THE BULLETIN

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

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

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

The decisions are presented in the following way:

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

G. Buquicchio
Secretary of the European Commission for Democracy through Law

THE VENICE COMMISSION

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

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Strasbourg, October 2006

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

Japan, Luxembourg, United States of America.

Précis of important decisions of the reference period 1 September 2005 – 31 December 2005 will be published in the next edition, *Bulletin* 2006/1 for the following country:

Netherlands.

Albania
Constitutional Court

Important decisions

Identification: ALB-2005-3-004

a) Albania / **b)** Constitutional Court / **c)** / **d)** 02.11.2005 / **e)** 26 / **f)** Constitutionality of law / **g)** *Fletore Zyrtare* (Official Gazette), 91/05, 2927 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.9 **General Principles** − Rule of law.
3.10 **General Principles** − Certainty of the law.
3.11 **General Principles** − Vested and/or acquired rights.
3.18 **General Principles** − General interest.
5.2 **Fundamental Rights** − Equality.
5.3.13 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial.

Keywords of the alphabetical index:

Property, restitution / Housing, allocation / Land, illegal occupation.

Headnotes:

The principle of legal certainty is fundamental to the establishment and functioning of the rule of law. It serves as the starting point for assuring a certain group within society that the state will not make changes to the established legal order in a way which is prejudicial to those individuals belonging to this group.

Summary:

I. When the Law no. 7698 dated 15 April 1993 "On the restitution and compensation of property to the former owners" came into force, it became evident that there was a problem in dealing with the tenants of the houses which were to be handed back to their legal owners. Since then, other legislation and by-laws have been passed with a view to resolving problems that might arise from the application of the above Law. The legal system applying to this category of tenants was changed when the Law no. 9235 dated 29 July 2004 "On the restitution and compensation of property" was enacted. Article 9.1 of Law no. 9235 stipulates that in cases where the house is to be restored to its owner, the tenant must vacate it within a period of three years from the coming into force of the Law. The tenants are to continue to pay the rent defined by the Council of Ministers for a period of two years from the coming into force of the Law. The Council of Ministers has the duty to secure accommodation for tenants with the status of homeless individuals by deploying such measures as houses at a low rent, rent entirely subsidised by the state and low interest rate loans. Article 9.2 imposes an obligation on individuals who have breached the law by building on land which is to be restored to its owner to pay the market value for the land fixed at the time of its registration.

The association of tenants of state owned houses that are to be restored to their legal owners requested the repeal of Article 9.1 and 9.2 of Law no. 9235, on the grounds that both were unconstitutional.

II. The Court observed that prior to the enactment of Article 9.1, the tenants of state owned houses that were previously privately owned enjoyed a number of rights. Over the years, some of them acquired certain benefits, notably:

1. the rent would be in accordance with the fees of 1993 (Article 4 of the Law no. 8467, dated 24 July 2000 "On the state contribution to homeless families") until such time as the housing problems for this category of tenant were resolved;
2. the state would provide them with housing from the National Housing Entity under the criteria of the Law no. 7652, dated 23 December 1992 "On the privatisation of state owned houses".

In summary, the state would provide them with housing upon the payment of a privatisation price fixed during the privatisation of houses in 1992, and the amount of rent would not change until this problem had been solved.

Article 9.1 introduced sweeping changes to tenants' rights. Under the old law, the state was committed to solve the housing problem by making this category of tenant owners based on the same criteria as for the rest of the population. Article 9.1 was very different. It envisaged the provision of accommodation either at a very low rent or entirely subsidised by the state and the provision of low interest rate loans. Earlier provisions provided for a frozen rent until the final settlement of the tenants' housing predicament (Article 10 of the Law no. 8030, dated 15 November 1995). By contrast, Article 9.1 explicitly provided for a

frozen rent to be paid for up to two years from the date of enactment of the law.

The Court also observed that the new law set out other measures with a very prejudicial effect on the tenants' situation. The earlier repealed legislation had expressly stated that the deadline for vacating the houses was the time when the housing problem would finally be resolved. Article 9.1, arbitrarily and with no apparent safeguards, stated that tenants should vacate the houses within three years.

The Court concluded that Article 9.1 of Law no. 9235, dated 29 July 2004, breached several of the appellants' rights which were enshrined in the legislation, including some recommendations made in its case law (Decision no. 5/97, dated 27 February 1997). Only some of the tenants enjoyed those rights. New solutions had been imposed on others which were clearly unfavourable and qualitatively distinguishable from the previous rights.

The Court held that Article 9.1 of Law no. 9235, dated 29 July 2004 "On the restitution and compensation of property" violated the principle of certainty of the law, an important component of the rule of law, guaranteed by Articles 15, 17 and 18 of the Constitution.

The doctrine of constitutional law recognises certainty of the law to be one of the most essential elements of the rule of law. It means that citizens can trust in the immutability of the law for matters already dealt with by legislation. The rationale behind it is that citizens should not be constantly concerned about the changeable nature and the negative consequences of normative acts that violate and jeopardise the system established by previous legislation.

The Court affirmed the principle of certainty of the law but emphasised that this principle cannot always prevail. In certain situations, the principle of public interest will prevail over certainty of the law. The amendment of a law favourable to a specific group of the population is not justified by a substantial public interest. The provision under dispute might be favourable to the owners of the houses but it discriminates against another group of society by infringing their basic right to shelter. The Court went on to say that the rationale behind the principle of legal certainty is not to eliminate any unpopular consequences which might result from new legislation. The new provision brought about profound changes to the relationship between the state and the tenants of privately owned houses, with very serious consequences.

The earlier legislation placed an obligation on the state to solve the housing problem for this category of people by making them owners (like most other citizens). Article 9.1 curtailed the state's obligations to a great extent.

The Court concluded that Article 9.1 did not come about as a result of the requirements of the public interest or the demands of the welfare state. It therefore infringed the principle of legal certainty and was unconstitutional. For these reasons, the Court decided to repeal Article 9.1. However, the Court did not discern any unconstitutional elements in the provisions of Article 9.2 of the law.

Languages:

Albanian.

Identification: ALB-2005-3-005

a) Albania / **b)** Constitutional Court / **c)** / **d)** 09.11.2005 / **e)** 29 / **f)** Constitutionality of law / **g)** *Fletore Zyrtare* (Official Gazette), 91/05, 2934 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.2.2.2 **Sources of Constitutional Law** − Hierarchy − Hierarchy as between national sources − The Constitution and other sources of domestic law.
4.7.1 **Institutions** − Judicial bodies − Jurisdiction.
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.
4.7.7 **Institutions** − Judicial bodies − Supreme court.
5.3.13.3 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Access to courts.

Keywords of the alphabetical index:

Constitutionality, functional / High Council of Justice, powers / Judge, disciplinary measure / Judge, dismissal / Legislator, discretionary power / Supreme Court, jurisdiction / Supremacy, Constitution / Constitution, direct effect.

Headnotes:

Constitutional norms take precedence over inferior normative acts. Under the Constitution, public bodies can exercise their authority only in the framework and in pursuance of constitutional norms. This constitutes the principle of functional constitutionality. Inferior legal acts should comply with higher legal acts, both on a formal and a substantive basis. The constitutional provisions are directly applicable, except in cases where the Constitution has stipulated otherwise.

Summary:

Article 34.1 of the Law no. 8811, dated 17.05.2001 "On the organisation and functioning of the High Council of Justice" provides that complaints against decisions by the High Council of Justice on the removal from office of judges, as well as any other disciplinary measures taken against them, may be submitted by the judge concerned to the Supreme Court within ten days of his being notified of the decision. Article 147.6 of the Constitution allows the judge to complain to the Supreme Court against a decision to remove him or her from office.

A first instance judge complained to the Supreme Court about a decision by the High Council of Justice on the disciplinary measure of reprimand. In accordance with Article 145.2 of the Constitution, the Supreme Court suspended the judgment and asked the Constitutional Court to assess the constitutionality of the above provision, and in particular the part that entitles judges to complain to the Supreme Court against any type of disciplinary measure.

The Constitution, as the state basic law, imposes on all public bodies the obligation to exercise their authority only in the framework and in pursuance of constitutional norms. This constitutes the important principle of functional constitutionality.

The legislative activity of the bodies established under the Constitution, and the content of the laws and regulations they issue define the position of these acts in the hierarchy of legal norms. This is how the principle evolved that lower legal acts should be in compliance with higher ones, both from the formal and the substantive point of view.

The provisions of the Constitution are directly applied, except where the Constitution has stipulated otherwise. This is a fundamental principle set out in Article 4.3 of the Constitution, according to which, in cases when the constitutional rule has been made explicit, it can neither be avoided nor exceeded. The Constitution has included provisions that regulate its direct or indirect implementation, leaving the legislator the necessary scope to act, except in cases when the Constitution has stipulated otherwise. From this point of view, it is the Constitution that authorises the legislator to define the boundaries of its lawmaking, through the issuance of respective legal norms, whilst always respecting constitutional concepts and principles.

The Court began by examining the wording of Article 147.4 and 147.6 of the Constitution. Article 147.4 empowers the High Council of Justice to decide on the removal of judges as well as the legal responsibility for their disciplinary system. The wording of this provision belongs to that category of exclusive cases where constitutional norms cannot be directly applied, because the possibility exists for the system to be governed by legislation. This provision contains the elements of a referring norm because the question of the removal of judges and the disciplinary system that applies to them has been delegated to the legislator. The wording of Article 147.6 is quite different. The Constitution has conferred no authority on the legislator in this article and, furthermore, has itself undertaken not only the regulation of the issue which is the object of review, but also the question of the competent body to deal with the matter. This constitutional norm can be described as an exclusive and restrictive provision, and as such, it should be interpreted strictly. The Constitution has provided that the Joint Chambers of the Supreme Court should only review complaints against decisions by the High Council of Justice on the removal from office of judges.

The Court took the view that Article 34.1 of the law under dispute, which provides for the right to complain to the Supreme Court against any other disciplinary measure besides that of removal from office, goes beyond the content of the constitutional provision both in terms of expanding the range of disciplinary measures and in terms of exceeding the jurisdiction of the Supreme Court.

The standard established by the Constitution for the protection of the status of judges is focused on its application to the measure of removal from office of the judges and not against the other disciplinary measures. Removal from office is a draconian measure for a judge. It brings his career to an end, and, as such, has a direct impact on his constitutional status. The Constitution does not prohibit interference with the discipline of judges in areas related to the exercise of their function. It is for the legislator to decide upon the nature and type of disciplinary measures, apart from the measure of removal from office, for which there is specific regulation within the Constitution.

According to Article 147.6 of the Constitution, the measure of removal from office of judges has been given special status by comparison with other types of disciplinary measures, under the control by the Joint Colleges of the Supreme Court. When the Constitution was drafted, Article 147.6 was put in place to provide for the right to complain against the measure of removal from office, and for the body which should oversee such measures whilst Article 147.4 accords the legislator the discretion to regulate the disciplinary system for judges.

The Court highlighted another major problem with the legal provision under dispute, namely the conferring of a legal competence on the Supreme Court which is beyond the scope of its constitutional jurisdiction. Article 147.6 of the Constitution entitles a judge to complain about a decision to remove him from office to the Supreme Court, which takes its decisions in joint colleges. Article 141 of the Constitution provides that the Supreme Court has original and review jurisdiction. The same provision bestows upon it the right of unification and change of judicial practice. The Constitutional Court did not have a problem with the question of the broad constitutional interpretation of the review jurisdiction of the Supreme Court, as set out in Article 141 of the Constitution, provided that the Constitution had explicitly and specifically established, in another provision, the question of complaint against the measure of removal from office of judges, as well as the body that should oversee such measures.

The Constitution did not leave any scope to the legislator to include within the constitutional jurisdiction of the Supreme Court the examination of complaints against other disciplinary measures, in the context of improving protection for judges. Raising the standard of protection for judges cannot be an argument for going beyond the Supreme Court's constitutional jurisdiction.

The question of positive standards has been generally accepted under the Constitution, but its scope cannot be unlimited, especially with regard to public officials. The removal from office of judges is an impeachment procedure, to be applied to officials who exercise aspects of state sovereignty, and as such, it cannot be on an equal footing with the procedure to be followed for the rest of the population. Recourse to the courts is an aspect of the rights of every individual but "this is not an absolute right. It can be the subject of legal limitations." From this point of view, the Constitution has taken one step further than the European Court of Human Rights, in associating the measure of removal from office of judges with the safeguard of complaining to the Supreme Court. The extension of this concept by comparison with other types of disciplinary measures runs against the Constitution. In this context, Article 147.6 of the Constitution, which was conceived as an exclusive provision, cannot be interpreted in a broad sense.

The Court ruled that Article 34.1 of Law 8811, which deals both with complaints made by judges against disciplinary measures taken against them and the jurisdiction of the Supreme Court, exceeded the limits imposed by the Constitution, both in form and content. Furthermore, the Court concluded that this article infringed the principle of hierarchy of norms. The Court has expressed similar views in recent cases, namely "that which the Constitution is unwilling to do, cannot be done by the law. It cannot be said that there have been omissions without mentioning such cases…" (Decision no. 212 of the Constitutional Court, dated 29.12.2002, Official Digest, 2002, p. 206).

