164).

9. Decision 1999/726 of the European Central Bank on fraud prevention infringes Regulation no. 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), in particular Article 4 thereof, and exceeds the margin of autonomy of organisation which the Bank retains for the purpose of combating fraud, since, in view of its preamble and provisions, that decision is based on the incorrect premiss that Regulation no. 1073/1999 does not apply to the Bank and consequently gives expression to the Bank's intention to assume sole responsibility for combating fraud within it, by failing

to apply the system set up by the regulation and substituting for adoption of the decision referred to in Article 4.1.2 and 4.1.6 of the regulation the establishment of a separate system peculiar to the Bank (see paragraphs 173, 176, 181-182).

### Summary:

According to Decision no. 1999/726/EC of the European Central Bank (ECB) of 7 October 1999 on fraud prevention, administrative investigations in the ECB in respect of fraud fall within the sole competence of the Directorate for Internal Audit, which ipso facto precludes both the investigative powers in fraud matters conferred upon the European Anti-Fraud Office (OLAF) by Regulation (EC) no. 1073/1999 of the European Parliament and of the Council of 25 May 1999 and the applicability of that regulation to the ECB. The Commission brought an action for annulment of that decision on the ground that it infringed Regulation no. 1073/1999 and amounted to the outright negation of that regulation.

The Court upheld the application, holding that the contested decision was incompatible with the regulation, since it sought to establish a regime of fraud prevention separate from and exclusive by reference to the regime provided for by Regulation no. 1073/1999, although that regulation provides that it is to apply to all the "institutions, bodies, offices and agencies established by, or on the basis of, the Treaties", which includes the ECB. The Court stated that such an application is not per se capable of undermining the ECB's independence.

### Cross-references:

On the application of Regulation no. 1073/1999 to the EIB: CJEC, 10 July 2003, *Commission v. European Investment Bank*, C-15/00, paragraphs 97-99.

### Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



### Identification: ECJ-2005-2-014

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 10.07.2003 / **e)** C-20/00 et C-64/00 / **f)** Booker Aquaculture Ltd, trading as "Marine Harvest McConnell" and Hydro Seafood GSP Ltd v. The Scottish Ministers / **g)** *European Court Reports* I-07411 / **h)** CODICES (English, French).

### Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.  
 3.25 **General Principles** – Market economy.  
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.  
 5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

### Keywords of the alphabetical index:

Commerce, risk, no compensation / Damage caused by application of community law, no damages.

### Headnotes:

The Community legislature may consider, in the context of its broad discretion in the field of agricultural policy, that full or partial compensation is appropriate for owners of farms on which animals have been destroyed and slaughtered. Nonetheless, the existence, in Community law, of a general principle requiring compensation to be paid in all circumstances cannot be inferred from that fact.

### Summary:

I. Two Community directives sought to control the spread of certain diseases and pathogens affecting fish, molluscs and crustacea. The first, Directive no. 91/67/EEC, lists a number of those diseases, including infectious salmon anaemia (ISA) and viral haemorrhagic septicaemia (VHS). The second, Directive no. 93/53/EEC, provides for the adoption of various measures, mainly the killing and destruction of all fish in affected farms, with the exception of those which have reached commercial size and show no clinical sign of disease, which may be marketed for human consumption after being slaughtered and gutted.

However, neither of those measures makes provision for compensation for the owners of the fish farms affected by ISA and VHS.



In the United Kingdom, the two directives were implemented by regulations. The regulations adopted in order to implement Directive no. 93/53/EEC oblige the minister responsible to adopt by orders the measures which it prescribes.

Two Scottish fish farms were affected, one in 1994 by an outbreak of VHS and the other in 1998 by an outbreak of ISA. Both farms were therefore required, in application of ministerial orders adopted on the basis of the regulations implementing Directive no. 93/53/EEC, to slaughter all of their fish and, accordingly, to destroy those which had not reached commercial size or to market the others early. Both claimed compensation from the Scottish public authorities for the losses thus sustained. However, their claims were rejected.

Both undertakings then sought judicial review of the decision of the public authorities refusing them compensation and indeed, in the case of the first undertaking, judicial review of the regulation on the basis of which the measures had been taken.

Both cases came before the Court of Session, which asked the Court of Justice of the European Communities whether, in substance, the right to property requires that compensation be paid to farmers whose fish have had to be destroyed in application of the measures adopted in accordance with Directive no. 93/53/EEC.

II. The Court ruled that a Community directive and the national measures adopted in order to implement it, which make no provision for compensation for the owners of the infected fish, do not infringe the right to property if they correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference impairing the very substance of that right.

The fundamental rights protected by the Court, of which right to property is one, are not absolute rights but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organisation of the markets, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights.

Directive no. 93/53 introducing minimum Community measures for the control of certain fish diseases seeks to contribute to the completion of the internal market in aquaculture animals and products and

forms part of a regime intended to introduce minimum Community measures for the control of certain fish diseases. Accordingly, the measures which that directive imposes are in conformity with objectives of general interest pursued by the Community.

Taking into account the objective sought, the minimum measures of immediate destruction and slaughter laid down by Directive no. 93/53 in order to control the diseases in List I in Annex A to Directive no. 91/67 concerning the animal health conditions governing the placing on the market of aquaculture animals and products, as amended by Directive no. 93/54, do not constitute, in the absence of compensation for affected owners, a disproportionate and intolerable interference impairing the very substance of the right to property.

First of all, the measures laid down by Directive no. 93/53 are urgent and are intended to guarantee that effective action is implemented as soon as the presence of a disease is confirmed and to eliminate any risk of the spread or survival of the pathogen.

Further, the measures referred to do not deprive farm owners of the use of their fish farms, but enable them to continue to carry on their activities there. In effect, the immediate destruction and slaughter of all the fish enable owners to restock the affected farms as soon as possible. Those measures therefore enable the resumption of the transportation and placing on the market in the Community of species of live fish susceptible to the diseases in Lists I and II in Annex A to Directive no. 91/67, with the result that all interested parties, including fish farm owners, may benefit as a result.

Finally, fish farmers carry on a business which carries commercial risks. As farmers, they can expect that a fish disease may break out at any moment and cause them loss. Such risk is inherent in the business of raising and selling livestock and is the consequence of a natural occurrence, so far as the diseases in both List I and II in Annex A to Directive no. 91/67 are concerned.

As to the extent of any loss, by reason of their condition, fish which show clinical signs of disease have no marketable value. So far as concerns fish which have reached a commercial size and could have been marketed or processed for human consumption since they were not showing, when slaughtered, any clinical sign of disease, any loss eventually suffered by farmers by reason of the immediate slaughter of that kind of fish arises from the fact that they have been unable to choose the most advantageous time for their sale. In fact, because of the risk of their presenting clinical signs of



disease in future, it is impossible to determine a more advantageous time for their sale. So far as all other types of fish are concerned, it is not possible to establish whether they have any marketable value either, because of the risk that in the future they will develop clinical signs of disease.

Having regard to those same considerations, the measures for the immediate destruction and slaughter of fish implemented by a Member State in order to control List I and II diseases in the context of the application of Directive no. 93/53, which are, respectively, identical and similar to the minimum measures which the Community has laid down for List I diseases and which do not provide for compensation, are not incompatible with the fundamental right to property.

The fact that the outbreak of the disease is due or not due to the fish owner's fault has no bearing on the compatibility with the fundamental right to property of those national measures (see paragraphs 68, 78-83, 84-86, 93, 95, disp. 1-3).

#### *Languages:*

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



#### *Identification:* ECJ-2005-2-015

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 10.07.2003 / **e)** C-87/01 P / **f)** Commission of the European Communities v. Council of European Municipalities and Regions (CEMR) / **g)** *European Court Reports* I-07617 / **h)** CODICES (English, French).

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

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

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

Compensation, out-of-court, between two obligations governed by separate legal orders.

#### *Headnotes:*

The Community rules may give rise, as between an authority and a trader, to reciprocal claims which are an appropriate subject for set-off. In so far as it extinguishes two obligations simultaneously, an out-of-court set-off between claims governed by two separate legal orders can take effect only in so far as it satisfies the requirements of both legal orders concerned. More specifically, any set-off of that nature makes it necessary to ensure, as regards each of the claims concerned, that the conditions relating to set-off provided for in the relevant legal order are not disregarded. In that regard, it is immaterial that one of the legal orders concerned is the Community legal order and the other the legal order of one of the Member States. In particular, the fact that both legal orders are equally competent to govern any set-off cannot be called in question on the basis of considerations linked with the primacy of Community law.

Accordingly, a Commission decision to effect a set-off between a debt owed to it and sums payable by way of Community contributions, which was adopted even though the rules of the legal order governing one of the claims concerned clearly precluded the extinction of that claim by way of the set-off effected, must be annulled as being legally unfounded, without there being any need to examine it from the aspect of the rules governing the other claim (see paragraphs 56, 61-62, 64).