The Court ordered that Article 34.1, giving the right to judges to complain to the Supreme Court against other types of disciplinary measures, should be repealed on the grounds of its incompatibility with the Constitution.

There was a dissenting opinion to the effect that the expansion of a constitutional right by legislation, for example the right to complain, could not be described as an infringement of the Constitution.

Cross-references:

- European Court of Human Rights, *Devlin v. United Kingdom,* Decision no. 29545/95, dated 30.10.2001.

Languages:

Albanian.

Andorra
Constitutional Court

Important decisions

Identification: AND-2005-3-002

a) Andorra / **b)** Constitutional Court / **c)** / **d)** 07.09.2005 / **e)** 2005-21-RE / **f)** / **g)** *Butlletí Oficial del Principat d'Andorra* (Official Gazette), 77 (2005) / **h)** CODICES (Catalan).

Keywords of the systematic thesaurus:

3.20 **General Principles** − Reasonableness.
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:

Time, reasonable / Investigative measures, lack.

Headnotes:

The length of proceedings must be measured in accordance with general criteria which, when applied to the particular features of the case at issue, will permit an assessment of the reasonableness required by the Constitution in order to determine whether any unjustifiable delay has occurred during the proceedings.

Summary:

I. On 19 February 2001 the applicant brought an action for misuse of company funds or property to his detriment. On 23 February 2001 the Batlles Court decided to open a preliminary investigation. In accordance with the Code of Criminal Procedure, this investigation was to be conducted "concisely, accurately and speedily".

More than a year after the opening of the investigation, the Batlles Court declared the action inadmissible, apparently without having taken any investigative measures.

The applicant appealed against the decision. The Court of second instance has a maximum of twenty days in which to give its decision. In fact, it was not until sixteen months had elapsed that it dismissed the appeal.

On 17 December 2003 the applicant lodged a plea of nullity with this same court; only on 29 March 2005 did the Court dismiss it.

The applicant filed an application for constitutional protection, alleging that his right to a fair hearing within a reasonable time had been infringed.

II. While reiterating its established case-law, and that of the European Court of Human Rights, according to which the length of proceedings must be measured in accordance with general criteria which, when applied to the particular features of the case at issue, will permit an assessment of the reasonableness required by the Constitution in order to determine whether any unjustifiable delay has occurred during the proceedings, the Constitutional Court held that the case before it was not legally complex, that the applicant had taken numerous steps to obtain a decision from the competent judicial bodies and that the total duration of the proceedings from the start until the final decision had exceeded four years. No investigative measures had been taken, neither had there been any decision, apart from the finding of inadmissibility on 19 July 2002.

Application of the criteria reiterated above led to the conclusion that the total length of the proceedings was excessive, it being unnecessary to comment on the other grounds of appeal. Constitutional protection was therefore granted.

Languages:

Catalan.

Argentina
Supreme Court of Justice of the Nation

Important decisions

Identification: ARG-2005-3-003

a) Argentina / **b)** Supreme Court of Justice of the Nation / **c)** / **d)** 07.12.2005 / **e)** M. 1022. XXXIX / **f)** Maldonado, Daniel Enrique y otro s/ robo agravado por el uso de armas en concurso real con homicidio calificado / **g)** *Fallos de la Corte Suprema de Justicia de la Nation* (Official Digest), 328 / **h)** CODICES (Spanish).

Keywords of the systematic thesaurus:

5.1.1.4.1 **Fundamental Rights** − General questions − Entitlement to rights − Natural persons − Minors.
5.3.5.1.2 **Fundamental Rights** − Civil and political rights − Individual liberty − Deprivation of liberty − Non-penal measures.
5.3.13.22 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Presumption of innocence.
5.3.44 **Fundamental Rights** − Civil and political rights − Rights of the child.

Keywords of the alphabetical index:

Dangerousness, concept influenced by positivism / Minor, criminal liability / Child, sentence, less severe / Sentence, consistent with the offender's personal situation / Sentence, reduction / Sentence, purpose / Sentence, criminal offence, proportionality / Dangerousness, concept, ethics, conflict.

Headnotes:

Judges must exercise caution in assessing the need to punish a child with a custodial sentence.

The concept of the "minor in an irregular situation" is incompatible with the national Constitution and international treaties.

A sentence can only be motivated by a person's "dangerousness" in the scope of a view that likens human beings to things.

The Constitution has always envisaged a criminal law which focuses on the act committed and which rejects criticism directed at the personality of the offender. Furthermore, it is undeniable that minors do not have the emotional maturity which must be assumed and required of an adult.

Any sentence imposed on a child must be less severe that which would be imposed on an adult in equivalent circumstances.

Summary:

I. The Court of First Instance sentenced the defendant to fourteen years' imprisonment for armed robbery and aggravated homicide committed at the age of sixteen. The public prosecutor contested the judgment and applied to the Court of Criminal Appeals asking for a life sentence. The appellate Court allowed the application, holding that the circumstances of the case did not justify the reduction of sentence allowed by the legislation relating to minors – application of the scales for attempted offences – and that the life sentence laid down in the Criminal Code for criminal homicide was the most appropriate sentence in this particular case. The Official Defender then lodged an extraordinary appeal with the Supreme Court, which set aside the judgment. The Court argued as follows:

II. There is a constitutional mandate under which the essential aim of any custodial sentence is the prisoner's reformation and social rehabilitation (Article 5.6 of the American Convention on Human Rights) and the aim of penal treatment is therefore to bring about such reformation and social rehabilitation (Article 10.3 of the International Covenant on Civil and Political Rights). This requires courts to consider the possible effects of a sentence from a preventive standpoint. Where minors are involved, this mandate is far more restrictive and carries a duty to justify the need for a custodial sentence in terms of the possibilities of rehabilitation, and to assess carefully the possible harmful effects of imprisonment.

The old juvenile justice system in Argentina had a distinctive feature that was open to criticism. Traditionally, since the Law on the Patronage of Minors (Law no. 10.903), no clear distinction was drawn between a child charged with an offence, an unprotected child or even a child victim. In all cases, the judge could order similar measures, including the "disposal" of children, which often led to their internment. A further feature of this criminal justice system was its use of euphemisms, which was no less open to criticism. For instance, minors were not the subject of provisional measures such as detention on remand and were not deprived of their liberty, but

were “interned”, “re-educated” or “disposed of”, or were the subject of “protective measures”. These measures often meant deprivation of liberty in places of detention on the par with the adult facilities in terms of their severity and the restrictions imposed. Historically, another feature of the country’s juvenile justice system was disregard for the basic principles of criminal procedure: legality, guilt, presumption of innocence, proportionality of punishment and the rights of the defence.

All this is described by legal writers as the doctrine of “irregular situation”. This doctrine has been criticised by international law, especially in UN-sponsored conventions and the recommendations of the Committee on the Rights of the Child. Recently, following the recommendations of the UN, legislation was passed to replace Law no. 10.903 with Law no. 26.61 on Integral Protection of the Rights of Children and Adolescents, which provides, *inter alia*, that minors shall enjoy full constitutional safeguards, irrespective of the proceedings against them.

In addition, as the Inter-American Court of Human Rights pointed out, children enjoy not only rights of universal application, but also special rights related to their status, which are matched by specific duties on the part of the family, society and the State.

At present, therefore, the legal rules governing juvenile criminal justice are those set out in the national Constitution, the Convention on the Rights of the Child, the American Convention on Human Rights and the International Covenant on Civil and Political Rights. Courts must refer to all these rules when imposing penalties for acts committed by minors.

Care must accordingly be taken that custodial sentences do not have adverse effects on a child’s social rehabilitation; consideration must be given as to whether it is actually necessary to impose a sentence at all. Account must also be taken of the constitutional doctrine that the penalty must be commensurate with the charge against the person for having chosen unlawful behaviour when he or she could have obeyed the law: the sentence must be proportionate to the offender’s guilt, and that guilt is determined by the extent to which the person was able to exercise his or her moral conscience in the particular situation, having regard to his or her personal capacities in that situation. From the beginning, the Constitution envisaged a criminal law focusing on the act committed rather than the personality of the offender, who is punished not for who he or she is, but for what he or she has done, in strict proportion to the seriousness of the offence. It must also be borne in mind that minors do not have the emotional maturity that must be assumed and expected of an adult.

To determine the sentence corresponding to an act committed by a child while applying the same criteria as for adults, the principle of guilt would need to be discarded and replaced with the old concept of “dangerousness”. But the view of the human being adopted by the Constitution disavows this concept influenced by positivism which is at odds with all traditional ethics and which is rooted in the worst racist theories of the 19th century. A sentence can only be motivated by a person’s “dangerousness” within a view that likens human beings to things.

Consequently, one has to accept the limitation placed on the sentence by the principle of guilt, and in the particular case of a child’s guilt, one has to accept the reduction of sentence justified by his or her emotional immaturity, which is universally recognised as being a necessary stage in the child’s development. It can only be emphasised, therefore, that the response by the State’s criminal justice system must be less severe than the response to adult guilt would be in equivalent circumstances.

The Court added that if further proceedings were brought against the defendant for acts committed during the period of release granted to him during the first set of proceedings, those further proceedings should not be taken into account to increase the sentence incurred in the first case, at the risk of breaching the presumption of innocence.

Supplementary information:

Two judges gave dissenting opinions.

Languages:

Spanish.

Armenia
Constitutional Court

Statistical data
1 September 2005 − 31 December 2005

- 22 referrals made, 21 cases heard and 21 decisions delivered.

  - 21 decisions concern the conformity of international treaties with the Constitution. All treaties examined were declared compatible with the Constitution. The examination of one case is pending.

Information on the activities of the Constitutional Court

On the occasion of the 10th anniversary of the Constitution and the Constitutional Court of Armenia, the Constitutional Court, the Venice Commission, the International Association of Constitutional Law (IACL) and the Conference of Constitutional Control Organs of the Countries of Young Democracy organised the Conference on "Legal Principles and Political Reality in the Exercise of Constitutional Control". The Conference, attended by presidents and judges from 22 countries, was opened by the President of the Republic, Mr Kocharian, Mr Buquicchio, the Secretary General of the Venice Commission, the President of the European Court of Human Rights, Mr Wildhaber, and the President of IACL, Ms Saunders.

During the Conference, the relationship between constitutional courts and politics was approached from several angles. It was pointed out that the independence of the constitutional courts is of key importance in order to guarantee the implementation of the Constitution. Even though constitutional judges are often elected by Parliament, they do not represent the political force which may have nominated them but act on the basis of their own personal judgment. On the basis of the principle of collegiality the judges work together as a single body and their allegiance is to the Constitution, not to any party or institution. Constitutional court judges have the famous "duty of ingratitude" towards the entity which nominated them. Notwithstanding their independence, constitutional courts may be subject to undue pressure from other state powers. Mr Buquicchio pointed out that the Venice Commission is ready to stand up for the courts in such situations.

Some courts can themselves take into account the possible consequences of the implementation of their decisions. For example when they mitigate these effects by delaying the entry into force of their judgment or by limiting its effects *inter partes*. Ms Saunders underlined that the more power was concentrated in one hand, the more the scope of action for constitutional courts was reduced. In some cases, courts would have to assess the sustainability of their judgments.

Another problem addressed was the non-execution of decisions of constitutional courts. Sometimes, even in older democracies, problems in the execution of final and binding constitutional court judgments can be witnessed. In a democratic state ruled by law, constitutional court decisions may be regretted by other state powers but they are not negotiable and have to be implemented as handed down by the court.

The notions of judicial restraint and "political questions" were discussed as well. Several participants insisted that a clear distinction between political and legal questions will often be impossible and the nature of constitutional cases could not be defined in a general way. All the more it was important that the constitutional courts gave clear and transparent decisions based on a coherent reasoning which laid open the criteria for the decision taken.

In parallel to the Conference, the parliament had organised a round table on the constitutional amendments in which about 40 persons, participants of the Conference parliamentarians, civil society and the media took part. The debate covered different aspects of the amendments, which had been adopted in third reading shortly before the Conference.

Both the Conference and the round table had excellent media coverage.

Austria
Constitutional Court

Statistical data

Session of the Constitutional Court during September/October 2005

- Financial claims (Article 137 B-VG): 7
- Conflicts of jurisdiction (Article 138.1 B-VG): 2
- Review of regulations (Article 139 B-VG): 39
- Review of laws (Article 140 B-VG): 39
- Challenge of elections (Article 141 B-VG): 4
- Complaints against administrative decrees (Article 144 B-VG): 332
  (219 refused to be examined)

and during November/December 2005

- Financial claims (Article 137 B-VG): 1
- Conflicts of jurisdiction (Article 138.1 B-VG): 0
- Review of agreements (Article 138a B-VG): 0
- Review of regulations (Article 139 B-VG): 17
- Review of laws (Article 140 B-VG): 11
- Challenge of elections (Article 141 B-VG): 0
- Complaints against administrative decrees (Article 144 B-VG): 2 087
  (1 764 refused to be examined)

- There was a series of 1 839 cases.

Important decisions

Identification: AUT-2005-3-001

a) Austria / **b)** Constitutional Court / **c)** / **d)** 30.09.2005 / **e)** B 1741/03 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.6.2 **Constitutional Justice** − Effects − Determination of effects by the court.
2.1.3.1 **Sources of Constitutional Law** − Categories − Case-law − Domestic case-law.
4.6.9 **Institutions** − Executive bodies − The civil service.
5.3.13.1.2 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Scope − Civil proceedings.
5.3.13.13 **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:

Civil servant, claim, pecuniary, civil right / Civil right, inner core.

Headnotes:

Disputes raised by public servants should not be classified as cases belonging to the inner core of civil rights but as cases that touch upon civil rights only in the effects they have. Article 6.1 ECHR is, however, applicable, insofar as such a dispute must be decided within a reasonable time.

Summary:

I. The claimant was head of clinic at the Krems public hospital. On 5 August 1991, he applied for pecuniary compensation in respect of those days when he was supposed to be on leave but ended up at work.

The Krems municipal authority rejected his claim on 30 September 1991. His appeal against this decision was dismissed by the Krems Municipal Council on 7 July 1993. The Administrative Court overruled parts of this decision on 29 June 1994. On February 1997 the Municipal Council of Krems once again dismissed the claimant's case. The Council's decision was overturned by the Administrative Court on 27 October 1999.

The matter was referred to the Municipal Council of Krems which eventually rejected the claim on 3 November 2003. The claimant then filed a complaint with the Constitutional Court, alleging infringement of his rights of equality, property and a fair trial, all of which are guaranteed under the Constitution. He pointed out that the proceedings commenced on 5 August 1991 and were still not finished, and argued that such a length of time was incompatible with the right enshrined in Article 6 ECHR to a hearing within a reasonable time. In his opinion, the case was not that difficult to determine and the delay was only caused by the administrative authorities.

II. The Court referred to previous jurisprudence to the effect that rights and obligations arising from public service are not to be regarded as rights and obligations within the meaning of Article 6.1 ECHR.

The Court also cited more recent case law from the European Court of Human Rights with a bearing on this legal question.

The European Court of Human Rights, in its judgment in *Pellegrin v. France* on 8 December 1999, *Bulletin* 1999/3 [ECH-1999-3-009], held that disputes raised by civil servants fall within the scope of Article 6.1 ECHR unless they are raised by public servants whose duties typify the specific activities of the public service insofar as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities. A manifest example of such activities is provided by the armed forces and the police. The European Court of Human Rights stated that it would henceforth seek to ascertain in each case whether an applicant's post entails – in the light of the nature of the duties and responsibilities appertaining to it – direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities. In so doing, the Court would have regard, for guidance, to the categories of activities and posts listed by the European Commission in its communication of 18 March 1988 (published in *Official Journal of the European Communities* no. 72) and by the European Court of Justice (Judgment of 2 July 1996, C-473/93).

Having regard to this case law – consolidated by the cases of *G. K. v. Austria*, (decision of 14 March 2000) and *Volkmer v. Germany* (decision of 22 November 2001) – the Court decided to adopt the legal opinion expounded by the European Court of Human Rights.

Applying this jurisprudence, the Court found that the claimant's work as head of clinic fell within the scope of Article 6.1 ECHR.

The Court turned to the question of the extent of the guarantees granted by Article 6.1 ECHR and its consistent jurisprudence in this area. Starting in 1987 the Court took the view that a tribunal must be established and must decide on their merits all those cases belonging within the inner core of civil rights. The Court also found that cases which are traditionally allocated to the ordinary civil courts may not subsequently be reviewed either by the Constitutional or by the Administrative Court as neither of them can be considered as a tribunal invested with full jurisdiction for the purposes of Article 6.1 ECHR. Cases within the inner core of civil rights might include compensation for damage by deer or damage caused by hunting, decisions on disputes as to the interpretation of contracts by an arbitration committee under the Social Insurance Act, the adequacy of a lease or compensation for expropriation.

The effects of some disputes may have an impact on civil rights even though the disputes themselves do not arise from civil rights. The administrative authorities may well preside over these disputes and they can subsequently reviewed by the Administrative Court. Examples could be the grant or refusal of a building permit, a construction permit for a street, the cancellation of a pharmacy licence or the refusal of a permit to employ foreigners.

The Court examined all the precedents on this question and concluded that decisions on disputes raised by public servants are not to be classified as cases belonging to the inner core of civil rights. That is already made evident by the appointment of a public servant through an administrative decree. Service in this context can therefore never be regarded from the point of view of the rights and obligations of citizens as between each other (Article 1 of the Civil Code) but only from that of a single person, the public servant, in relation to the sovereign State.

The Court also drew attention to the fact that Article 21.3 of the Constitution allocates the ultimate responsibility for the public service and its employees to the supreme administrative organs of the Austrian Federation and its member states. It would therefore be unconstitutional if a public servant could not appeal to the appropriate supreme authority.

The Court ruled that Article 6.1 ECHR did apply to this particular case in so far as the claimant was entitled to a decision "within a reasonable time". The Court found that the proceedings were not particularly complex – neither in terms of facts nor in terms of the legal questions which arose –and yet they lasted about twelve years. There was also a considerable period of inactivity after the Administrative Court's ruling, when it took about four years to obtain the decision of the Municipal Council of Krems. Article 6 ECHR had accordingly been breached.

The Court did not, however, overrule the impugned decision as this would cause another delay which would worsen the effect of the infringement, not improve it. The Court accordingly restricted itself to the sentence that the claimant's right to a hearing within a reasonable time was breached.

Languages:

German.

Identification: AUT-2005-3-002

a) Austria / **b)** Constitutional Court / **c)** / **d)** 12.12.2005 / **e)** B 64/05 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** − Jurisdiction − The subject of review − Failure to act or to pass legislation.
1.6 **Constitutional Justice** − Effects.
2.1.3.1 **Sources of Constitutional Law** − Categories − Case-law − Domestic case-law.
4.3.4 **Institutions** − Languages − Minority language(s).
5.3.45 **Fundamental Rights** − Civil and political rights − Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Minority, city limit sign, bilingual / Minority, inscription, topographical, bilingual.

Headnotes:

Applicable legislation and the direct applicability of Article 7.3 of the Vienna State Treaty 1955 (a constitutional provision) impose a legal obligation on district authorities to post bilingual city limit signs and to determine place names both in the German and Slovenian languages when issuing road traffic regulations on city limit signs.

Summary:

A citizen who belonged to the Slovene minority was fined for having exceeded the speed limit in the area of Bleiburg. He complained to the Court that the legal basis for the fine, namely the city limit sign (an administrative regulation) was not lawful as the name Bleiburg should not have been written only in German but also in Slovenian.

The Court began by examining the lawfulness of the administrative regulation in question which was issued by the district administration office of Völkermarkt on the precise posting of city limit signs for Bleiburg-Ebersdorf and for Bleiburg on 11 November 1998.

The Court outlined the current applicable law and the precedent of *VfSlg.* 16404/2001, *Bulletin* 2001/3 [AUT-2001-3-007]. This judgment overturned that part of Article 2.1.2 of the Law on Ethnic Groups of 1976 which states that topographical terminology shall be bilingual in areas where a considerable number of people belonging to an ethnic group (a quarter) live. The remaining text of the article empowers the Federal Government to issue a regulation stipulating those areas where topographical terminology shall be bilingual.

The above judgment also overturned parts of Article 1.2 of the Federal Government's administrative regulation of 1977 (the *Topographieverordnung)* identifying areas where topographical terminology shall be fixed both in German and in Slovenian language. The remainder of this statute reads as follows "in the political district of Völkermarkt:" Due to lack of consent, the Government was unable to amend this regulation. No place names have been added since the regulation was overturned.

The Federal Government's administrative regulation of 1977 (the *Topographieverordnung*) identifying areas situated in the district of Völkermarkt did not contain Slovenian names for Bleiburg Ebersdorf or for Bleiburg.

As well as those provisions within the Road Traffic Act (the *Strassenverkehrsordnung*) dealing with city limit signs and their meaning as road signs (namely speed limits) the Court pointed out Article 94b which obliges district administrative authorities to issue regulations on city limit signs.

Quoting the precedent mentioned above, the Court once again held that the posting of city limit and road signs is covered by the second sentence of Article 7.3 of the Austrian State Treaty of 1955. The Court also stated that the term "administrative district" within Article 7.3 used in the context of topographical terminology and the posting of city limit signs – smaller territorial units such as built-up areas.

The Court referred to its consistent line of opinion interpreting the term "administrative and judicial district ... of mixed population" within Article 7.3 as a territory in which a higher number of the population belongs to a minority. The statistical data taken at a census could serve to identify their number. A built-up area which shows a minority percentage of more than 10 % over a longer period (e.g. in the censuses between 1961 and 2001) must be classified as "an administrative district ... of mixed population".

In the case in point, the Court found no reason to deviate from the precedent mentioned above,

especially because the review proceedings were comparable in all essential respects.

In response to the statement submitted by the Carinthian Government, the Court explained that there is only one standard minority percentage and it does not matter whether a question is raised on the use of Slovene as an official language or on the drafting of bilingual topographical terminology, nor does it matter which territorial structure is to be considered as an “administrative district”.

The Carinthian Government had argued that it was for the Federal Government to determine the Slovenian names for built-up areas. Therefore the district administrative authority would have no jurisdiction to issue a regulation on bilingual city limit signs. Moreover, it would be very difficult to figure out Slovenian place names because of the existing diversity of names.

Consequently the Court repealed parts of the regulation under review, setting a deadline of 30 June 2006 for the repeal to take effect.

Supplementary information:

As happened in 2001 see [AUT-2001-3-007] the judgment attracted tremendous attention from the media and large-scale protests at the Court mounted by several politicians (mostly Carinthian) and notably the Governor of Carinthia.

He counteracted the judgment by moving the annulled city limit signs written in German just a few metres from where they were before. That means in legal terms that a new regulation has been published which will have to be brought back before the Court. This issue is likely to continue.

Languages:

German.

Identification: AUT-2005-3-003

a) Austria / **b)** Constitutional Court / **c)** / **d)** 15.12.2005 / **e)** B 1590/03 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.17 **General Principles** − Weighing of interests.
3.18 **General Principles** − General interest.
5.3.32.1 **Fundamental Rights** − Civil and political rights − Right to private life − Protection of personal data.

Keywords of the alphabetical index:

Conduct, arbitrary, authority / Data, personal, processing, police investigation / Data, personal, rectification / Data, personal, erasure, right.

Headnotes:

It is possible to erase personal data from police investigations on matters of criminal justice if it is no longer necessary to retain the data. A decision has to be made in each case by the weighing of interests as to whether the conditions for erasure have been met.

The processing of personal data which affects a person’s legal position cannot be classified as data processed for the interior documentation purposes of a police authority.

Summary:

On 13 November 2000 the Vienna Court of Appeal found the claimant in this case guilty under Article 209 of the Criminal Code and imposed a fine on him, which was suspended on probation.

In May 2000 the police began investigating the claimant on suspicion of having committed homosexual acts with adolescents in contravention of Article 209 of the Criminal Code, which they reported to the Vienna Public Prosecution Office.

Due the Constitutional Court’s repeal of Article 209 (see *Bulletin* 2002/2 [AUT-2002-2-002]) the legislator amended this part of the Criminal Code. Article 209 eventually lost its force on 13 August 2002.

As a result, the claimant asked the Vienna Federal Police Office to erase all automatically and conventionally processed data recorded on him.

In December 2002 the Vienna Federal Police Office informed the claimant that data held on him in the Central Information Collection had been erased, but it was not possible to erase manual filing systems such as index cards and entries into police journals because of their documentation purpose. Such data could only be destroyed if the whole file in which it was contained was destroyed.

The claimant requested the destruction of any manually processed data still in existence. This request was refused, so he filed a complaint with the Austrian Data Protection Commission (hereinafter referred to as DPC). The DPC upheld the impugned decision and expressly ordered the rectification of the complainant's index card and entries into a police journal. It should be added here that the Vienna Public Prosecution Office had decided that the police report of 2000 was not to be pursued according to § 90 of the Code of Criminal Procedure.

The DPC found that the data in question, namely an index card and entries into a police journal, were to be regarded as manual filing systems which could in principle be erased. However, the relevant data was used for the purpose of documenting actions by administrative authorities on an internal and formal basis, so that these actions could be registered and subsequently controlled. It was therefore not possible to destroy the data (see Article 27.3 of the Data Protection Act). Nonetheless, a paper file was still in existence containing the full documentation of the police investigations concerning the claimant. This was not to be classified as a filing system in the meaning of a structured set of personal data which would be accessible according to at least one specific criterion, under the terms of Directive no. 95/46/EC). It should not therefore be destroyed.

The Court recalled a relevant former precedent (*VfSlg*. 16149/2001) to the effect that data can be erased if it is no longer necessary to store it for the purpose of police investigations in furtherance of criminal justice. A weighing of interests needs to be carried out in each case. Stating that the norms applied were not illegal, the Court went on to say that the claimant's right to equality before the law could be infringed if the authority was to blame for arbitrary conduct such as accumulated misinterpretation of the law, neglect of correct inquiry procedure, wanton deviation from the contents of the files or disregard of the precise facts.