#### *Summary:*

The Council of European Municipalities and Regions (CEMR), an association constituted under French law which brings together national associations of local and regional authorities in Europe, the association *Agence pour les Réseaux Transméditerranéens* (ARTM) and *Cités Unies Développement* (CUD), an association constituted under French law, concluded three technical assistance contracts with the Commission. Those contracts concerned two regional cooperation programmes which were adopted on the basis of Council Regulation (EEC) no. 1763/92 of 29 June 1992 concerning financial cooperation in respect of all Mediterranean non-member countries, and which were called MED-URBS et MED-URBS MIGRATION. Following an audit of the CEMR's accounts, the Commission concluded that the sum of ECU 195 991 must be recovered from that association in connection with the MED-URBS contracts. However, the CEMR challenged the Commission's position on its merits in various letters and on the occasion of a number of meetings, and refused to pay the sum claimed. The Commission then gave the CEMR formal notice to repay the sum

in question and raised the possibility of recovering it by set-off against the sums payable to the CEMR by way of Community contribution, or even by legal action, in respect of both the principal sum and interest. The CEMR denied the real and undisputed nature of its alleged debt and raised an objection to set-off. The Commission informed the CEMR that the debt in question was indeed real and undisputed, of an ascertainable amount and immediately payable, enabling set-off. It therefore informed the CEMR that it had decided to recover the amount of 195 991.0 Euros by set-off against the sums payable by way of Community contributions relating to certain activities.

The CEMR brought proceedings before the *Tribunal de Première Instance*, Brussels, in accordance with the clause conferring jurisdiction contained in the MED-URBS contracts, in order to challenge the validity of the alleged debt owed to the Commission in connection with those contracts and to establish, for the same reason, that the conditions required under Belgian law for the extinction of contractual obligations by way of set-off were not satisfied. At the same time, the CEMR brought an action before the Court of First Instance of the European Communities for annulment of the Commission's decision.

After rejecting the objection of inadmissibility raised by the Commission, the Court of First Instance, adjudicating on the plea alleging lack of legal basis, annulled the contested decision. The Court considered that the Commission was not entitled to adopt the decision without first ensuring that it did not pose a risk for the use of the funds in question for the purposes for which they were intended and for the carrying out of the activities at issue, when it could have acted otherwise without jeopardising the recovery of the CEMR's alleged debt to it and the proper use of the contested sums. The Commission therefore lodged an appeal and requested the Court of Justice to set aside the judgment of the Court of First Instance. It was in the context of the examination of that appeal that the Court of Justice was called upon to adjudicate in the present case.

#### *Languages:*

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



#### *Identification:* ECJ-2005-2-016

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 31.07.2003 / **e)** C-208/03 P-R / **f)** Jean-Marie Le Pen v. European Parliament / **g)** *European Court Reports* I-07939 / **h)** CODICES (English, French).

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

1.5.4.7 **Constitutional Justice** – Decisions – Types – Interim measures.

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

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

Interim measure, *prima facie* case, condition.

#### *Headnotes:*

1. An application for interim relief, brought in the context of an appeal from the Court of First Instance, cannot be held inadmissible on the ground that it is seeking to obtain suspension of operation of the act in question, which was challenged at first instance.

Were Article 83.1 of the Rules of Procedure of the Court to be interpreted to the effect that the Court has no competence to order suspension of operation of the act that was challenged at first instance when it is hearing an appeal, that would mean that in a large number of appeals, and in particular when the application to the Court to set aside the judgment of the Court of First Instance is founded on a challenge to the latter's ruling of inadmissibility, the appellant would be deprived of any possibility of obtaining interim protection. Such an interpretation would be incompatible with the right to effective judicial protection, which is a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 ECHR. The right of individuals to complete and effective judicial protection under Community law implies in particular that interim protection be available to them if it is necessary for the full effectiveness of the definitive future decision (see paragraphs 79-81, 85).

2. In the context of an appeal against a judgment of the Court of First Instance which held inadmissible the action for annulment, however solid the pleas and

arguments put forward by the appellant against that judgment, they cannot suffice to justify *prima facie* suspension of operation of the act in question, the annulment of which was sought at first instance. In order to establish that the condition relating to a *prima facie* case is satisfied, the appellant would have to succeed in showing that the pleas and arguments relied on against the legality of that act in the action for annulment are such as to justify *prima facie* grant of the suspension of operation sought (see paragraphs 89-90).

3. Serious and irreparable harm, one of the criteria for establishing urgency, constitutes the first element in the comparison carried out in assessing the balance of interests. More particularly, that comparison must lead the judge hearing the application to examine whether the possible annulment of the act in question by the Court giving judgment in the main action would make it possible to reverse the situation that would have been brought about by its immediate implementation and conversely whether suspension of the operation of that act would be such as to prevent its being fully effective in the event of the appeal being dismissed on the merits. Furthermore, the strength or weakness of the pleas relied on to show a *prima facie* case may be taken into consideration by the judge in his assessment of urgency and, if appropriate, of the balance of interests (see paragraphs 106, 110).

#### Summary:

Although the applicant had lodged an appeal against the judgment of the Court of First Instance (T-353/00, see *Bulletin* 2004/2 [ECJ-2004-2-002]) dismissing as inadmissible his action for annulment of the decision in the form of a declaration of the President of the European Parliament on the applicant's disqualification as a Member of that assembly, he also requested the Court of Justice, pursuant to Articles 242 EC and 243 EC, to order suspension of operation of the contested decision. It is that application for suspension of operation of the decision that is at the origin of the present case. However, the Court of Justice dismissed the application for interim relief.

#### Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



#### Identification: ECJ-2005-2-017

**a)** European Union / **b)** Court of First Instance / **c) / d)** 05.08.2003 / **e)** T-116/01 and T-118/01 / **f)** P & O European Ferries (Vizcaya), SA (T-116/01) and Diputación Foral de Vizcaya (T-118/01) v. Commission of the European Communities / **g)** *European Court Reports* II-02957 / **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.  
 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Effective remedy.

#### Keywords of the alphabetical index:

Competition, distortion / Restitution, general interest / *Effet utile* / Good administration, principle.

#### Headnotes:

Whilst it is important to ensure compliance with requirements of legal certainty that protect private interests, those requirements must be balanced against requirements that protect public interests, which, in the field of State aid, are designed to prevent the operation of the market from being distorted by aid injurious to competition. The latter mean that unlawful aid must be repaid and competitors of the recipient of the aid must be able to challenge Commission measures which adversely affect them as otherwise the review, conducted by the Community judicature in accordance with Articles 220, 230.1 and 233 EC, of the legality of measures adopted by the Community institutions would be rendered ineffective. The requirement of judicial review reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 ECHR. The right to an effective remedy has, moreover, been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union (see paragraphs 207-209).

#### Summary:

The Regional Council of Vizcaya and the Ministry of Trade and Tourism of the Basque Government, of the one part, and Ferries Golfo de Vizcaya, now P&O European Ferries (Vizcaya) SA, of the other part, signed an original agreement relating to the establishment of a ferry service between Bilbao and Portsmouth. That agreement provided for the

purchase by the signatory authorities of 26,000 travel vouchers to be used on the Bilbao-Portsmouth route. The maximum financial consideration to be paid to P&O Ferries was fixed at 911,800,000 Spanish pesetas (ESP) and it was agreed that the tariff per passenger would be ESP 34,000 for 1993-94 and, subject to alteration, ESP 36,000 for 1994-95 and ESP 38,000 for 1995-96. The Commission was not notified of that original agreement.

Bretagne Angleterre Irlande, a company which, under the name Brittany Ferries, has for several years operated a shipping service between the ports of Plymouth in the United Kingdom and Santander in Spain, lodged a complaint with the Commission concerning the large subsidies which were to be granted to P&O Ferries by the Regional Council of Vizcaya and the Basque Government.

The Commission then decided to initiate the procedure provided for in Article 93.2 of the Treaty (now Article 88.2 EC). It took the view that the original agreement was not a normal commercial transaction since it concerned the purchase of a predetermined number of travel vouchers over a period of three years, the agreed price was higher than the commercial rate, the vouchers would be paid for even in respect of journeys which were not made or were diverted to other ports, the agreement included an undertaking to absorb all losses during the first three years of operation of the new service and the element of commercial risk was therefore eliminated for P & O Ferries. In the light of the information which had been passed on to it, the Commission considered that the financial aid given to P & O Ferries constituted State aid within the meaning of Article 92 of the Treaty (now, after amendment, Article 87 EC) and did not fulfil the conditions necessary for it to be declared compatible with the common market. The Commission therefore notified its decision to the Spanish Government and requested it to confirm that it would suspend all payments of the aid in question until the Commission adopted its final decision, which the Spanish Government did.

Accordingly, P & O Ferries sent the Commission a copy of a new agreement containing a number of significant amendments introduced in order to satisfy the Commission's requirements. The Basque Government was no longer a party to that agreement. The number of travel vouchers to be purchased by the Regional Council of Vizcaya was based on the estimated take-up of the offer by certain low-income groups and those covered by social and cultural programmes, including school groups, young people and the elderly. The cost of the vouchers was below the advertised brochure price of tickets for the period in question, in accordance with the normal market

practice of volume discounts for large users of commercial services. It was also stated in the decision that the remaining elements of the original agreement which had caused concern had been deleted from the new agreement. On 7 June 1995 the Commission therefore considered that the new agreement did not constitute State aid and decided to close the procedure which it had initiated.

However, the Court of First Instance annulled the decision of 7 June 1995 on the ground that the Commission had founded the decision on a misinterpretation of Article 92.1 of the Treaty when concluding that the new agreement did not constitute State aid. The Commission therefore decided to initiate the procedure provided for in Article 88.2 EC in order to enable interested parties to submit their comments on the position adopted by the Commission in the light of the judgment of the Court of First Instance. The Commission closed that procedure by Decision no. 2001/247/EC of 29 November 2000, declaring the aid in question incompatible with the common market and ordering the Kingdom of Spain to require its recovery.