The Court concurred with the DPC's legal view that both the index card and the journal entries constitute manual filing systems. However, it did not share the DPC's views on the processing of the personal data of persons who are subject to police measures. The Court held that data processing of police measures which affect a person's legal position cannot be interpreted as data processed for the interior purposes and organisation of an authority. Thus the DPC had not only misinterpreted the law but had also neglected the necessary weighing of interests in such a case. Moreover, it had failed to examine whether the documentation of administrative actions and their subsequent control could not be achieved equally well by means of anonymous data files. By ordering the rectification of the index card and the journal entries the authority had even disregarded the relevant facts of the case. This order could have been especially misleading for people who knew about the claimant's conviction insofar as it documented prima vista a second charge.

Accordingly the claimant's right to equality before the law was violated through the arbitrary conduct of the authority and the relevant part of the impugned decision was overruled.

Supplementary information:

Many similar cases have been brought before the Court in which the data controller and the Data Protection Commission have denied claimants' rights to destruction of their data processed in the context of the former Article 209 of the Criminal Code.

Languages:

German.

Azerbaijan
Constitutional Court

Important decisions

Identification: AZE-2005-3-003

a) Azerbaijan / **b)** Constitutional Court / **c)** Plenum / **d)** 21.10.2005 / **e)** S-10 / **f) / g)** Azerbaijan, *Respublika*, *Khalg gazeti*, *Bakinski rabochiy* (Official Newspapers); *Azerbaycan Respublikasi Konstitusiya Mehkemesinin Melumati* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

2.1.1.4 **Sources of Constitutional Law** − Categories − Written rules − International instruments.
3.12 **General Principles** − Clarity and precision of legal provisions.
3.13 **General Principles** − Legality.
3.17 **General Principles** − Weighing of interests.
3.18 **General Principles** − General interest.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.28 **Fundamental Rights** − Civil and political rights − Freedom of assembly.

Keywords of the alphabetical index:

Freedom of assembly, possible, restrictions.

Headnotes:

Article 49 of Constitution bestows the right to freedom of assembly upon all citizens, and also allows them to stage peaceful, unarmed meetings, demonstrations, street processions and pickets if the relevant state bodies are given prior notice.

Summary:

I. The Supreme Court asked the Constitutional Court to interpret Article 49 of the Constitution in the light of other relevant articles of the Constitution and norms of international legislation and to clarify whether any restrictions can be placed on the right to freedom of assembly.

II. The Plenum of the Constitutional Court made the following observations.

The right to freedom of assembly is fundamental to the political lives of all citizens. It is a subjective right and it is closely bound with various other rights, freedoms and responsibilities. Its primary objective is to ensure the agreement and formation of opinion and the expression of opinion as to various issues of public life as well as to influence decision-making by state organs and public unions.

People avail themselves of this type of political freedom not only to develop their personality, self-expression and self-determination but also to take an active part in public and political life. The assembling of people for a free exchange of views may not always be politically motivated, but freedom of assembly is usually viewed as an integral part of political rights and freedoms.

The right to freedom of assembly cannot be considered as absolute and as something which cannot be subject to restrictions. On the whole, the protection of basic human rights is achieved through the interplay between individual and public interests and through compromise of rights and interests as between individuals. Careful distinctions need to be drawn between the areas of fundamental human rights and any restrictions on them.

Human rights cannot be thought of as behaviour with unfettered freedom and expression of self-will. On the contrary, every right has its own clearly defined framework and for every freedom there is a corresponding obligation. Examples of such obligations include the observance of common interests, non-interference with the rights of others, respect for customs and the inadmissibility of any arbitrary and in particular forceful action against the rights of other citizens, whatever form this might take.

The obligation of non-interference by the state and by individuals with the rights and freedoms of citizens and other individuals is accepted as a restriction on rights. Lawful restrictions placed by a state on human rights aim at the prevention of arbitrary interference with the rights of other citizens. By imposing certain defined restrictions on the freedom of all individuals, the law ensures free and peaceful enjoyment of individual rights. The freedom of one person ends at the border where the freedom of another person starts. By attempting to define these boundaries the law helps to create order within daily life based on freedom.

The nature of the freedom envisaged in the above article of the Constitution and the issue of restrictions

on the exercise of that right must be examined with due consideration for fundamental human rights and obligations and also in the context of other constitutional norms addressing the issue of freedoms and responsibilities.

The duty to avoid the imposition of restrictions on human rights and freedoms rests not only with state organs or their representatives but with all institutions and persons within the Republic.

Under Article 12.2 of the Constitution, the rights of individuals and citizens listed in the Constitution shall be applied in accordance with the international agreements to which Azerbaijan is a party. The State, for the purposes of effective provision of the right to freedom of assembly, might guarantee more safeguards than those envisaged in international agreements or refuse to incorporate one or more of the restrictions determined by international agreements into its national legislation. The judicial bodies of a country might interpret such restrictions in rather a narrow sense.

However, to exclude restrictions on the right to freedom of assembly in general would be in conflict with human rights and with the main principles of constitutional organisation.

The Court also noted that a characteristic feature of international legal instruments in the field of human rights protection is that they envisage the imposition of legal restrictions on various rights when such restrictions are necessary in a democratic society. The effective realisation of human rights is only possible when the restrictions necessary in a democratic society are fully and clearly defined. This also helps to ensure democratic governance.

In conclusion the Court held that the right to freedom of assembly envisaged in Article 49 of the Constitution can be the subject of restrictions prescribed by law and necessary in a democratic society.

Languages:

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

Belgium
Court of Arbitration

Important decisions

Identification: BEL-2005-3-014

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 05.10.2005 / **e)** 152/2005 / **f)** / **g)** *Moniteur belge*, (Official Gazette), 17.10.2005 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.7 **General Principles** − Relations between the State and bodies of a religious or ideological nature.
3.16 **General Principles** − Proportionality.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.2.2.7 **Fundamental Rights** − Equality − Criteria of distinction − Age.
5.3.20 **Fundamental Rights** − Civil and political rights − Freedom of worship.

Keywords of the alphabetical index:

Church, autonomy / Age, limit, church, functions.

Headnotes:

The placing of a maximum age limit (75 years) on members of church councils constitutes an interference with the recognised right of religions to regulate their functioning autonomously, but does not in itself entail an unwarranted restriction of freedom of religion and freedom of worship (Articles 19 and 21 of the Constitution and Article 9 ECHR), provided that it enables the administration to involve new members, who might be able to contribute to the desired rationalisation and modernisation of the management of the assets by the “church fabrics”, whose losses are borne by the public authorities.

However, the introduction of an age limit which applies without exception excludes a category of elderly believers, who are increasingly more important in the religious community, from playing any part in the management of the assets of that community. The measure is therefore disproportionate to the objective pursued by the

legislature and, accordingly, contrary to the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution).

Summary:

By decree of 7 May 2004, the Flemish Region introduced a maximum age limit for members of church councils which administer the "church fabrics": those members, whether appointed or elected, are deemed by operation of law to have resigned when they reach the age of 75 years. "Church fabrics" are institutions governed by public law which are responsible at local level (in each parish) for the physical management of the Roman Catholic and Anglican religions and also for the administration of the temporals (the secular income of the church).

Introducing new blood into the members of the church councils is one of the measures adopted by the Executive (see Supplementary information) with a view to ensuring the efficient and rational management of the material possessions of the religious communities.

A number of persons sought the annulment of that measure, which in their view was contrary to freedom of religion and which also led to discrimination on the basis of age.

The plea alleging violation of freedom of religion (Articles 19 and 21 of the Constitution, Article 9 ECHR and Article 18 of the International Covenant on Civil and Political Rights) was rejected: after defining the scope of freedom of religion (by reference, *inter alia*, to the European Court of Human Rights, 26 October 2000, *Hassan and Tchaouch v. Bulgaria*, § 62), the Court observed that freedom of religion and freedom of worship do not preclude the authority from adopting positive measures which permit the effective exercise of those freedoms. The Executive's desire to create institutions governed by public law which are responsible for the physical aspects of the recognised religions and the management of the temporals is capable of contributing to the effective enjoyment of freedom of worship. In order to be compatible with freedom of religion and with freedom of worship, however, the measures must be subject to sufficiently accessible and precise regulation, they must pursue a legitimate objective and they must be necessary in a democratic society. The interference must correspond to a "pressing social need" and there must be a reasonable link of proportionality between the legitimate aim pursued and the restriction of those freedoms. The Court considered in the present case that the reducing the age of the church councils might allow the administration to involve new members, who might contribute to the desired rationalisation and modernisation of the management of the assets by the "church fabrics", whose losses are borne by the public authorities. The Court concluded that the measure did not entail an unwarranted restriction of freedom of religion or freedom of worship.

The applicants also claimed that there had been a violation of the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution). The Court replied that the placing of an age limit on members of the "church councils" was based on an objective criterion, namely the age of members of the "church councils". That measure was relevant to ensuring the Executive's objective of reducing the age of members of those councils with a view to the efficient and rational management of the assets of the religious communities. However, in the Court's view the measure was disproportionate to the objective pursued by the Executive: the measure proceeded from the presumption that persons who have reached the age fixed by the Executive are thereby wholly incapable of having the qualities needed to ensure such management. Even if, in spite of their age, they did not have a record of service in "church fabrics" and if they were involved in the administration for the first time, they would not be deemed capable of ensuring a rational and modern management of the physical possessions of their religious community, in accordance with the provisions of the decree on the material organisation and functioning of the recognised religions.

In the Court's view, the introduction of an age limit which applies without exception excludes a category of elderly believers, who are increasingly important in the religious community, from playing any part in the management of the assets of that community.

The Court concluded that the contested legislative provisions must be annulled on the ground that they violated Articles 10 and 11 of the Constitution.

Supplementary information:

Under the Special Law of 13 July 2001, the regions (the Flemish Region, the Walloon Region and the Brussels-Capital Region) were given competence (including legislative competence in the form of decrees and orders), with effect from 1 January 2002, for the church fabrics and the institutions responsible for the management of the temporals of the recognised religions. The Decree of 7 May 2004 regulates that competence for the Flemish region. The recognition of religions and also the salaries and pensions of ministers of religion continue to be a matter for the Federal Government.

Languages:

French, Dutch, German.

Identification: BEL-2005-3-015

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 26.10.2005 / **e)** 160/2005 / **f)** / **g)** *Moniteur belge*, (Official Gazette), 11.01.2006 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

5.3.13.19 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Equality of arms.
5.3.13.27.1 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Right to counsel − Right to paid legal assistance.

Keywords of the alphabetical index:

Legal aid, right / Legal aid, purpose / Expert, fees, legal aid / Expert, medical, examination, report.

Headnotes:

The provisions of the Judicial Code on legal aid (exemption from certain legal fees for those not having sufficient means of their own) are unconstitutional in so far as they do not provide cover for the fees and costs of a medical expert in the context of an examination ordered by the court in relation to a dispute of a medical nature concerning social security allowances.

Summary:

An individual was attempting before the Brussels Labour Court to obtain payment of a handicapped person's social security allowances. In a prior administrative stage, the Medical Officer of the Belgian State had considered that the person concerned did not satisfy the medical requirements and refused the allowance. The person concerned requested the court to appoint a medical expert and sought legal aid for that purpose. The Court declared that a medical expert's fees were not covered by the legal aid provisions in force. It referred to the Court of Arbitration the question whether those provisions are contrary to the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution, taken on their own or read with Article 6 ECHR) and with the constitutional right to legal aid (Article 23.3.2 of the Constitution).

In its reply, the Court referred first of all to the right to legal aid, guaranteed by Article 23 of the Constitution, and to Article 6 ECHR (with reference to the right to be assisted by a lawyer where the person concerned is unable to present his or her own case – European Court of Human Rights, *Airey v. Ireland*, 9 October 1979, Series A, no. 32, p. 13; *Special Edition ECHR* [ECH-1979-S-003]). The Court observed that the right to a fair hearing must also be guaranteed in proceedings involving an expert examination ordered by the court, the findings of which may have a decisive influence on the decision of the court. Anyone who is unable to receive the assistance of a medical expert during the proceedings is, according to the Court, not on an equal footing with an opponent who is assisted by a medical expert. Such a person is therefore the victim of a discriminatory interference with his or her right to a fair hearing.

The Court further observed that the public service of justice must also be accessible to all litigants. A difference in treatment on the basis of the financial situation of one party to the proceedings cannot be justified.

According to the Court, the difference in treatment also constitutes a violation of the right to legal aid guaranteed by Article 23.3.2 of the Constitution.

Languages:

French, Dutch, German.