It was the action brought by the Regional Council of Vizcaya and P & O European Ferries against that decision that gave rise to the present case. The applicants claimed, in particular, that even if the aid at issue were to be classified as unlawful aid, certain general principles of law, including in particular the principle of legitimate expectations and the principle of good administration, would prevent recovery of the aid. The Commission claimed, on the other hand, that the fact that it did not initially raise objections to the aid at issue was not capable of giving rise to a legitimate expectation on the part of the recipient undertaking that the aid granted pursuant to the new agreement was lawful, given that the conditions laid down in Article 88.3 EC were not observed and the decision of 7 June 1995 was annulled by the BAI judgment.

The Court reaffirmed on this occasion that whilst it is important to ensure compliance with requirements of legal certainty which protect private interests, those requirements must be balanced against requirements which protect public interests, which, in the field of State aid, seek to prevent the operation of the market from being distorted by aid injurious to competition, a fact which requires unlawful aid to be repaid and the competitors of the recipient of the aid to be able to challenge Commission measures which adversely affect them, as otherwise review by the Community judicature, in accordance with Articles 220, 230.1 and 233 EC, of the legality of measures adopted by the Community institutions would be rendered ineffective.



**Languages:**

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.

**Identification:** ECJ-2005-2-018

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 09.09.2003 / **e)** C-198/01 / **f)** Consorzio Industrie Fiammiferi (CIF) v. Autorità Garante della Concorrenza e del Mercato / **g)** *European Court Reports* I-08055 / **h)** CODICES (English, French).

**Keywords of the systematic thesaurus:**

3.10 **General Principles** – Certainty of the law.  
3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.

**Keywords of the alphabetical index:**

Competition, anti-competitive, duty to disapply.

**Headnotes:**

Where undertakings engage in conduct contrary to Article 81.1 EC and where that conduct is required or facilitated by national legislation which legitimises or reinforces the effects of the conduct, specifically with regard to price-fixing or market-sharing arrangements, a national competition authority which has been made responsible for ensuring that the competition rules and, in particular, Article 81 EC are observed, is under a duty not to apply the national legislation. Since Article 81 EC, in conjunction with Article 10 EC, imposes a duty on Member States to refrain from introducing measures contrary to the Community competition rules, those rules would be rendered less effective if, in the course of an investigation under Article 81 EC into the conduct of undertakings, the authority were not able to declare a national measure contrary to the combined provisions of Articles 10 and 81 EC and if, consequently, it failed to disapply it.

However, if the general Community-law principle of legal certainty is not to be violated, the duty of a national competition authority to disapply such an anti-competitive law cannot expose the undertakings

concerned to any penalties, either criminal or administrative, in respect of past conduct where the conduct was required by the law concerned. It follows that that authority may not impose penalties on the undertakings concerned in respect of past conduct when the conduct was required by the national legislation; it may impose penalties on them in respect of their conduct after the decision declaring there to be a breach of Article 81 EC, once the decision has become definitive in their regard.

In any event, the national competition authority may impose penalties in respect of past conduct where the conduct was merely facilitated or promoted by the national legislation, whilst taking due account of the specific features of the legislative framework in which the undertakings acted. In that regard, when the level of the penalty is set the conduct of the undertakings concerned may be assessed in the light of the national legal framework, which is a mitigating factor (see paragraphs 50, 53-55, 57-58, disp. 1).

**Summary:**

Acting on a complaint from a German match manufacturer which claimed to be experiencing difficulties in distributing its products on the Italian market, the Italian competition authority opened an investigation in respect of the Italian consortium of national match manufacturers, the member undertakings and a body representing almost all the operators of warehouses for monopoly goods, who act as wholesalers, in order to ascertain whether there were infringements of Articles 85 and 86 of the Treaty, now Articles 81 and 82 EC, and to determine whether the consortium's constitution and the various agreements between it and the Italian State infringed Article 81.1 EC. The remit of the investigation was extended shortly afterwards to cover in particular an agreement between the consortium and one of the main European match manufacturers, under which the consortium had undertaken to purchase from that manufacturer a quantity of matches corresponding to a pre-determined percentage of Italy's domestic consumption.

The Italian competition authority declared the legislation establishing the Italian consortium of national match manufacturers and governing its operation contrary to Articles 10 and 81 EC. It also considered that the consortium and its member undertakings had infringed Article 81 EC through the allocation of production quotas and ordered them to bring the infringements found to an end.

The consortium of national match manufacturers brought an action against that decision before the administrative court of the Region of Lazio. It was in

the context of those proceedings that the administrative court referred to the Court of Justice of the European Communities the following question for a preliminary ruling on the interpretation of Article 81 EC, viz whether, where an agreement between undertakings adversely affects Community trade, and where that agreement is required or facilitated by national legislation which legitimises or reinforces those effects, specifically with regard to the determination of prices or market-sharing arrangements, Article 81 EC requires or permits the national competition authority to disapply that measure and to penalise the anti-competitive conduct of the undertakings or, in any event, to prohibit it for the future and, if so, with what legal consequences.

The Court reaffirmed, and further explained, the duty of a national authority to disapply national legislation which requires or facilitates conduct by undertakings which is contrary to the Community competition rules.

#### *Languages:*

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



#### *Identification:* ECJ-2005-2-019

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 11.09.2003 / **e)** C-211/01 / **f)** Commission of the European Communities v. Council of the European Union / **g)** *European Court Reports* I-08913 / **h)** CODICES (English, French).

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

4.17.3 **Institutions** – European Union – Distribution of powers between institutions of the Community.

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

European Community, act, choice of legal basis / European Community, act, pursuing twofold purpose or having twofold component / European Community, act, single legal basis.

#### *Headnotes:*

1. The choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and the content of the measure. If examination of such a measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of these is identifiable as the main or predominant purpose or component whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component. By way of exception, if it is established that the measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure must be founded on the corresponding different legal bases (see paragraphs 38-40).

2. Even accepting that the harmonisation of the laws of the Member States achieved through Article 8 of the agreements concluded between the European Community on the one hand and the Republic of Bulgaria and the Republic of Hungary on the other, establishing certain conditions for the carriage of goods by road and the promotion of combined transport, is necessary in order to ensure the establishment and the functioning of the internal market, as required under Article 93 EC if that Article is to be taken as the legal basis for a Community measure, in any event the aspect of those agreements which concerns the harmonisation of fiscal laws is, in the light of their aim and their content, only secondary and indirect in nature compared with the transport policy objective which they pursue. The principle of equal treatment in the area of road vehicle taxation and other fiscal charges set out in Article 8.1 and the various fiscal exemptions laid down in Article 8.2 and 8.4 are closely linked to the simplification of transit through Bulgaria and Hungary for the purpose of facilitating the carriage of goods between Greece and other Member States. Moreover, Article 2 of the agreements, concerning their scope, characterises fiscal measures as 'supporting measures'. It follows that the Council should have used Article 71 EC alone, in conjunction with Article 300.3 EC, as the legal basis for the decisions on the conclusion of the agreements.

Since Article 93 EC is referred to as the legal basis for the decisions in question, they must be annulled, since, in principle, the incorrect use of a Treaty article as a legal basis which results in the substitution of unanimity for qualified majority voting in the Council cannot be considered a purely formal defect since a change in voting method may affect the content of the act adopted (see paragraphs 48-50, 52-53).

3. In order to avoid any legal uncertainty as regards the applicability of the international commitments entered into by the Community within the Community's legal order, the effects of Decisions 2001/265 and 2001/266 concerning the conclusion of agreements between the European Community on the one hand and the Republic of Bulgaria and the Republic of Hungary on the other, establishing certain conditions for the carriage of goods by road and the promotion of combined transport, must be maintained until the measures necessary to implement the judgment annulling them have been adopted. The content of international agreements cannot be amended unilaterally, without new negotiations being undertaken by the contracting parties (see paragraphs 55, 57).

### Summary:

Having been authorised by the Council to negotiate agreements with the Republic of Bulgaria, the Republic of Hungary and the Republic of Romania for the purpose of establishing certain conditions for the carriage of goods by road and the promotion of combined transport and to facilitate the transit of road vehicles through the territory of the contracting parties, the Commission forwarded to the Council two proposals for a decision, based on Article 71 EC, concerning the signature of two agreements already initialled, namely the agreement with the Republic of Bulgaria and the agreement with the Republic of Hungary. By two decisions, Decision no. 2001/265/EC and Decision no. 2001/266/EC, the Council authorised the signature of those agreements, although it added as a legal basis, in addition to Article 71 EC, Article 93 EC on the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation. By contrast with Article 71 EC, which refers to the procedure in Article 251 EC and provides for consultation with the Economic and Social Committee and the Committee of the Regions, Article 93 EC provides that the Council is to act unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee.

Being of the view that the Council was wrong to take Article 93 EC as the legal basis, the Commission brought an action, claiming that the Court of Justice should annul both decisions in so far as they were based on that Article and should maintain the effects of the agreements until such time as the Council had adopted new concluding acts. The Council contended that the dual legal basis of the contested decisions was justified in so far as the aim and content of the agreements negotiated sought, distinctly, autonomously and separately, to achieve a transport-related objective and a fiscal objective and that it was

not possible to consider one to be the principal and the other a subsidiary objective.

The Court considered that the aspect inherent in the harmonisation of fiscal legislation was, in the light of the aim and the content of the agreements, only secondary and indirect in nature compared with the transport policy objective which they pursued and, accordingly, held that the Council should have used Article 71 EC alone, in conjunction with Article 300.3 EC, as the legal basis for the decisions concluding the agreements. The Court therefore annulled the contested decisions, while declaring that their effects were to be maintained until the measures necessary to implement its judgment had been adopted.

### Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



### Identification: ECJ-2005-2-020

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 11.09.2003 / **e)** C-445/00 / **f)** Republic of Austria v. Council of the European Union / **g)** *European Court Reports* I-08549 / **h)** CODICES (English, French).

### Keywords of the systematic thesaurus:

1.3.5.2.2 **Constitutional Justice** – Jurisdiction – The subject of review – Community law – Secondary legislation.

1.4.9 **Constitutional Justice** – Procedure – Parties.

1.4.9.4 **Constitutional Justice** – Procedure – Parties – Persons or entities authorised to intervene in proceedings.

### Keywords of the alphabetical index:

Transport, road, ecopoints.

### Headnotes:

Actions for annulment may be brought only against the institution which adopted the contested measure. Nevertheless, the circumstances affecting the legality of that measure may be relied upon in support of such an

action even if they relate to the conduct of an institution other than the defendant institution. An institution whose conduct is called into question in that way cannot be involved as a main party to the proceedings but may intervene in them in support of one of the main parties (see paragraphs 32-34).

### *Summary:*

The Act of Accession of Austria to the Community includes a protocol which establishes special rules for the transit of goods by road through that Member State. The rules are based on a mechanism designed to reduce total emissions of NO<sub>x</sub>, which provides that in order to cross Austria each heavy goods vehicle needs a certain number of ecopoints representing its level of NO<sub>x</sub> emissions. Those points are administered by the Commission, which allocates them to the Member States.

During the period 1 January 1992 to 31 December 2003, total NO<sub>x</sub> emissions from heavy goods vehicles were to be gradually reduced by 60%. Consequently, the protocol fixed, for each year of that period, a reduced number of ecopoints. If in any year the number of transit journeys exceed the reference figure for 1991 by more than 8%, the Commission was to adopt measures. Those measures, which consisted in reducing the number of ecopoints and, in consequence, the number of transit journeys, were, according to the protocol, to be applied during the following year.

The statistics drawn up towards September 2000 revealed, however, that traffic in 1999 represented an increase of 14.57% by comparison with 1991. According to the Commission and the Council, an application of the reduction of ecopoints in 2000 would have had the consequence that, in reality, all transit of heavy goods vehicles through Austria in the last quarter of 2000 would be prohibited.

To avoid applying the reduction made necessary by the increase in traffic in 1999 to the year 2000 alone, the Council, by Regulation no. 2012/2000 of 21 September 2000, spread the reduction over four years, by sharing it between the years 2000 to 2003, as to 30% in 2000, 2001 and 2002 and 10% in 2003.

The new regulation also provided generally for that method of spreading the reduction to be converted to all reductions to be applied in the future should the transit journey threshold be exceeded.

The Republic of Austria sought annulment of that Council regulation introducing new rules for the ecopoints system in the present case.

The Council claimed, in particular, that, of the pleas relied on in support of the action, the heads of complaint raised against the Commission were inadmissible because no action had been brought against the Commission and the judgment to be given in the case would not be enforceable against an institution which was not a party to the proceedings.

The Court held that while an action for annulment must be brought against the institution which adopted the contested measure, the circumstances affecting the legality of a contested measure may be relied upon in support of such an action even if they relate to the conduct of an institution other than the defendant institution. The Court pointed out, however, that while such an institution whose conduct is called into question in that way cannot be involved as a main party to the proceedings, it may intervene in them in support of one of the main parties.

### *Languages:*

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



### *Identification: ECJ-2005-2-021*

**a)** European Union / **b)** Court of First Instance / **c)** / **d)** 17.09.2003 / **e)** T-137/01 / **f)** Stadtsportverband Neuss eV v. Commission of the European Communities / **g)** *European Court Reports* II-03103 / **h)** CODICES (English, French).

### *Keywords of the systematic thesaurus:*

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

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

3.26 **General Principles** – Principles of Community law.

### *Keywords of the alphabetical index:*

Time-bar, delay, fixed / Time-bar, application by analogy.



**Headnotes:**

In order to fulfil their function of ensuring legal certainty limitation periods must be fixed in advance by the Community legislature within whose powers the fixing of their duration and the detailed rules for their application come. Moreover, as regards limitation periods, legislative provisions unconnected with the case in point cannot be applied by analogy (see paragraph 123).

**Summary:**

In February 1994 the group of sporting associations of the German municipality of Neuss, whose purpose is the promotion of sport in the public interest, requested a subsidy from the Commission to finance an international sporting event, called "ISO 94". The Commission granted the group, under the Eurathlon programme, which comes under the general budget of the Communities, financial assistance of ECU 20,000. The financial assistance was paid in January 1995. By a debit note of 6 April 1999, however, the Commission demanded repayment of the assistance in full, on the ground that it had had no response to its request for all the documents relating to expenditure and income in connection with ISO 94 and that, in addition, it was in possession of information that the group had made a profit from the event, which was incompatible with the rules on financial assistance. After the group brought an action, however, the Commission withdrew its decision.

Approximately one year later, the Commission's representatives carried out an audit of the ISO 94 accounts at the office of the group's lawyer. There followed an audit report, after which a new debit note was drawn up by the Commission, ordering partial repayment of financial assistance granted under the Eurathlon programme. It was against the latter decision that the group of sporting associations of the German municipality of Neuss brought the action for annulment which gave rise to the present case.

The applicant relied, *inter alia*, on limitation of the Commission's rights of action. It observed that, even if a right to repayment arose during 1994, when ISO 94 took place, the contested decision was dated 9 April 2001, in other words more than six years after the alleged claim arose. The applicant, which accepted that Community law does not expressly provide for a limitation period for repayment of subsidies, none the less submitted that the Court of First Instance had upheld the application of provisions laying down shorter limitation periods than those which might apply in the present case. The applicant cited paragraph 48 *et seq.* of the German law on administrative procedure, according to which the

administration's power to annul a positive measure is time-barred one year after the administration becomes aware of circumstances justifying repayment.

The Court of First Instance held that, in order to fulfil their function of ensuring legal certainty, limitation periods must be fixed in advance by the Community legislature, which has power to fix their duration and the detailed rules for their application, and that legislative provisions unconnected with the case in point cannot be applied by analogy.

**Languages:**

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.

**Identification:** ECJ-2005-2-022

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 30.09.2003 / **e)** C-224/01 / **f)** Gerhard Köbler v. Republik Österreich / **g)** *European Court Reports* I-10239 / **h)** CODICES (English, French).

**Keywords of the systematic thesaurus:**

- 1.2.3 **Constitutional Justice** – Types of claim – Referral by a court.
- 3.26 **General Principles** – Principles of Community law.
- 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Effective remedy.
- 5.3.17 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.

**Keywords of the alphabetical index:**

Free movement of persons, remuneration of university professors, direct discrimination / European Community, law, breach by Member State, compensation, criteria.

**Headnotes:**

1. The principle that Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible is also applicable when the alleged infringement stems from a decision of a court adjudicating at last instance.

That principle, inherent in the system of the Treaty, applies to any case in which a Member State breaches Community law, whichever is the authority of the Member State whose act or omission was responsible for the breach.

It is for the legal system of each Member State to designate the court competent to adjudicate on disputes relating to such reparation. Subject to the reservation that it is for the Member States to ensure in each case that those rights are effectively protected, it is not for the Court to become involved in resolving questions of jurisdiction to which the classification of certain legal situations based on Community law may give rise in the national judicial system (see paragraphs 30-31, 33, 46-47, 50, disp. 1).

2. Member States are obliged to make good damage caused to individuals by infringements of Community law for which they are responsible where the rule of Community law infringed is intended to confer rights on individuals, the breach is sufficiently serious and there is a direct causal link between that breach and the loss or damage sustained by the injured parties. In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from a decision of a court adjudicating at last instance, the competent national court must, taking into account the specific nature of the judicial function and the legitimate requirement of legal certainty, determine whether that infringement is manifest.

In particular, the national court must take account of all the factors which characterise the situation put before it. Those factors include, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution and non-compliance by the court in question with its obligation to make a reference for a preliminary ruling under Article 234.3 EC.

In any event, an infringement of Community law will be sufficiently serious where the decision concerned was made in manifest breach of the case-law of the Court in the matter (see paragraphs 51-56, disp. 1).

3. Article 48 of the Treaty (now, after amendment, Article 39 EC) and Article 7.1 of Regulation no. 1612/68 on freedom of movement for workers within the Community are to be interpreted as meaning that they preclude the grant by a Member State *qua* employer, of a special length-of-service increment to university professors which secures a financial benefit in addition to basic salary, the amount of which is already dependent on length of service, and which a university professor receives if he has carried on that profession for at least 15 years with a university in that Member State and if, furthermore, he has been in receipt for at least four years of the normal length-of-service increment.

As it precludes, for the purpose of the grant of the special length-of-service increment for which it provides, any possibility of taking into account periods of activity completed by a university professor in another Member State, such a regime is clearly likely to impede freedom of movement for workers.

Although it cannot be excluded that an objective of rewarding workers' loyalty to their employers in the context of policy concerning research or university education constitutes a pressing public-interest reason, the obstacle which such a measure entails clearly cannot be justified in the light of such an objective (see paragraphs 70-72, 83, disp. 2).

4. An infringement of Community law does not have the requisite manifest character for liability under Community law to be incurred by a Member State for a decision of one of its courts adjudicating at last instance when, firstly, Community law does not expressly cover the issue of law in question, there is no answer to be found in the Court's case-law and the answer is not obvious and secondly, the infringement is not deliberate in nature but results from the incorrect reading of a judgment of the Court (see paragraphs 122-123, 126, disp. 3).