Identification: BEL-2005-3-016

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 23.11.2005 / **e)** 167/2005 / **f)** / **g)** *Moniteur belge*, (Official Gazette), 02.12.2005 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.4.9.1 **Constitutional Justice** − Procedure − Parties − *Locus standi*.
1.4.9.2 **Constitutional Justice** − Procedure − Parties − Interest.
2.1.1.3 **Sources of Constitutional Law** − Categories − Written rules − Community law.
3.13 **General Principles** − Legality.
3.16 **General Principles** − Proportionality.
3.20 **General Principles** − Reasonableness.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.21 **Fundamental Rights** − Civil and political rights − Freedom of expression.
5.4.1 **Fundamental Rights** − Economic, social and cultural rights − Freedom to teach.
5.4.21 **Fundamental Rights** − Economic, social and cultural rights − Scientific freedom.

Keywords of the alphabetical index:

Education, university, organisation / Education, freedom / European Union, Charter of Fundamental Rights.

Headnotes:

Academic freedom expresses the principle that teachers and researchers must, in the very interest of the development of knowledge and the pluralism of opinions, enjoy a very wide freedom to carry out research and to express their opinions in the performance of their duties.

Academic freedom therefore constitutes an aspect of freedom of expression (Article 19 of the Constitution and Article 10 ECHR) and forms part of freedom of education (Article 24.1 of the Constitution).

Academic freedom is not unlimited, since it is exercised within the same normative framework as freedom of expression and freedom of education. Any restrictions on academic freedom must therefore be examined by reference to the restrictions permitted for those two freedoms.

Summary:

I. A number of professors, assistants and researchers at the University of Liege brought actions before the Court of Arbitration for annulment of a decree of the French Community of 31 March 2004 defining higher education, favouring its integration within the European Higher Education Area and refinancing the universities.

The Court of Arbitration recognised that they had *locus standi* to bring an action against the decree provisions relating to academic freedom and to the allocation, renewal or alteration of academic duties because those provisions are capable of directly and adversely affecting them in the exercise of their profession. However, it considered that those persons did not have *locus standi* to bring an action against the provisions which confer geographical powers on the higher education establishments or which provide for modes of harmonisation between universities, because those provisions do not directly affect them.

The applicants claimed that there had been a violation of academic freedom as guaranteed by the constitutional provisions on freedom of expression (Article 19 of the Constitution) and freedom of education (Article 24 of the Constitution), read in isolation or together with Article 13 of the Charter of Fundamental Rights of the European Union, incorporated in Title II of the Constitution for Europe, and Articles 9 and 10 ECHR, and also a violation of the prohibition of delegation in relation to the organisation of education (Article 24.5 of the Constitution), and of the principle of equality and non-discrimination (Articles 10, 11 and 24.4 of the Constitution).

II. The Court confirmed first of all that academic freedom expresses the principle that teachers and researchers must enjoy, in the very interest of the development of knowledge and of the pluralism of opinions, considerable freedom to carry out research and express their opinions in the exercise of their duties.

That freedom has a twofold basis in the Constitution: it is the consequence of freedom of expression (Article 19 of the Constitution and Article 10 ECHR) and freedom of education (Article 24.1 of the Constitution). The Court, which has jurisdiction to review compliance with those two constitutional principles, was required to consider whether the contested provisions of the decree constitute a disproportionate restriction of academic freedom.

The Court further stated that it must take into account, in the exercise of its review, Article 13 of the Charter of Fundamental Rights of the European Union, even though it is not binding, because it also provides that academic freedom has the status of a “common value” of the European Union. “It is therefore in the light of that provision too that the academic freedom implied by Articles 19 and 24.1 of the Constitution must be interpreted.”

The Court then made clear that academic freedom is not unlimited: it is exercised within the same

normative framework as freedom of expression and freedom of education, which may be subject to restrictions in accordance with Article 10.2 ECHR and Articles 19 and 24.1 of the Constitution.

Article 67 of the contested decree establishes the academic freedom of "every person responsible for teaching" "within the context of his teaching activities" and provides that that freedom "shall be exercised in compliance with the provisions of this decree".

The Court proceeded to neutralise the restrictive scope that that provision might have. It considered that by reasserting in a provision of a decree the principle of academic freedom inferred from Articles 19 and 24.1 of the Constitution, the provision in question could not have the effect of restricting the scope of that principle and could not have the effect of limiting to pedagogic choices or solely to the context of teaching activities a freedom which generally protects teachers.

Thus, the provision in question could not have the effect of abolishing the right to criticise or to call in question the provisions of the contested decree, as otherwise it would constitute a disproportionate and unreasonable restriction of the freedom of expression of persons responsible for teaching.

The Court concluded that the provision must therefore be interpreted as being confined to reasserting the principle of academic freedom resulting from freedom of expression and freedom of education by expressly placing that principle within the framework of the restructuring of higher education organised by the decree. It was subject to that interpretation that the Court, in the operative part of the judgment, dismissed the actions.

As regards the principle of *"détitularisation"* (where academic duties are allocated on a temporary basis), the Court explained that academic freedom requires that the independence of teachers vis-à-vis the university institution is guaranteed. It was in the light of that requirement of the independence of those responsible for education that the Court examined the rules relating to the allocation, renewal or alteration of academic duties in university education contained in the contested decree.

The principle of *"détitularisation"* was intended by the Executive in order to allow greater mobility at domestic, European and international level. The Court observed that that principle cannot lead to the elimination of academic duties but only to a possible change in their content, which cannot have an effect on the appointment or the rights of the teacher. Regard being had to the objectives pursued and to the scope of the principle of *"détitularisation"*, the decree does not constitute a disproportionate interference with academic freedom, as observance of that principle does not entail the definitive allocation of the same academic duties.

The Court then ascertained whether the conditions of the application of the principle of *"détitularisation"* were consistent with Article 24.5 of the Constitution and constituted a disproportionate restriction of the rights of teachers, particularly their independence vis-à-vis the university institution.

Article 24.5 of the Constitution reflects the intention of the drafters to reserve to the legislature the task of adopting rules governing the essential aspects of education, as regards its organisation, its recognition and its subsidisation, but it does not preclude those tasks being conferred on other authorities on certain conditions.

Article 24.5 requires that any delegation made by the Executive applies only to the implementation of the principles which it itself has adopted. By means of such delegation, the Community Government or another authority cannot make good the lack of precision of those principles or refine options that are insufficiently detailed.

By providing that any revision or alteration of the content of academic duties is to be effected "according to a general regulation established by the management board and adopted by a majority of two thirds of the members present", the Executive was not delegating any essential element of the organisation of education but, on the contrary, entrusting the task of determining the conditions of any renewal or alteration of academic duties to the body best placed to appreciate the requirements of the proper functioning of the university institution.

The Court further observed that the decree lays down a number of essential guarantees for those concerned, since any renewal or alteration of academic duties is made after the person concerned and the body or bodies responsible for the academic duties have expressed their views. The Court made clear, however, that it is necessary, when a proposal to alter the content of academic duties is not approved by the person concerned, that the regulation contain specific procedural guarantees capable of preventing that alteration from constituting in reality a threat or pressure which hinders academic freedom and adversely affects the independence of teachers vis-à-vis the university institution. It was subject to that reservation too that the Court dismissed the actions.

Last, the Court stated that the guarantees thus defined were sufficient for the immediate application of the principle of *"détitularisation"* not to constitute a discriminatory interference with the legitimate expectations of the applicants, who, moreover, could not claim that under the previous rules the content of the academic duties allocated to them could not be altered in any circumstances.

Languages:

French, Dutch, German.

Identification: BEL-2005-3-017

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 23.11.2005 / **e)** 171/2005 / **f)** / **g)** *Moniteur belge*, (Official Gazette), 20.01.2006 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.16 **General Principles** − Proportionality.
5.2.2.1 **Fundamental Rights** − Equality − Criteria of distinction − Gender.
5.3.32 **Fundamental Rights** − Civil and political rights − Right to private life.
5.3.33.1 **Fundamental Rights** − Civil and political rights − Right to family life − Descent.

Keywords of the alphabetical index:

Name, family / Name, change / Child, name / Paternity, contested.

Headnotes:

The obligation to change surnames after legal proceedings to contest paternity constitutes interference in the exercise of the right to respect for private life. There is no justification for purely and simply prohibiting a child of full age who has successfully brought an action to disprove his or her paternity from keeping his or her original surname.

Summary:

I. A woman of full age institutes court proceedings to contest her paternity, submitting as evidence a genetic test in support of her claim. She expresses the desire, however, to keep her surname. Article 335 of the Civil Code does not allow her to do so: it provides that a child for whom only the maternal affiliation has been established, must carry the mother's surname. The Liège court of first instance therefore asks the Arbitration Court to rule on the conformity of this Article with the Constitutional provisions concerning equality and non-discrimination (Articles 10 and 11 of the Constitution), on the grounds that it would discriminate between children of full age whose paternal affiliation is established after their maternal affiliation, who as a rule keep their original surname, and children of full age who successfully bring an action to contest paternity, who may not keep their surname.

II. In answer to the Cabinet (Council of Ministers), which as a party before the Court to defend the law was of the opinion that the categories of persons were not comparable, the Arbitration Court first points out that the two categories of people concerned are comparable in that, in both cases, it is a question of enabling a child of full age, whose civil status has been changed, to keep his or her surname.

The Court goes on to state that a family name is assigned mainly for reasons of social usefulness. In contrast to the assignment of a first name, it is governed by law, the law being designed both to establish the family name in a simple and uniform manner and to ensure that the family name is, by and large, unvarying.

The Court then notes that, under Article 335.2 of the Civil Code, a child of full age who successfully contests paternity loses his or her original surname and takes on his or her mother's surname.

This obligation to change surnames constitutes an interference in the exercise of the right of the person concerned to respect for his or her private life (European Court of Human Rights, 25 November 1994, *Stjerna v. Finland*, Series A, no. 299-B; *Bulletin* 1994/3 [ECH-1994-3-019]). The Court therefore considers that it must ascertain whether the decision in question disproportionately violates the right to respect for the private lives of children of full age and, in particular, undermines the social safeguard of keeping the same family name when their civil status is changed. It is of little importance for this purpose that the change of surname is linked to proceedings to contest paternity that "may be motivated on other grounds and have consequences other than a change

of surname". Lastly, the Court holds that the provision in the Surnames and First Names Act of 15 May 1987 whereby a child of full age may ask the competent authority to change his or her surname is not such as to provide reasonable justification for the contested difference in treatment, as this possibility is inherently hypothetical. The Court therefore concludes that there has been a violation of Articles 10 and 11 of the Constitution.

Languages:

French, Dutch, German.

Identification: BEL-2005-3-018

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 14.12.2005 / **e)** 187/2005 / **f)** / **g)** *Moniteur belge*, (Official Gazette), 06.02.2006 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

3.16 **General Principles** − Proportionality.
4.6.9.2 **Institutions** − Executive bodies − The civil service − Reasons for exclusion.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.2 **Fundamental Rights** − Equality.
5.3.14 **Fundamental Rights** − Civil and political rights − *Ne bis in idem*.
5.3.41.1 **Fundamental Rights** − Civil and political rights − Electoral rights − Right to vote.
5.3.41.2 **Fundamental Rights** − Civil and political rights − Electoral rights − Right to stand for election.

Keywords of the alphabetical index:

Sentence, proportionality / Vote, prohibition / Imprisonment, voting, right, suspension, automatic.

Headnotes:

Automatic deprivation of the right to vote and stand for election (for six or twelve years) when a person is sentenced to prison for over four months, without such deprivation resulting from any specific court decision, undermines, in a discriminatory manner, that person's right to vote and stand for election.

Summary:

I. A teacher is sentenced to five years' imprisonment. Under Article 7 of the Electoral Code, the sentence automatically suspends his right to vote and stand for election. The authorities stop paying his salary because persons deprived of their civil and political rights may no longer hold posts as civil servants. In response to an application to continue receiving his salary, the judge asks the Court on the constitutionality of this law.

II. In its reply, the Court first points out that the right to vote and the right to stand for election, which stem in particular from Article 3 Protocol 1 ECHR, must, under Article 14 ECHR and Articles 10 and 11 of the Constitution, be secured without discrimination. While they are rights that are fundamental to democracy and the rule of law, they are not absolute and may be restricted. Any restrictions may not, however, impair the very essence of these rights and deprive them of their effectiveness; they must be imposed in pursuit of a legitimate aim, and the means employed must not be disproportionate (see European Court of Human Rights, Grand Chamber, *Hirst v. United Kingdom* (no. 2), 6 October 2005, and the case law quoted in the judgment). The Court observes that in the present case, in contrast to the Hirst case, the issue it is being asked to consider is not whether the penalties are reasonable or excessive, but solely the automatic nature of the disqualifications provided for by law, which allegedly undermine the right of access to the courts and the principle that a person must not be tried or punished twice for the same offence (double jeopardy).

The Court observes that provision for temporary deprivation of the right to vote and stand for election in the Electoral Code of 12 April 1894 was prompted by the desire to deprive of such rights citizens who, because of the offences they had committed, could be presumed to be unworthy of taking part in elections. The measure was made automatic because, when it used to be optional, the court generally refrained from ordering it, regardless of the seriousness of the offence […].

According to the Court, the desire to prevent unworthy citizens from taking part in elections must be weighed up against a concern not to deprive citizens disproportionately of a fundamental right. There is all the more need to strike a balance given that, in criminal law, the focus has been increasingly on rehabilitating offenders, and this implies that they must be able to become reintegrated in a democratic society, in which the community as a whole is supposed to elect its representatives.

Even though Article 7 of the Electoral Code continues to be in keeping with the legitimate objective pursued in 1894, it has disproportionate consequences, according to the Court, in that it deprives sentenced persons of their right to vote and stand for election for a period that may be much longer than the period for which they serve their sentence. The Court adds that the fact that this measure is automatic makes it all the more disproportionate, as the consequences of the suspension of civil and political rights have been substantially exacerbated, in particular, by the provision whereby anyone who no longer enjoys his or her civil and political rights, if only temporarily, automatically loses the status of civil servant.

The Court concludes that Article 7.1.2 of the Electoral Code violates the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), in that it automatically suspends the right of the sentenced persons in question to vote and stand for election.

Languages:

French, Dutch, German.

Identification: BEL-2005-3-019

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 21.12.2005 / **e)** 194/2005 / **f)** / **g)** *Moniteur belge*, (Official Gazette), 10.02.2006 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

5.1.1.3 **Fundamental Rights** − General questions − Entitlement to rights − Foreigners.
5.2.2.8 **Fundamental Rights** − Equality − Criteria of distinction − Physical or mental disability.
5.3.33 **Fundamental Rights** − Civil and political rights − Right to family life.
5.4.19 **Fundamental Rights** − Economic, social and cultural rights − Right to health.

Keywords of the alphabetical index:

Foreigner, residence, illegal, deportation, obstacle / Foreigner, child, residence / Foreigner, medical assistance, urgent care, limitation / Disability, serious / Child, disabled, care.

Headnotes:

The mutual enjoyment by parents and child of each other's company constitutes a fundamental element of family life; the natural family relationship is not terminated by reason of the fact that the child is taken into public care.

It is discriminatory to treat in the same way, without reasonable justification, foreigners who are illegal residents in the country but are in fundamentally different situations, namely those who may be deported and those who may not as they have an under-age child, who is completely unable to leave the country because of a serious disability and whose right to respect for family life must be preserved, by ensuring that his or her parents are present at his or her side.

Summary:

I. The Court must consider yet again (see references) whether Section 57.2 of the Law of 8 July 1976 laying down the principles governing the organisation of state social welfare centres is compatible with the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution), in that it provides that foreigner illegally resident in Belgium are not entitled to social welfare other than emergency medical assistance.

The actual case concerns a foreign mother illegally resident in the country, whose under-age son is severely disabled and cannot be deported, for medical reasons.

In its Judgment no. 80/99 of 30 June 1999, the Arbitration Court held that it was contrary to the principle of equality to deprive all foreigners, who had been ordered to leave the country of social welfare and not to take account of the situation of those who, for medical reasons, were completely unable to comply with the order to leave Belgium.

The Brussels employment tribunal asks the Arbitration Court to review the above-mentioned Section 57.2 in the light of Articles 10 and 11 of the Constitution, possibly taken together with other rights and freedoms enshrined in the Constitution or the European Convention on Human Rights and in the UN Convention on the Rights of the Child, given that it allegedly deals identically with all illegal aliens, without making a distinction according to whether or not they have a dependent, seriously disabled under-

age child who, because of the disability, is completely unable to leave the country.

II. In its reply, the Court first points out that the mutual enjoyment by parent and child of each other's company is a fundamental element of family life, and that the natural family relationship is not terminated by reason of the fact that the child is taken into public care (the Court refers to the judgments of the European Court of Human Rights in the cases of *W., B. and R. v. the United Kingdom* – 8 July 1987, paragraph 59 – and *Gnahoré v. France* – 19 September 2000, paragraph 50, *Reports of Judgments and Decisions* 2000-IX).

The right to respect for private and family life (Article 8 ECHR, Article 22 of the Constitution) is essentially designed to protect individuals from arbitrary interference by the authorities. According to the Court, it also means that the State has positive obligations inherent in the need to ensure that family life is respected in practice: "Where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed …" and take steps to reunite the parent and child concerned (European Court of Human Rights, *Eriksson v. Sweden* of 22 June 1989, paragraph 71, Series A, no. 156; *Special Bulletin* ECHR [ECH-1989-S-002]; *Margarita and Roger Andersson v. Sweden* of 25 February 1992, paragraph 91, Series A, no. 226-A; *Olsson v. Sweden (no.2)* of 27 November 1992, paragraph 90, Series A, no. 250; *Keegan v. Ireland* of 26 May 1994, paragraph 44, Series A, no. 290; *Bulletin* 1994/2 [ECH-1994-2-008] and *Hokkanen v. Finland* of 23 September 1994, paragraph 54, Series A, no. 299-A; *Bulletin* 1994/3 [ECH-1994-3-015]).

The Court therefore concludes that, as interpreted by the lower court, the provision in question deals in the same way, with no reasonable justification, with persons who are in fundamentally different situations: those who may be deported and those who may not because they are the parents – and can prove it – of an under-age child who, for medical reasons, is completely unable to comply with an order to leave the country because of a serious disability that cannot be treated appropriately in the country of origin or in another country obliged to take the child back, and that the right to respect for family life must be preserved by ensuring that the child's parents are present at his side.

It therefore concludes that Articles 10, 11 and 22 of the Constitution have been violated.

Supplementary information:

- See also *Bulletin* 2003/2 [BEL-2003-2-009]; *Bulletin* 2002/3 [BEL-2002-3-012]; *Bulletin* 1999/2 [BEL-1999-2-006].

Languages:

French, Dutch, German.

Bosnia and Herzegovina
Constitutional Court

Important decisions

Identification: BIH-2005-3-004

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 23.09.2005 / **e)** AP-696/04 / **f)** / **g)** *Službeni glasnik Bosne i Hercegovine* (Official Gazette), 86/05 / **h)** *Court Bulletin*; CODICES (Bosnian, English).

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.
2.1.1.1.1 **Sources of Constitutional Law** − Categories − Written rules − National rules − Constitution.
4.16.1 **Institutions** − International relations − Transfer of powers to international institutions.
5.1.1.1 **Fundamental Rights** − General questions − Entitlement to rights − Nationals.
5.3.5.1.1 **Fundamental Rights** − Civil and political rights − Individual liberty − Deprivation of liberty − Arrest.
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:

Agreement, international / Arrest, safeguards / Constitutional right, violation, remedy / Detention, duration / Detention, reason / Detention, unlawful / Positive obligation, investigation.

Headnotes:

All people in the territory of Bosnia and Herzegovina must be secured the highest level of protection of their guaranteed constitutional rights. The fact that human rights have been violated by people who are not accountable to the national authorities does not waive the state's obligation to protect such rights. The Constitutional Court considers that it has jurisdiction to render a decision in cases where an appellant had no effective or adequate legal remedy at his disposal to protect his rights.

Summary:

I. The appellant filed an appeal with the Constitutional Court about the violation of his rights under Article II.3.b, II.3.d and II.3.f of the Constitution and under Articles 3, 5 and 8 ECHR.

The appellant was arrested in his family home in Banja Luka by SFOR and detained in an unknown location for six days and then released. Upon arrest, SFOR entered the appellant's house without introduction and without wearing any insignia on the basis of which they could be identified and produced no summons, indictment or order to explain the appellant's arrest. SFOR searched the appellant's house and confiscated certain items without showing these to the appellant or his family. On arrival at the place of detention, the appellant was informed that he was arrested for having violated the Dayton Agreement and was then questioned about Mr Radovan Karadžic, the former President of the Republika Srpska accused of war crimes. The appellant was released after six days of degrading treatment. The authorities of Bosnia and Herzegovina took no measures in respect of the arrest and detention of the appellant despite the fact that the appellant and his family asked for the protection of their constitutional rights by the authorities, which they considered competent under the local law. The appellant is of the opinion that Bosnia and Herzegovina is responsible for the violation of the aforementioned rights since it assumed responsibility, as a contracting party to the international instruments, for guaranteeing the highest level of protection of human rights and freedoms on its territory and to prevent any interference with the security of the person by the authorities or individuals operating in its territory.

In response to the appeal, the Public Attorney's Office alleges that according to the relevant provisions regulating the status of SFOR, the latter is not subject to the jurisdiction of the authorities of Bosnia and Herzegovina. Therefore, the appellant could not pursue any legal remedy against the acts of SFOR. The Public Attorney's Office therefore alleges that the appeal is not admissible as the Constitutional Court is not competent to deal with this matter since the appeal concerns actions taken by SFOR, which do not fall within the jurisdiction of Bosnia and Herzegovina.

II. The Constitutional Court recalls that by signing the General Framework Agreement for Peace in Bosnia and Herzegovina and its Annexes (hereinafter: "the

GFAP") and for the purpose of its implementation, Bosnia and Herzegovina transferred a part of its state competences to the international community and its bodies and organisations, including IFOR and later SFOR. According to Annex 1 to the GFAP, the IFOR (SFOR) shall have the authority to do all that it judges necessary and proper to carry out its responsibilities. The Constitutional Court acknowledges the necessity for Bosnia and Herzegovina, as a subject of international law, to respect its obligations undertaken under the international agreements. However, Bosnia and Herzegovina has also undertaken the obligation to guarantee the highest level of protection of human rights for all people within its jurisdiction, as provided for in the Constitution (Annex 4) as an integral part of the GFAP.

The European Court of Human Rights does not exclude the transfer of competences to international organisations, provided that European Convention on Human Rights continue to be "secured". Member States' responsibility therefore continues even after such a transfer. Furthermore, the state in the territory of which the violation of the rights safeguarded under the European Convention on Human Rights occurred, retains the responsibility to take appropriate steps to protect the victims, even if the violation comes as a result of the actions of representatives over whom the mentioned state has no *de facto* control.

The Constitutional Court concedes that the competent local authorities may find it difficult to take all appropriate measures in respect of SFOR, an international organisation, which enjoys immunities and which has greater coercive means at its disposal than does the state. However, the obligation to protect human rights and fundamental freedoms is a general obligation of the state, in accordance with Article 1 ECHR and the competent authorities were therefore obliged to conduct an investigation on the violation of the appellant's rights. Since the obligation relates to action and not a result, it is possible for the authorities to fulfil their positive obligations in accordance with the European Convention on Human Rights, even if they are ultimately unable to establish the facts and circumstances in which the violation of the right occurred.

However, in this case, the local authorities did not take appropriate steps to protect those rights since no appropriate investigation was conducted nor was SFOR contacted in order to ascertain the truth of the above-mentioned events. This must be considered a serious failure since it deprives the appellant of the basic guarantee to human rights.

The authorities cannot be exempted from responsibility for the violation of the constitutional rights on the grounds that no investigation was conducted after the information concerning the appellant was received.

The Constitutional Court reminds that all annexes of the GFAP are of the same importance and that they do not allow the violation of the principle of protection of the highest level of the guaranteed human rights and fundamental freedoms. It also recalls Article 3 of the Agreement between Bosnia and Herzegovina and North Atlantic Treaty on the status of NATO and its personnel, according to which:

> "All personnel enjoying privileges and immunities under this Agreement shall respect the laws of the Republic of Bosnia and Herzegovina insofar as it is compatible with the entrusted tasks/mandate and shall refrain from activities not compatible with the nature of the Operation".

However, in the present case, the interference with the appellant's rights was not "in accordance with the law". It might be possible to interpret the concept of "law" in a wide sense due to the specific situation concerning the activities of SFOR in Bosnia and Herzegovina, so that Annex 1a to the GFAP and other instruments regulating the status and framework of SFOR's activity could be considered "law" for the purpose of justifying the interference with the appellant's right. Nevertheless, even if that is possible, the Constitutional Court considers that the interference was not in accordance with the law because the actions of SFOR in the present case exceeded the framework that is provided for by both the domestic law and the standards contained in the international instruments. Therefore, the action taken by SFOR, even if *bona fide*, cannot justify the use of such coercive measures in the present case.

According to Article 1 ECHR:

> "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

This provision obliges High Contracting Parties not only to refrain from violating those rights and freedoms but also to protect those rights and to prevent third parties from violating the rights of individuals. Article 13 ECHR provides that there is an obligation of the state to provide for an effective legal remedy before a national authority.

The Constitutional Court concluded that there was a violation of the appellant's rights and fundamental freedoms.

Languages:

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

Identification: BIH-2005-3-005

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 02.12.2005 / **e)** AP-1005/04 / **f)** / **g)** *Službeni glasnik Bosne i Hercegovine* (Official Gazette), 4/06 / **h)** *Court Bulletin*; CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

3.16 **General Principles** − Proportionality.
3.17 **General Principles** − Weighing of interests.
5.1.3.1 **Fundamental Rights** − General questions − Limits and restrictions − Non-derogable rights.
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.
5.3.31 **Fundamental Rights** − Civil and political rights − Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Media, press, freedom, scope of protection / Defamation, against public officials / Slander.