**Summary:**

Mr Köbler has been employed since 1 March 1986 under a public-law contract with the Austrian State in the capacity of ordinary university professor in Innsbruck. On his appointment he was awarded the salary of an ordinary university professor, tenth step, increased by the normal length-of-service increments. However, Mr Köbler applied for the special length-of-service increment for university professors, under Article 50a of the law on salaries. He claimed that, although he had not completed 15 years' service as a professor at Austrian universities, he had completed the requisite length of service if the duration of his service in universities of other Member States of the Community were taken into consideration. He

maintained that the condition of completion of 15 years' service solely in Austrian universities – with no account being taken of periods of service in universities in other Member States – amounted, since the accession of the Republic of Austria to the Community, to indirect discrimination unjustified under Community law. In the proceedings to which Mr Köbler's claim gave rise, the *Verwaltungsgerichtshof* referred a question to the Court of Justice for a preliminary ruling. However, the *Verwaltungsgerichtshof* withdrew its reference for a preliminary ruling and, by judgment of the same date, dismissed Mr Köbler's action, on the ground that the special length-of-service increment was a loyalty bonus which objectively justified a derogation from the Community law provisions on freedom of movement for workers.

Mr Köbler therefore brought an action for damages against the Republic of Austria before the *Landesgericht für Zivilrechtssachen Wien*, seeking reparation for the loss which he claimed to have suffered as a result of the non-payment to him of a special length-of-service increment. He maintained that the judgment of the *Verwaltungsgerichtshof* had infringed directly applicable provisions of Community law, as interpreted by the Court of Justice in judgments in which it held that a special length-of-service increment does not constitute a loyalty bonus. Taking the view that in the case before it the interpretation of Community law was not free from doubt and that such interpretation was necessary in order for it to give its decision, the *Landesgericht für Zivilrechtssachen Wien* decided to stay proceedings and to refer to the Court of Justice for a preliminary ruling the five questions giving rise to the present case.

#### Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



#### Identification: ECJ-2005-2-023

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 02.10.2003 / **e)** C-194/99 / **f)** Thyssen Stahl AG v. Commission of the European Communities / **g)** *European Court Reports* I-10821 / **h)** CODICES (English, French).

#### Keywords of the systematic thesaurus:

3.26 **General Principles** – Principles of Community law.

#### Keywords of the alphabetical index:

File, access, right, denied.

#### Headnotes:

In all proceedings in which sanctions, especially fines or penalty payments, may be imposed, observance of the rights of the defence is a fundamental principle of Community law which must be complied with even if the proceedings in question are administrative proceedings.

The rights of the defence are infringed where it is possible that the outcome of the administrative procedure conducted by the Commission may have been different as a result of an error committed by it. An undertaking establishes that there has been such an infringement where it adequately demonstrates, not that the Commission's decision would have been different in content, but rather that it would have been better able to ensure its defence had there been no error, for example because it would have been able to use for its defence documents to which it was denied access during the administrative procedure (see paragraphs 30-31).

#### Summary:

From 1974 onwards the European steel industry underwent a crisis characterised by a fall in demand giving rise to problems of excess supply and capacity and low prices. In 1980, after having attempted to manage the crisis by way of unilateral voluntary commitments given by undertakings as regards the amount of steel put on the market and minimum prices ("the Simonet Plan") or by fixing guide and minimum prices ("the Davignon Plan", the "Eurofer I" agreement), the Commission declared that there was a manifest crisis within the meaning of Article 58 of the ECSC Treaty and imposed mandatory production quotas for, *inter alia*, beams. That Community system came to an end in 1988. Long before that date, however, the Commission had announced in various communications and decisions that the quota system was to be abandoned, pointing out that the end of that system would mean a return to a market characterised by free competition between undertakings. However, the sector continued to be affected by excess production capacity which, according to expert opinion, had to undergo a sufficient and rapid reduction to enable undertakings

to meet world competition. For that reason, from the end of the quota system the Commission set up a surveillance system involving the collection of statistics on production and deliveries, monitoring of market developments and regular consultations with undertakings on the market situation and trends. The undertakings in the sector, some of which were members of the Eurofer trade association, thus maintained regular contact with the Commission's Directorate-General for the "Internal Market and Industrial Affairs" (DG III) by way of consultation meetings. The surveillance system itself came to an end in 1990 and was replaced by an individual and voluntary information scheme.

At the beginning of 1991, the Commission carried out a series of inspections in the offices of a number of steel undertakings and associations of undertakings in the sector. A statement of objections was sent to them. Hearings were held at the beginning of the following year. In the next year the Commission adopted the contested decision, by which it found that 17 European steel undertakings and one of their trade associations had participated in a series of agreements, decisions and concerted practices designed to fix prices, share markets and exchange confidential information on the market for beams in the Community, contrary to Article 65.1 ECSC. By that decision, it imposed fines on 14 undertakings for infringements committed between 1988 and 1990.

One of those undertakings, the applicant, then brought an action before the Court of First Instance for partial annulment of the contested decision. Although the Court of First Instance granted the applicant's application only in part, it reduced the fine imposed on the applicant. However, the applicant appealed against that judgment. It was that appeal that gave rise to the present case. Among the grounds of appeal put forward, the appellant maintained, in particular, that the refusal to communicate to it the documents relating to the internal investigation carried out by the Commission into the role of DG III and the refusal to hear the applicant in that regard during the administrative procedure. The Court rejected this ground of appeal, holding that the appellant had not established to the requisite standard that it would have been better able to ensure its defence in the absence of the alleged error, that is to say, if it had been able to use for its defence the documents to which it was denied access during the administrative procedure.

#### *Languages:*

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



#### *Identification:* ECJ-2005-2-024

**a)** European Union / **b)** Court of First Instance / **c) / d)** 21.10.2003 / **e)** T-392/02 / **f)** Solvay Pharmaceuticals BV v. Council of the European Union / **g)** *European Court Reports* II-04555/ **h)** CODICES (English, French).

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

3.16 **General Principles** – Proportionality.  
 3.17 **General Principles** – Weighing of interests.  
 3.26 **General Principles** – Principles of Community law.  
 5.2 **Fundamental Rights** – Equality.  
 5.4.19 **Fundamental Rights** – Economic, social and cultural rights – Right to health.

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

Public health, principle of precaution / Animal, food additive, safety, scientific uncertainty, principle of precaution / Precaution, principle.

#### *Headnotes:*

1. The precautionary principle constitutes a general principle of Community law requiring the authorities in question, in the particular context of the exercise of the powers conferred on them by the relevant rules, to take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests. Since the Community institutions are responsible, in all their spheres of activity, for the protection of public health, safety and the environment, the precautionary principle can be regarded as an autonomous principle stemming from the Treaty provisions, in particular Articles 3.p, 6, 152.1, 153.1, 153.2, 174.1 and 174.2 EC.

In the field of public health, the precautionary principle implies that, where there is uncertainty as to the existence or extent of risks to human health, the institutions may take precautionary measures without having to wait until the reality and seriousness of those risks become fully apparent.



Where scientific evaluation does not make it possible to determine the existence of a risk with sufficient certainty, whether to have recourse to the precautionary principle depends on the level of protection chosen by the competent authority in the exercise of its discretion, taking account of the priorities that it defines in the light of the objectives it pursues in accordance with the relevant rules of the Treaty and of secondary law. That choice must, however, comply with the principle that the protection of public health, safety and the environment is to take precedence over economic interests, as well as with the principles of proportionality and non-discrimination (see paragraphs 121-122, 125).

2. In the domain of additives for feedingstuffs, the existence of solid evidence which, while not resolving the scientific uncertainty, may reasonably raise doubts as to the safety of a substance, justifies the withdrawal of the authorisation for that substance. The precautionary principle is designed to prevent potential risks. By contrast, purely hypothetical risks – based on mere hypotheses that have not been scientifically confirmed – cannot be accepted.

To make the maintenance of the authorisation of a substance subject to proof of the lack of any risk, even a purely hypothetical one, would be both unrealistic – in so far as such proof is generally impossible to give in scientific terms since ‘zero risk’ does not exist in practice – and contrary to the principle of proportionality.

Furthermore, the adoption of a precautionary measure in order to prevent a risk which cannot be demonstrated in the state of scientific knowledge at the date of that adoption, but which is supported by sufficiently serious evidence, may in certain cases be deferred on the basis of the nature, the seriousness and the scope of that risk on the basis of a balancing of the various interests involved. During that balancing exercise the competent authority enjoys a wide discretion (see paragraphs 129-130, 135).

#### *Summary:*

Nifursol is an additive used in feedingstuffs, manufactured by Solvay Pharmaceuticals BV. It is used to prevent the occurrence of histomoniasis, known as “blackhead”, in turkeys. Nifursol belongs to the group of nitrofurans, which are medicinal substances belonging to the class of coccidiostats, which are regarded in relation to feedingstuffs as additives in Directive no. 70/524, pending the drawing-up of a directive on medicinal feedingstuffs. The Community legislature thought it appropriate, provisionally, to regard those substances as additives, because legislation relating to feedingstuffs

was more harmonised than that relating to medicinal products.

Although it had been authorised as an additive in animal feedingstuffs, following an assessment of that substance on the basis of a dossier compiled in accordance with Directive no. 87/513, and although the procedure for granting a new authorisation provided for in the transitional rules introduced by Directive no. 96/51 had been initiated, the procedure for the re-assessment of Nifursol led to the withdrawal of its authorisation by Council Regulation (EC) no. 1756/2002 of 23 September 2002 amending Directive no. 70/524. In that regulation, based on Directive no. 70/524, and in particular Article 9 M thereof, the Council refers to the opinions of the Joint FAO/WHO Expert Committee on Food Additives and the Committee for Veterinary Medicinal Products of the European Agency for the Evaluation of Medicinal Products which were issued on the subject and according to which it is not possible to determine an acceptable daily intake which is safe for consumers, because of the genotoxicity and carcinogenicity of those substances.

In the present case Solvay Pharmaceuticals BV sought annulment of that Council regulation. The applicant maintained principally that the contested regulation was based on a purely hypothetical risk to human health. It claimed in that regard that there had been an infringement of Articles 9 M and 3 A.b of Directive no. 70/524 and, in the alternative, an infringement of the precautionary principle.

The Court of First Instance rejected that complaint. Recalling that, in the field of public health, the precautionary principle implies that, where there is uncertainty as to the existence or extent of risks to human health, the institutions may take precautionary measures without having to wait until the reality and seriousness of those risks become fully apparent, the Court considered that where scientific evaluation does not make it possible to determine the existence of a risk with sufficient certainty, whether to have recourse to the precautionary principle depends on the level of protection chosen by the competent authority in the exercise of its discretion, taking account of the priorities that it defines in the light of the objectives it pursues in accordance with the relevant rules of the Treaty and of secondary law.

#### *Languages:*

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



**Identification:** ECJ-2005-2-025

**a)** European Union / **b)** Court of Justice of the European Communities / **c)** / **d)** 09.12.2003 / **e)** C-129/00 / **f)** Commission of the European Communities v. Italian Republic / **g)** *European Court Reports* I-14637 / **h)** CODICES (English, French).

**Keywords of the systematic thesaurus:**

2.2.1.6 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law.

**Keywords of the alphabetical index:**

European Commission, commissioner, resignation / European Communities.

**Headnotes:**

A Member State's failure to fulfil obligations may, in principle, be established under Article 226 EC whatever the agency of that State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution (see paragraph 29).

**Summary:**

An Italian law, no. 428/1990, introduced into the tax legislation of that Member State special rules in respect of repayment of taxes recognised to be incompatible with the Community rules. Previously, that question was governed by Article 19.1 of Decree-Law no. 688 of 30 September 1982. Whereas Article 19 of Decree-Law no. 688/1982 had given rise to two judgments of the Court of Justice, one of which was given in an action for failure to fulfil obligations, Article 29.2 of Law no. 428/1990 had subsequently already given rise itself to references for preliminary rulings, to which the Court had replied in its judgment of 9 February 1999 in Case C-343/96 *Dilexport* [1999] ECR I-579. The referring court had stated at the time that that provision was applied by the Italian courts to the effect that, in order to resist the repayment of customs duties or taxes paid but not due, the administration might rely on the presumption that such duties and taxes are normally passed on to third parties.

In the present case, the Commission considered, essentially, as the referring court had considered in the case which gave rise to the judgment in *Dilexport*, that, as interpreted and applied by the Italian administrative authorities and courts, the provisions of Article 29.2 of Law no. 428/1990 led to the same result as those of the former Article 19 of Decree-Law no. 688/1982.

Having given the Italian Republic an opportunity to submit its observations, the Commission issued a reasoned opinion requesting that Member State to comply with its obligations under the Treaty within a period of two months. Since it was not satisfied with the Italian authorities' reply, the Commission decided to bring the action for failure to fulfil obligations giving rise to the present case. Such an action sought a declaration that, by maintaining in force Article 29.2 of Law no. 428 of 29 December 1990, as interpreted and applied by the administrative authorities and the courts, the Italian Republic had failed to fulfil its obligations under the EC Treaty, since in the Commission's view such a provision amounted to allowing rules of evidence in relation to the passing on to third parties of the amount of charges levied in breach of Community rules which made exercise of the right to repayment of such charges virtually impossible or, at least, excessively difficult for the taxpayer.

It was on this occasion that the Court recalled that a Member State's failure to fulfil obligations may, in principle, be established under Article 226 EC whatever the agency of that State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution.

**Languages:**

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



**Identification:** ECJ-2005-2-026

**a)** European Union / **b)** Court of First Instance / **c)** First Chamber / **d)** 17.12.2003 / **e)** T-219/99 / **f)** *British Airways plc v. Commission of the European Communities* / **g)** not yet published / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

4.6.10.2 **Institutions** – Executive bodies – Liability – Political responsibility.

4.17.1.3 **Institutions** – European Union – Institutional structure – Commission.

*Keywords of the alphabetical index:*

European Community, Commission, simultaneous individual resignation by all commissioners / Censure, motion, collective resignation.

*Headnotes:*

Commissioners cannot be regarded as having been ‘obliged to resign as a body’, within the meaning of the last sentence of the second paragraph of Article 201 EC, unless the parliament has first adopted a motion of censure under the conditions defined by the same article. In the absence of such a motion, individual voluntary resignations, even if simultaneous, of all the Commission’s Members constitute a scenario outside the provisions of Article 201 EC, falling solely under Article 215 EC, the simultaneous nature of those individual resignations not being capable of calling into question the voluntary character of each of them.

It follows that, in such a case, the resigned Members remain in office with full powers until their replacement, since the first paragraph of Article 215 EC defines only the legal causes of the cessation of Commissioners’ duties during their mandate, without thereby wishing to prohibit Commissioners who have resigned from exercising their normal powers until their resignation takes effect on the date of their actual replacement (see paragraphs 50-51, 53, 55-56).

*Summary:*

The largest British airline company, British Airways, had concluded agreements with travel agents established in the United Kingdom and accredited by the International Air Transport Association (IATA) which entitled them to a basic standard commission on their sales of air tickets on its flights. In addition to that basic commission system, British Airways had concluded agreements with those travel agents comprising three distinct systems of financial incentives, namely “marketing agreements”, “global agreements” and, finally, a “performance reward scheme”.

On a complaint by one of its competitors, Virgin Atlantic Airways Ltd, the Commission had adopted a decision whereby it found that by applying those marketing agreements and the new performance

reward scheme to air travel agents established in the United Kingdom, British Airways had abused the dominant position which it held on the United Kingdom market for air travel agency services. British Airways brought an action for annulment of that decision, claiming *inter alia* that the Commission was not competent to adopt it. It maintained that the Commission had exceeded its competence in adopting the contested decision on 14 July 1999, since all its members, who had resigned on 16 March 1999 in order to avoid a motion of censure by the parliament, had authority only to deal with current business within the meaning of Article 201 EC, applicable by analogy, until the appointment of the members of the new Commission on 15 September 1999. British Airways submitted in effect that the reasons for the restrictions imposed on the Commission’s activities by Article 201 EC, which include, first and foremost, the investing in the parliament of the constitutional authority to withdraw the Commission’s political mandate, are at least as valid where the Commission’s resignation as a body is voluntary, as in this case, as where it follows a motion of censure by the parliament. The Court of First Instance rejected that argument.

*Languages:*

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



# European Court of Human Rights

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## Important decisions

*Identification:* ECH-2005-2-002

a) Council of Europe / b) European Court of Human Rights / c) Grand Chamber / d) 30.06.2005 / e) 45036/98 / f) *Bosphorus Hava Yollari Turizm Ve Ticaret Şirketi ("Bosphorus Airways") v. Ireland* / g) *Reports of Judgments and Decisions of the Court* / h) CODICES (English, French).

*Keywords of the systematic thesaurus:*

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

*Keywords of the alphabetical index:*

Property, enjoyment / Seizure / Embargo / European Community, institution, act / State, duty to guarantee the protection of fundamental rights and freedoms.

*Headnotes:*

The protection of fundamental rights by EC law may be considered "equivalent" to that of the European Convention on Human Rights. A presumption arises that a State does not depart from the requirements of the Convention when it implements legal obligations flowing from its membership of the European Union but such a presumption may be rebutted if, in a particular case, the protection of Convention rights was manifestly deficient.

*Summary:*

In May 1993 an aircraft leased by "Bosphorus Airways", an airline charter company registered in Turkey, from Yugoslav Airlines ("JAT") was seized by the Irish authorities. It had been in Ireland for maintenance by TEAM Aer Lingus, a company owned by the Irish State, and was seized under EC Council Regulation 990/93 which, in turn, had implemented the UN sanctions regime against the Federal Republic of Yugoslavia (Serbia and Montenegro). The applicant's challenge to the retention of the aircraft was initially successful in the High Court, which held in 1994 that Regulation 990/93 was not applicable to the aircraft. However, on appeal, the Supreme Court referred a

question under Article 177 of the EC Treaty to the European Court of Justice (ECJ) on whether the aircraft was covered by Regulation 990/93. The ECJ found that it was and, in its judgment of 1996, the Supreme Court applied the decision of the ECJ and allowed the State's appeal. By that time, the applicant's lease on the aircraft had already expired. Since the sanctions regime against FRY (Serbia and Montenegro) had also been relaxed by that date, the Irish authorities returned the aircraft directly to JAT. The applicant consequently lost approximately three years of its four-year lease of the aircraft, which was the only one ever seized under the relevant EC and UN regulations.

In the application lodged with the Court, the applicant company complained that the manner in which Ireland had implemented the sanctions regime to impound its aircraft had constituted an unjustified interference with its right to peaceful enjoyment of its possessions. It relied on Article 1 Protocol 1 ECHR.