Headnotes:

The right to freedom of expression under Article II.3.h of the Constitution and Article 10 ECHR was not violated when the appellants were ordered, by a court judgment rendered in civil proceedings, to compensate the plaintiff for damage caused to his reputation by stating and disseminating incorrect facts, as the "interference" was in accordance with the law, its aim was the "protection of the rights of others" and was a "necessary measure in a democratic state".

Summary:

I. The appellants (RTV, editor and journalist) lodged an appeal with the Constitutional Court against the judgment of the Supreme Court of the Federation of BiH (hereinafter: the Court) by which they were ordered to pay jointly and individually to the plaintiff the amount of KM 10,000 as compensation for damage caused to his reputation by making and disseminating false facts during the TV show broadcasted on RTV. The Court concluded that the appellants exceeded the limits of allowed criticism and offended the plaintiff. Moreover, according to the Court, the appellants did not take any appropriate measures to mitigate the damage caused to the plaintiff's reputation by stating incorrect facts.

The appellants complain, *inter alia*, that the challenged judgments violated their right to freedom of expression under Article 10.1 ECHR. They allege that the topic of the report was not the plaintiff at all but the political party and the manner in which it has exercised power. Their critical view towards the plaintiff that he did not have the capacity to carry out the duties of a minister and that he demonstrated autocracy did not exceed the limits of allowed criticism.

II. The Constitutional Court holds that freedom of expression is *conditio sine qua non* for the functioning and the existence of every democratic society, guaranteeing all other human rights and freedoms. In case of possible conflicts of this right with other guaranteed rights and freedoms, the courts must take into account the fact that every restriction of that freedom, with the aim of protecting other constitutional rights, may only be permitted as an exception. However, this does not mean that the freedom of expression is absolute and unlimited. In states governed by democracy and the rule of law, no freedom and right, regardless of how fundamental or significant it may be, is or could be absolute and unlimited. In view of the fact that absolute freedom and absolute right are *contradictio in adiecto*, the manner in which an established legal principle may be interpreted and applied in practice remains decisive and disputable at the same time. Therefore, the crucial role and task of an independent judiciary is to make a clear distinction, in each individual case, between justified and necessary restrictions on the one hand and unjustified and unnecessary restrictions on the other hand, thus confirming or denying the applicability of the rule in question.

The significance of Article 10 ECHR is that it frequently protects expression that carries a risk of endangering the interests of others. It "… is applicable not only to "information" or "ideas" that are

favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"…" (see *Handyside v. the United Kingdom*, Judgment of 7 December 1976, Series A, no. 24, p. 23, § 49).

A clear distinction needs to be made between fact (the truth of which can be proved) and value judgments i.e. opinions (the truth of which cannot be proved). A defence on the basis of a sincere belief in the truth of the alleged facts is acknowledged, in order to provide the media with room to make honest mistakes. When a journalist pursues a legitimate aim in respect of a matter of public importance and when reasonable efforts are made to confirm the facts, the media shall not be held responsible even if it is later established that the allegations were not correct.

Every restriction, condition, limitation or any kind of interference with the freedom of expression may apply only to specific manifestations of that freedom, and only so long as the essence of the right to freedom of expression remains intact. A public authority may, but is not under the obligation to order a restriction, sanction or penalty against the exercise of the right to freedom of expression. One form of restriction on this freedom is imposed by the Law on Protection against Defamation in Bosnia and Herzegovina, which set out the conditions for compensation for damage caused by defamation and provides very stringent conditions for its application. They offer, to a certain extent, a larger degree of protection of freedom of expression than that provided by Article 10 ECHR.

Damage awards in civil defamation claims for damage caused to someone's dignity or reputation represents a clear interference with the fulfilment of the right to freedom of expression. In the present case, the challenged judgments were rendered on the basis of the Law on Protection against Defamation, which means that the interference is prescribed by law. That Law was published in an official gazette, the wording of the Law is unambiguous, accessible, foreseeable and, as already stated, provides a greater degree of protection of freedom of expression than the minimum provided by Article 10 ECHR.

The challenged judgments were rendered in civil proceedings instituted by the plaintiff against the appellants due to the harm caused to his reputation so that it is clear that the interference aims to protect the "reputation or the rights of others", i.e. the plaintiff's reputation.

The limitation imposed on the freedom of expression of the appellants is not based on the presented "value judgments" but on the basis of the expression of incorrect facts. The lower courts made the necessary distinction between fact and value judgments. Moreover, the courts took into account the fact that the plaintiff, at the time when the report in question was broadcasted, was a public official and, in that respect, under the obligation of tolerance. Taking into account all the circumstances, the courts concluded that the present case disclosed an expression of incorrect facts, that the allowed limits and necessary tolerance on the part of the plaintiff were exceeded, that the act of defamation was committed and therefore damaged the plaintiff's reputation.

The Constitutional Court holds that despite the existence of a legitimate aim in the report in question, as the matter was of public importance, there was no honest belief on the part of the appellants in the truth of the allegation made and they had made no reasonable efforts to confirm the facts, nor to mitigate any harmful consequences by allowing the plaintiff to deny the incorrect facts broadcasted. Therefore, they must be held responsible for making and disseminating defamatory statements. In the present case, the general interest allowing the issue of the economic situation to be raised may not be defended by broadcasting incorrect facts which represent an attack on the reputation of the plaintiff, and may not be considered to be a criticism of the plaintiff, which the latter was to tolerate because of the position which he held at that time. Therefore, it considered that a balance is struck in the challenged judgments between the freedom of the media and the right of the official of the executive power not to have his reputation tainted according to the principle of proportionality. The Constitutional Court holds that the ordinary courts did not err in making that assessment.

Languages:

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

Bulgaria
Constitutional Court

Statistical data
1 September 2005 – 31 December 2005

Number of decisions: 2

Important decisions

Identification: BUL-2005-3-004

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 01.09.2005 / **e)** 07/05 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), no. 74, 13.09.2005 / **h)** CODICES (Bulgarian).

Keywords of the systematic thesaurus:

1.3.3 **Constitutional Justice** − Jurisdiction − Advisory powers.
1.3.5.3 **Constitutional Justice** − Jurisdiction − The subject of review − Constitution.
3.4 **General Principles** − Separation of powers.
3.9 **General Principles** − Rule of law.
4.1.2 **Institutions** − Constituent assembly or equivalent body − Limitations on powers.
4.7.1.1 **Institutions** − Judicial bodies − Jurisdiction − Exclusive jurisdiction.
4.7.4.3.1 **Institutions** − Judicial bodies − Organisation − Prosecutors / State counsel − Powers.
4.7.5 **Institutions** − Judicial bodies − Supreme Judicial Council or equivalent body.
5.3.13.14 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Independence.

Keywords of the alphabetical index:

Prosecutor, position in the constitutional and legal order / Powers, balance, shifting / Constitutionalism, modern / Powers, interaction / Powers, cooperation / Powers, vigilance, mutual / Powers, monitoring, mutual.

Headnotes:

Amendments to constitutional provisions restricted in their effect to the judiciary and aimed at restructuring, improvement of content and clearer definition or clarification of the different functions of various judicial organs and their interaction with other institutions do not result in changes to the form of state government. They may be passed by the Ordinary National Assembly (not by the Grand National Assembly), provided that the balance between the powers is not disrupted and that the fundamental principles underlying the constitutional model of the State are respected.

Summary:

I. The Supreme Court of Appeal requested a binding interpretation of certain provisions of the Constitution to establish whether the constitutional amendments set forth in the application might result in changes to the form of state government. The amendments in question were as follows:

1. Adoption of a constitutional provision proclaiming that judicial power lies primarily with the courts in the Republic of Bulgaria. Only they may dispense state justice;
2. Adoption of a constitutional provision restructuring the Prosecutor's office and specifying that it is competent within the framework of the judiciary only to present prosecution cases;
3. Creation of a constitutional provision giving a new structure for the Investigation Department under which it could participate in case investigations by exercising the functions of investigating judges;
4. Creation of a constitutional provision under which the Prosecutor's office, the Investigation department and the Ministry of the Interior would pursue a united state policy to combat crime, under the supervision of the National Assembly;
5. Provide, under the Constitution, for reform of the structure of the Supreme Judicial Council and its voting rules, so that both the professional and parliamentary quotas are elected by a two-thirds majority.

II. The Constitutional Court examined the arguments set out in the application and the additional written opinions submitted by the interested parties and made the following ruling.

The application concerns the term "form of state government" within Article 158.3 of the Constitution in connection with the application of Article 153 of the Constitution. Clarification was sought of the exact meaning of this term in the context of constitutional

amendments (Article 153 of the Constitution) applying solely to the judiciary and defined in the application as "restructuring, including improvement of the work of its bodies". This clarification of the exact meaning of the relationship between the basic law provisions concerned, interpreted in the light of the specific requests put forward in the application, will ultimately settle the question of which of the two existing constitutional procedures for revision of the Constitution – by the Ordinary National Assembly or by the Grand National Assembly – must be applied in the case in point.

The specific requests for interpretation put forward in the Supreme Court's application share a common feature: they seek to establish the impact of amendments to basic law which are confined to the judiciary and which aim to clarify the different functions of its organs, increasing or more clearly defining their powers and their relationship with other institutions.

1. By definition, the judiciary exercises the functions of the State in the area of justice (Article 119.1 of the Constitution). From a constitutional viewpoint, the judiciary is required to guarantee the application of the law, through specific means of influence, where the rights or lawful interests of any individual with the right to a defence are threatened or violated.

It is implicit in the Bulgarian Constitution as it stands that this capacity of the courts is indisputable, although this is not expressly stated. Furthermore, the content of Article 119 of the Constitution suggests that state justice is administered by constitutionally created courts.

2. Under Article 126.1 and 126.2 of the Constitution the structure of the Prosecutor's Office shall correspond to that of the courts and the Prosecutor General shall oversee the lawfulness of and provide methodological guidance for the activities of all other prosecutors. Pursuant to this constitutional provision, Article 111 of the law on the judiciary stipulates that the Bulgarian Prosecutor's office shall comprise the Prosecutor General, the Supreme Prosecutor's Office for Appeal, the Supreme Prosecutor's Office for administrative cases, prosecutors for appeal cases, military prosecutors for appeal cases, departmental prosecutors, departmental military prosecutors and regional prosecutors.

There are two elements to the structure, as established by the Constitution. The Prosecutor's Office forms part of the judiciary and so its structure corresponds to that of the courts. At the same time it enjoys a degree of independence from the unified judiciary. There are specific principles within the Constitution as to the exercise of judicial power by the Prosecutor's office. For example, Article 126.2 of the Constitution defines the functions of the Prosecutor General independently of the other prosecutors, designating his role as being fulfilled by a single individual, which diverges from the court structure. Thus, both structural correspondence and divergence are to be found in the Constitution.

If the term "restructuring" raised in the application suggests the perfecting of that structure in line with the main task and procedures exhaustively listed in the Constitution, through a more appropriate and efficient organisation of the component parts of the Prosecutor's office, for example by setting up specialised units to more effectively combat various types of crime (terrorism, corruption, trans-frontier crime, etc.) or by introducing specialised prosecutor's offices attached to specialised courts (Article 119.2 of the Constitution), then constitutional amendments restricted to the judiciary would not affect the form of state government and could be passed by the Ordinary National Assembly. This can be seen in case law from the Constitutional Court. In its Decision no. 8 of 1998, the Court stated that it lay "solely within the competence of the legislature to assess the need for these structural units within the court system and that of the prosecutor's office".

3. The only constitutional provision aimed specifically at investigating bodies is in Article 128 of the Constitution. It does not dictate the type or structure of these bodies. In contrast to the provisions governing the court system and the Prosecutor's office, this provision, in common with the other texts of Chapter 6 of the Constitution, does not use a synthetic notion to designate investigating bodies as a system of component parts. It is in this constitutional framework and pursuant to Article 133 of the Constitution that various organisational models for the investigating bodies have succeeded one another over the last three years, beginning with highly centralised systems followed by heavily decentralised systems, each governed by laws.

Under Article 128 of the Constitution, investigating bodies are responsible for preliminary investigation in criminal cases. In this context, to insert provisions in the Constitution which the application claimed were aimed at reforming the structure of these bodies whereas in reality they were creating them, would not entail changes in the form of state government, because this question, even today, lies within the competence of the Ordinary National Assembly.

4. No constitutional system in force provides for and guarantees total independence to any one of the three powers, because the necessary balance is

achieved through mutual vigilance on the assumption that each of the powers is able to monitor the others. At the same time, modern constitutionalism requires the shifting balance between the powers to be the result of cooperation and interaction between them, first and foremost in the areas which are indisputable national priorities, such as combating crime. It is a functional interaction in response to fundamental problems of society, which neither does away with nor downgrades this principle in favour of its opposite, namely unity of power. Interaction and cooperation on the one hand and mutual monitoring and vigilance on the other must not result, however, in the destabilising of any one of the three powers, nor in the weakening of its own responsibilities or the transfer of specific powers to other entities. The Constitution states that Bulgaria is a Republic with a parliamentary system (Article 1.1 of the Constitution) which is governed in compliance with the Constitution and laws of the country (Article 4.1 of the Constitution). As a freely elected body representative of the entire nation, the National Assembly takes a leading role within the state. As the sole body wielding legislative power, it is the Assembly which, through the acts it passes, influences the impact of state policy on various areas of public life. For that reason, the Constitutional Court considered that, in a parliamentary republic, the National Assembly could play a role not only at the level of framing state policy but also in the examination and analysis of its results in combating crime and that, in principle, the passing of such a constitutional provision did not entail changes in the form of state government.