The Court noted that it was not disputed that the impoundment of the aircraft had been implemented by the Irish authorities on its territory following a decision by the Irish Minister for Transport. In such circumstances, the matter fell within the "jurisdiction" of the Irish State within the meaning of Article 1 ECHR. As to the legal basis for the impoundment, the Court observed that EC Regulation 990/93 had been generally applicable and binding in its entirety, thus applying to all Member States, none of which could lawfully depart from any of its provisions. In addition, its direct applicability was not, and could not be, disputed. The Regulation had become part of Irish domestic law with effect from 28 April 1993, when it had been published in the Official Journal, prior to the date of the impoundment and without the need for implementing legislation. The impoundment powers had been entirely foreseeable and the Irish authorities had rightly considered themselves obliged to impound any departing aircraft to which they considered Article 8 of EC Regulation 990/93 applied. Their decision that it did so apply had later been confirmed by the ECJ. The Court furthermore agreed with the Irish Government and the European Commission (intervening in the case) that the Supreme Court had no real discretion to exercise in the case, either before or after its preliminary reference to the ECJ. In conclusion, the impugned interference had not been the result of an exercise of discretion by the Irish authorities, either under EC or Irish law, but rather had amounted to compliance by the Irish State with its legal obligations flowing from EC law and, in particular, Article 8 of EC Regulation 990/93.

As to the justification of the impoundment, the Court found that the protection of fundamental rights by EC law could have been considered to be, and to have



been at the relevant time, “equivalent” to that of the Convention system. Consequently, a presumption arose that Ireland had not departed from the requirements of the Convention when it had implemented legal obligations flowing from its membership of the EC. Such a presumption could be rebutted if, in a particular case, it was considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention’s role as a constitutional instrument of European public order in the field of human rights. The Court took note of the nature of the interference, of the general interest pursued by the impoundment and by the sanctions regime and of the ruling of the ECJ, a ruling with which the Supreme Court had been obliged to comply. It could not be said that the protection of Bosphorus Airways’ Convention rights had been manifestly deficient. It followed that the presumption of Convention compliance had not been rebutted and that the impoundment of the aircraft did not give rise to a violation of Article 1 Protocol 1 ECHR.

#### Cross-references:

- *CFDT v. European Communities*, no. 8030/77, Commission decision of 10.07.1978, *Decisions and Reports* 13, p. 231;
- *AGOSI v. the United Kingdom*, Judgment of 24.10.1986, Series A, no. 108;
- *Dufay v. European Communities*, no. 13539/88, Commission decision of 19.01.1989;
- *M. & Co v. Germany*, no. 13258/87, Commission decision of 09.02.1990, *Decisions and Reports* 64, p. 138;
- *Gasus Dosier-und Fördertechnik GmbH v. the Netherlands*, Judgment of 23.02.1995, Series A, no. 306-B;
- *Drozd and Janousek v. France and Spain*, Judgment of 26.06.1992, Series A, no. 240;
- *Loizidou v. Turkey* (preliminary objections), Judgment of 23.03.1995, Series A, no. 310;
- *Cantoni v. France*, Judgment of 15.11.1996, *Reports of Judgments and Decisions* 1996-V;
- *United Communist Party of Turkey and Others v. Turkey*, Judgment of 30.01.1998, *Reports of Judgments and Decisions* 1998-I; *Bulletin* 1998/1 [ECH-1998-1-001];
- *Waite and Kennedy v. Germany* [GC], no. 26083/94, *Reports of Judgments and Decisions* 1999-I; *Bulletin* 1999/1 [ECH-1999-1-005];
- *Matthews v. the United Kingdom* [GC], no. 24833/94, *Reports of Judgments and Decisions* 1999-I; *Bulletin* 1999/1 [ECH-1999-1-004];
- *Moosbrugger v. Austria* (dec.), no. 44861/98, 25.01.2000;
- *Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, *Reports of Judgments and Decisions* 2001-II; *Bulletin* 2001/1 [ECH-2001-1-002];
- *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, *Reports of Judgments and Decisions* 2001-VIII; *Bulletin* 2001/2 [ECH-2001-2-006];
- *Pellegrini v. Italy*, no. 30882/96, *Reports of Judgments and Decisions* 2001-VIII;
- *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, *Reports of Judgments and Decisions* 2001-XI; *Bulletin* 2002/1 [ECH-2002-1-002];
- *Stretch v. the United Kingdom*, no. 44277/98, 24.06.2003;
- *S.A. Dangeville v. France*, no. 36677/97, *Reports of Judgments and Decisions* 2002-III; *Bulletin* 2002/1 [ECH-2002-1-005];
- *Gentilhomme, Schaff-Benhadjji and Zerouki v. France*, Judgment of 14.05.2002;
- *Banković and Others v. Belgium and 16 other Contracting States* (dec.), no. 52207/99, *Reports of Judgments and Decisions* 2001-XII;
- *Assanidze v. Georgia*, no. 71503/01, *Reports of Judgments and Decisions* 2004-II; *Bulletin* 2004/1 [ECH-2004-1-002];
- *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, *Reports of Judgments and Decisions* 2004-VII.

#### Languages:

English, French.



#### Identification: ECH-2005-2-003

**a)** Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 26.07.2005 / **e)** 73316/01 / **f)** Siliadin v. France / **g)** Reports of Judgments and Decisions of the Court / **h)** CODICES (English, French).

*Keywords of the systematic thesaurus:*

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

5.1.2 **Fundamental Rights** – General questions – Horizontal / Vertical effects.

5.3.5.2 **Fundamental Rights** – Civil and political rights – Individual liberty – Prohibition of forced or compulsory labour.

*Keywords of the alphabetical index:*

Servitude, obligation to penalise / Obligation, positive / Labour, forced or compulsory, prohibition / Servitude, nature / Slavery, nature.

*Headnotes:*

States have a positive obligation to criminalise slavery, servitude and forced or compulsory labour punishable offences. That obligation extends to the acts of private individuals.

*Summary:*

The applicant is a Togolese national who, after being brought to France by a relative of her father before she had reached the age of sixteen, was made to work as an unpaid servant. As an impecunious illegal immigrant in France, whose passport had been confiscated, she was forced against her will and without respite to work for Mr and Mrs B., doing housework and looking after their three, and later four, young children. The applicant worked from 7 a.m. until 10 p.m. every day and had to share the children's bedroom. The exploitation continued for several years, during which time Mr and Mrs B. led the applicant to believe that her immigration status would soon be regularised. Finally, after being alerted by a neighbour, the Committee against Modern Slavery reported the matter to the prosecuting authorities. Criminal proceedings were brought against the couple, who were acquitted of the criminal charges. Proceedings continued in respect of the civil aspect of the case and resulted in the couple's being convicted and ordered to pay compensation in respect of non-pecuniary damage to the applicant for having taken advantage of her vulnerability and dependent situation by making her work without pay.

In the application lodged with the Court, the applicant claimed that the provisions of French law had not provided her with sufficient protection against being kept in servitude or at least obliged to perform forced or compulsory labour. She relied on Article 4 ECHR.

The Court considered that Article 4 ECHR imposed positive obligations on States, consisting in the adoption and effective implementation of criminal law provisions making the practices set out in Article 4 ECHR a punishable offence. In accordance with modern standards and trends in relation to the protection of human beings from slavery, servitude and forced or compulsory labour, States were under an obligation to penalise and punish any act aimed at maintaining a person in a situation incompatible with Article 4 ECHR.

In the instant case the applicant had worked for years for Mr and Mrs B., without respite, against her will and without being paid. She had been a minor at the relevant time, unlawfully present in a foreign country and afraid of being arrested by the police. Indeed, Mr and Mrs B. had maintained that fear and led her to believe that her status would be regularised. Hence the applicant had, at the least, been subjected to forced labour within the meaning of Article 4 ECHR. The Court had then to determine whether the applicant had also been held in slavery or servitude within the meaning of Article 4 ECHR.

With regard to slavery, although the applicant had been deprived of her personal autonomy, the evidence did not suggest that she had been held in slavery in the proper sense, in other words that Mr and Mrs B. had exercised a genuine right of ownership over her, thus reducing her to the status of an object. Accordingly, it could not be considered that the applicant had been held in slavery in the traditional sense of that concept. As to servitude, that was to be regarded as an obligation to provide one's services under coercion, and was to be linked to the concept of slavery. The forced labour imposed on the applicant lasted almost 15 hours a day, seven days a week. Brought to France by a relative of her father, she had not chosen to work for Mr and Mrs B. As a minor, she had no resources and was vulnerable and isolated, and had no means of subsistence other than in the home of Mr and Mrs B., where she shared the children's bedroom. The applicant was entirely at Mr and Mrs B.'s mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised, which never happened. Nor did the applicant, who was afraid of being arrested by the police, have any freedom of movement or free time. In addition, as she had not been sent to school, despite the promises made to her father, the applicant had no prospect of seeing any improvement in her situation and was completely dependent on Mr and Mrs B. In those circumstances, the Court considered that the applicant, a minor at the relevant time, had been held in servitude within the meaning of Article 4 ECHR.

Slavery and servitude were not as such classified as criminal offences in French criminal law. Mr and Mrs B. had been prosecuted under Articles of the Criminal Code which did not make specific reference to the rights secured by Article 4 ECHR. Having been acquitted, they had not been convicted under criminal law. Hence, despite having been subjected to treatment contrary to Article 4 ECHR and having been held in servitude, the applicant had not seen the perpetrators of those acts convicted under criminal law. In the circumstances, the Court considered that the criminal law legislation in force at the material time had not afforded the applicant specific and effective protection against the actions of which she had been a victim. Consequently, the French State had not fulfilled its positive obligations under Article 4 ECHR and there had been a violation of that provision.

#### Cross-references:

- *Ireland v. the United Kingdom*, Judgment of 18.01.1978, Series A, no. 25; *Special Bulletin ECHR* [ECH-1978-S-001];
- *Marckx v. Belgium*, Judgment of 13.06.1979, Series A, no. 31; *Special Bulletin ECHR* [ECH-1979-S-002];
- *Van Droogenbroeck v. Belgium*, Commission report of 09.07.1980, Series B, vol. 44;
- *X. v. the Netherlands*, no. 9327/81, Commission decision of 03.05.1983, *Decisions and Reports* 32, p. 180;
- *Van der Mussele v. Belgium*, Judgment of 23.11.1983, Series A, no. 70; *Special Bulletin ECHR* [ECH-1983-S-004];
- *X and Y v. the Netherlands*, Judgment of 26.03.1985, Series A, no. 91;
- *Soering v. the United Kingdom*, Judgment of 07.07.1989, Series A, no. 161; *Special Bulletin ECHR* [ECH-1989-S-003];
- *Stubbings and others v. the United Kingdom*, Judgment of 22.10.1996, *Reports of Judgments and Decisions* 1996-IV; *Bulletin* 1996/3 [ECH-1996-3-014];
- *Chahal v. the United Kingdom*, Judgment of 15.11.1996, *Reports of Judgments and Decisions* 1996-V; *Bulletin* 1996/3 [ECH-1996-3-015];
- *A. v. the United Kingdom*, Judgment of 23.09.1998, *Reports of Judgments and Decisions* 1998-VI;
- *Selmouni v. France*, no. 25803/94, *Reports of Judgments and Decisions* 1999-V; *Bulletin* 1992/2 [ECH-1999-2-008];
- *Seguin v. France* (dec.), no. 42400/98, 07.03.2000;

- *Z. and others v. the United Kingdom* [GC], no. 29392/95, *Reports of Judgments and Decisions* 2001-V;
- *E. and others v. the United Kingdom*, no. 33218/96, 26.11.2002;
- *August v. the United Kingdom* (déc.), no. 36505/02, 21.01.2003;
- *M.C. v. Bulgaria*, no. 39272/98, *Reports of Judgments and Decisions* 2003-XII.

#### Languages:

English, French.



## **Systematic thesaurus (V17) \***

\* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

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<sup>1</sup> This chapter – as the Systematic Thesaurus in general – should be used restrictively, as the keywords in it should only be used if a relevant question is raised. This chapter is thus not used to establish statistical data; rather, the *Bulletin* reader or user of the CODICES database should only find decisions under this chapter when the subject of the keyword is an issue in the case.

<sup>2</sup> Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

<sup>3</sup> E.g. Rules of procedure.

<sup>4</sup> E.g. Age, education, experience, seniority, moral character, citizenship.

<sup>5</sup> Including the conditions and manner of such appointment (election, nomination, etc.).

<sup>6</sup> Including the conditions and manner of such appointment (election, nomination, etc.).

<sup>7</sup> Vice-presidents, presidents of chambers or of sections, etc.

<sup>8</sup> E.g. State Counsel, prosecutors, etc.

<sup>9</sup> (Deputy) Registrars, Secretaries General, legal advisers, assistants, auditors, researchers, etc.

<sup>10</sup> E.g. assessors, office members.

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<sup>15</sup> Review *ultra petita*.

<sup>16</sup> Horizontal distribution of powers.

<sup>17</sup> Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.

<sup>18</sup> Decentralised authorities (municipalities, provinces, etc).

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<sup>22</sup> As understood in private international law.

<sup>23</sup> Including constitutional laws.

<sup>24</sup> For example, organic laws.

<sup>25</sup> Local authorities, municipalities, provinces, departments, etc.

<sup>26</sup> Or: functional decentralisation (public bodies exercising delegated powers).

<sup>27</sup> Political questions.

<sup>28</sup> Unconstitutionality by omission.

<sup>29</sup> For the withdrawal of proceedings, see also 1.4.10.4.

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<sup>31</sup> May be used in combination with Chapter 1.2 Types of claim.

<sup>32</sup> For the withdrawal of the originating document, see also 1.4.5.

<sup>33</sup> Comprises court fees, postage costs, advance of expenses and lawyers' fees.

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<sup>36</sup> This keyword allows for the inclusion of enactments and principles arising from a separate constitutional chapter elaborated with reference to the original Constitution (declarations of rights, basic charters, etc.).

<sup>37</sup> Including its Protocols.

<sup>38</sup> Presumption of constitutionality, double construction rule.

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<sup>39</sup> Including the principle of a multi-party system.

<sup>40</sup> Includes the principle of social justice.

<sup>41</sup> See also 4.8.

<sup>42</sup> Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.

<sup>43</sup> Including maintaining confidence and legitimate expectations.

<sup>44</sup> Principle according to which sub-statutory acts must be based on and in conformity with the law.

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<sup>46</sup> Including compelling public interest.

<sup>47</sup> Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).

<sup>48</sup> Including questions of treason/high crimes.

<sup>49</sup> Including prohibition on monopolies.

<sup>50</sup> For the principle of primacy of Community law, see 2.2.1.6.

<sup>51</sup> Including the body responsible for revising or amending the Constitution.

<sup>52</sup> For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.

<sup>53</sup> For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.

<sup>54</sup> For example, the granting of pardons.

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<sup>56</sup> Bicameral, monocameral, special competence of each assembly, etc.

<sup>57</sup> Including specialised powers of each legislative body and reserved powers of the legislature.

<sup>58</sup> In particular commissions of enquiry.

<sup>59</sup> For delegation of powers to an executive body, see keyword 4.6.3.2.

<sup>60</sup> Obligation on the legislative body to use the full scope of its powers.

<sup>61</sup> Representative/imperative mandates.

<sup>62</sup> Presidency, bureau, sections, committees, etc.

<sup>63</sup> Including the convening, duration, publicity and agenda of sessions.

<sup>64</sup> Including their creation, composition and terms of reference.

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<sup>68</sup> For local authorities, see 4.8.

<sup>69</sup> Derived directly from the constitution.

<sup>70</sup> See also 4.8.

<sup>71</sup> The vesting of administrative competence in public law bodies having their own independent organisational structure, independent of public authorities, but controlled by them. For other administrative bodies, see also 4.6.7 and 4.13.

<sup>72</sup> Civil servants, administrators, etc.

<sup>73</sup> Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

<sup>74</sup> Other than the body delivering the decision summarised here.

<sup>75</sup> Positive and negative conflicts.



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<sup>76</sup> Notwithstanding the question to which to branch of state power the prosecutor belongs.

<sup>77</sup> For example, Judicial Service Commission, *Conseil supérieur de la magistrature*.

<sup>78</sup> Comprises the Court of Auditors in so far as it exercises judicial power.

<sup>79</sup> See also 3.6.

<sup>80</sup> And other units of local self-government.

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<sup>81</sup> See also keywords 5.3.41 and 5.2.1.4.

<sup>82</sup> Organs of control and supervision.

<sup>83</sup> For questions of jurisdiction, see keyword 1.3.4.6.

<sup>84</sup> Proportional, majority, preferential, single-member constituencies, etc.

<sup>85</sup> For aspects related to fundamental rights, see 5.3.41.2.

<sup>86</sup> For the creation of political parties, see 4.5.10.1.

<sup>87</sup> E.g. Names of parties, order of presentation, logo, emblem or question in a referendum.

<sup>88</sup> Tracts, letters, press, radio and television, posters, nominations, etc.

<sup>89</sup> Impartiality of electoral authorities, incidents, disturbances.

<sup>90</sup> E.g. signatures on electoral rolls, stamps, crossing out of names on list.

<sup>91</sup> E.g. in person, proxy vote, postal vote, electronic vote.

<sup>92</sup> E.g. *Panachage*, voting for whole list or part of list, blank votes.

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<sup>93</sup> E.g. Auditor-General.

<sup>94</sup> Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.

<sup>95</sup> E.g. Court of Auditors.

<sup>96</sup> The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.

<sup>97</sup> *Staatszielbestimmungen*.

<sup>98</sup> Institutional aspects only: questions of procedure, jurisdiction, composition, etc. are dealt with under the keywords of Chapter 1.

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<sup>99</sup> Including state of war, martial law, declared natural disasters, etc.; for human rights aspects, see also keyword 5.1.3.1.

<sup>100</sup> Positive and negative aspects.

<sup>101</sup> For rights of the child, see 5.3.44.

<sup>102</sup> The criteria of the limitation of human rights (legality, legitimate purpose/general interest, proportionality) are indexed in chapter 3.

<sup>103</sup> Includes questions of the suspension of rights. See also 4.18.

<sup>104</sup> Taxes and other duties towards the state.

<sup>105</sup> Here, the term "national" is used to designate ethnic origin.

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<sup>106</sup> For example, discrimination between married and single persons.

<sup>107</sup> This keyword also covers "Personal liberty". It includes for example identity checking, personal search and administrative arrest.

<sup>108</sup> Detention by police.

<sup>109</sup> Including questions related to the granting of passports or other travel documents.

<sup>110</sup> May include questions of expulsion and extradition.

<sup>111</sup> Including the right of access to a tribunal established by law; for questions related to the establishment of extraordinary courts, see also keyword 4.7.12.

<sup>112</sup> This keyword covers the right of appeal to a court.

<sup>113</sup> Including the right to be present at hearing.

<sup>114</sup> Including challenging of a judge.



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<sup>115</sup> Covers freedom of religion as an individual right. Its collective aspects are included under the keyword "Freedom of worship" below.

<sup>116</sup> This keyword also includes the right to freely communicate information.

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For institutional aspects, see 4.9.5.

121

This keyword also covers "Freedom of work".

122

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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