At the same time, the Court held that, for the passing of such a text to comply with the basic principles of the Constitution, there must be prior clarification of the definition of the relevant powers of the National Assembly. Where judicial bodies were concerned, the classic form of parliamentary supervision typifying relations between legislative and executive powers should not be replicated, as this would constitute interference likely to alter the basis of the constitutional model of the State, and it would affect the constitutionally established form of state government.

5. Point 5 of the application failed to secure over half the votes of all the judges and was therefore ruled inadmissible.

In the light of the above considerations, the Constitutional Court ruled as follows:

1. The constitutional amendments applying only to the judiciary set out in the first four points of the application and aimed at the restructuring, the perfection of content and clearer definition of the different functions of its bodies, specifying these bodies' competence or titles and their interaction with the other institutions do not entail changes in the form of state government and may be passed by the Ordinary National Assembly (not by the Grand National Assembly), on condition that the balance of power is respected and the fundamental principles underlying the constitutional model of the State are respected. These are the rights of the individual, national sovereignty and political pluralism, the rule of law, primacy of law, separation of powers and independence of the judiciary.

2. Point 5 of the application was rejected on the grounds of inadmissibility.

Languages:

Bulgarian.

Canada
Supreme Court

Important decisions

Identification: CAN-2005-3-006

a) Canada / **b)** Supreme Court / **c)** / **d)** 30.09.2005 / **e)** 30349 / **f)** R. v. Turcotte / **g)** *Canada Supreme Court Reports* (Official Digest), [2005] 2 S.C.R. 519, 2005 SCC 50 / **h)** Internet: http://www.droit.umontreal.ca/doc/csc-scc/ en/index/html; 339 *National Reporter* 32; 200 *Canadian Criminal Cases* (3d) 289; 31 *Criminal Reports* (6th) 197; [2005] S.J.C. no. 51 (Quicklaw); CODICES (English, French).

Keywords of the systematic thesaurus:

5.3.13.23.1 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Right to remain silent − Right not to incriminate oneself.

Keywords of the alphabetical index:

Silence, inference of guilt / Silence, post-offence conduct / Silence, waiver of right.

Headnotes:

An individual has the right to refuse to respond to police questions even if he is not detained or arrested. Furthermore, an individual does not waive his right to silence by voluntarily going to the police station and answering some questions.

Summary:

I. The accused went to a police station and asked that a car be sent to the ranch where he lived. Despite repeated questions from the police, he refused to explain why a car was necessary or what would be found there. The officers dispatched to the ranch discovered three victims. All three died from axe wounds to the head. The accused was charged with three counts of second degree murder. At trial, the evidence against the accused was entirely circumstantial. He admitted finding the victims but denied killing them. With respect to the accused's refusal to respond to some police questioning, the trial judge told the jury that this silence was "post-offence conduct" and that an inference of guilt could be drawn from it. The jury found the accused guilty, but the Court of Appeal set aside the convictions and ordered a new trial.

In a unanimous decision, the Supreme Court of Canada dismissed the Crown's appeal.

II. The evidence of the accused's silence was not admissible as post-offence conduct. The right to silence would be illusory if the decision not to speak to the police could be used by the Crown as evidence of guilt.

Under the traditional common law rules, absent statutory compulsion, everyone has the right to be silent in the face of police questioning, even if he or she is not detained or arrested. The right to silence, which is also protected by the Canadian Charter of Rights and Freedoms, exists at all times against the state, whether or not the person asserting it is within its power or control. Furthermore, a voluntary interaction with the police, even one initiated by an individual, does not constitute a waiver of the right to silence. The right to choose whether to speak is retained throughout the interaction. Accordingly, the accused in this case did not waive his right to silence by going to the police station and answering some of the police's questions.

Conduct after a crime has been committed is admissible as "post-offence conduct" only when it provides circumstantial evidence of guilt. Since the law imposes no duty to speak to or cooperate with the police, this fact alone severs any link between silence and guilt. Silence in the face of police questioning will, therefore, rarely be admissible as post-offence conduct because it is rarely probative of guilt. An inference of guilt cannot logically or morally emerge from the exercise of a protected right. Using silence as evidence of guilt artificially creates a duty, despite a right to the contrary, to answer all police questions. Lastly, the accused's silence could not be used as "state of mind" evidence from which guilt could be inferred. Characterizing the silence as state of mind evidence was simply another way of arguing that the silence was post-offence conduct probative of the accused's guilt.

While not admissible as post-offence conduct or state of mind evidence, the accused's behaviour at the police detachment, including his refusal to answer some of the police's questions, was, arguably, admissible as an inextricable part of the narrative. Where evidence of silence is admitted, juries must be instructed about the proper purpose for which the evidence was admitted, the impermissible inferences

which must not be drawn from evidence of silence, the limited probative value of silence and the dangers of relying on such evidence. The failure to give the jury this limiting instruction, particularly given the circumstantial nature of the Crown's case, was highly prejudicial and a new trial is required.

Languages:

English, French (translation by the Court).

Identification: CAN-2005-3-007

a) Canada / **b)** Supreme Court / **c)** / **d)** 15.12.2005 / **e)** 29952, 29953 / **f)** R. v. Henry / **g)** *Canada Supreme Court Reports* (Official Digest), [2005] 3 S.C.R., 2005 SCC 76 / **h)** Internet: http://www.droit.umontreal.ca/doc/csc-scc/en/index/html; [2005 S.C.J. (Quicklaw); CODICES (English, French).

Keywords of the systematic thesaurus:

1.6.3.1 **Constitutional Justice** − Effects − Effect *erga omnes* − *Stare decisis*.
5.3.13.23.1 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Right to remain silent − Right not to incriminate oneself.

Keywords of the alphabetical index:

Accused, testimony, voluntary.

Headnotes:

The right against self-incrimination guaranteed by the Constitution is not available to an accused who chooses to testify at his retrial on the same indictment.

Summary:

I. In their retrial on a charge of first degree murder, the accused told a different story under oath than they had five years earlier at their first trial on the same charge. At the new trial, the Crown cross-examined the accused on these prior inconsistent statements for the purpose of impeaching their credibility. They were again convicted of first degree murder. On appeal, the accused argued that notwithstanding the fact they were not (and could not be) compelled to testify at their first trial, they ought nevertheless to have been protected as voluntary witnesses at their second trial from exposure of the contradictory testimony they gave at the first trial, despite the misleading impression such non-disclosure would have left with the jury. The search for truth, they contended, is limited by Section 13 of the Canadian Charter of Rights and Freedoms. The section provides that "A witness who testifies in any proceedings has the right not to have incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence." The majority of the Court of Appeal upheld the conviction; the dissenting judge would have ordered a new trial because the use of the prior inconsistent statements in those circumstances violated the accused's right against self-incrimination.

In a unanimous decision, the Supreme Court of Canada dismissed the accused's appeals.

II. The purpose of Section 13 of the Canadian Charter of Rights and Freedoms is to protect individuals from being indirectly compelled to incriminate themselves. The section embodies a *quid pro quo*: when a witness who is compelled to give evidence in a proceeding is exposed to the risk of self-incrimination, the state offers, in exchange for that witness's testimony, protection against the subsequent use of that evidence against him. Here, the accused freely testified at their first and second trials. The compulsion, which is the source of the *quid pro quo* which in turn lies at the root of Section 13, was missing. Accordingly, their Section 13 Charter rights were not violated by the Crown's cross-examination. They were in no need of protection "from being indirectly compelled to incriminate themselves".

The jurisprudence of this Court has not been altogether consistent on the scope of Section 13. While the Court's practice is against departing from its precedents unless there are compelling reasons to do so, such circumstances exist here in respect of *R. v. Mannion*, [1986] 2 S.C.R. 272. In *Mannion*, the Court did not adopt an interpretation in line with the purpose of Section 13. In that case, the accused freely testified at his first and second trials and the compulsion which is the source of the *quid pro quo*, which in turn lies at the root of Section 13, was missing. Denying the Crown the opportunity to cross-examine the accused in that case on his prior voluntary testimony gave him a constitutional immunity to which he was not entitled. As for *R. v. Kuldip*, [1990] 3 S.C.R. 618, it should be

affirmed insofar as it permitted cross-examination of the accused on the inconsistent testimony he volunteered at his first trial. However, insofar as the Court felt compelled by *Mannion* to narrow the purpose of the cross-examination to the issue of credibility, the decision in the instant case not to follow *Mannion* renders such restriction no longer operative. If the contradiction of testimony gives rise to an inference of guilt, Section 13 of the Charter does not preclude the trier of fact from drawing the common sense inference. Lastly, to the extent that *obiter* statements in this Court's earlier Section 13 cases are inconsistent with the rationale of compulsion (the "*quid pro quo*"), they should no longer be regarded as authoritative.

The result of a purposeful interpretation of Section 13 is that an accused will lose the *Mannion* advantage in relation to prior volunteered testimony but his protection against the use of prior compelled testimony will be strengthened. The two different situations will be treated differently instead of homogenized, and the unpredictability inherent in sorting out attacks on credibility from attempts at incrimination will be avoided.

Languages:

English, French (translation by the Court).

Croatia
Constitutional Court

Important decisions

Identification: CRO-2005-3-008

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 12.10.2005 / **e)** U-II-1362/2005 / **f)** / **g)** *Narodne novine* (Official Gazette), 125/05 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.13 **General Principles** − Legality.
4.8.3 **Institutions** − Federalism, regionalism and local self-government − Municipalities.

Keywords of the alphabetical index:

Interpretation, authentic, modification of the act / Urban planning, public participation.

Headnotes:

The constitutional principle of equality is breached when the legal procedures for altering a bye-law are not followed and those whose participation is required by the relevant Act do not take part in the process.

Summary:

I. The Constitutional Court considered a request by the Central State Administrative Office for the review of the constitutionality and legality of the Authentic Interpretation of Decision no. 2/97 Amending the Detailed Physical Plan of the Community, Recreational and Sports Centre Lazarica Park in Split (hereinafter known as the Authentic Interpretation), issued by the City Council of the City of Split. The Court overturned the decision. However, in its judgment in the same case, the Court rejected a proposal by an investor, Atrium Spalatum, that the execution of various enactments and actions brought in the course of building inspection of the residential and office Lazarica Building located in Firule, Split should be suspended on a temporary basis. The Central State Administrative Office had suspended the application of the Authentic Interpretation.

The government took the view that the Authentic Interpretation alters and amends the Decision that it interprets, in particular Article 6 of the Decision. If the correct procedure for making such an amendment is not followed, this infringes Article 29a of the Physical Planning Act. Full details were given of the type of changes the Authentic Interpretation had introduced.

During the proceedings, the investor Atrium Spalatum, filed a submission as an interested party with the Constitutional Court. The submission and the documentation attached to it clearly showed that spatial intervention was made pursuant to a valid construction permit; that there had been some discrepancy with the approved design during the construction and as a result the investor requested that the permit be amended. The competent administrative body rejected this request. The City Council, at the further request of the investor, issued the Authentic Interpretation.

II. The Constitutional Court upheld the Government's request. Articles 128.1 and 2 of the Constitution empower it to decide on the constitutionality and legality of legislation. The content of the legislation in question shows that it was passed in contravention of the principle of constitutionality and legality in Article 5 of the Constitution. The Court established that the City Council of Split had made substantial alterations to Decision 2/97, to the extent that the added text they contradicted the original text.

Article 27 of the Physical Planning Act requires that a local plan should set out details of the area in question, transport and telecommunication infrastructure and plans for future development. The local plan is a zoning document, and can in legal terms be described as a general regulation issued and altered by representatives of local government (examples are municipal and city councils or the City Council of the City of Zagreb). The provisions of Articles 10 to 33 of the Physical Planning Act stipulate the procedure for making changes to physical development documents (including local plans), actions or bye-laws to be taken or passed by the competent bodies, and the content of these documents.

Article 29a of the Physical Planning Act stipulates that there should be public debate about proposals for plans, proposals for changes to them and any proposals to repeal them. It is for the government to decide upon the way such a public debate should be conducted and the role the state, local government authorities and citizens should play.

Under Article 34 of the Physical Planning Act, any intervention in the environment must be conducted in accordance with the zoning document, special regulations and location permit. A location permit is an administrative enactment issued on the grounds of a zoning document. Under paragraph 2 of Article 34, a location permit shall not be issued for interventions in the environment in areas for which a local plan has been drawn up under regulations issued by the Minister. Article 40a stipulates that if interventions are carried out, the relevant town planning department will issue an extract from the local plan.

The Court's examination of the various provisions and bye-laws showed that in the case in point, correct procedures had not been followed, and that those who should have taken part in the process did not in fact participate.

As regards the ruling rejecting the investor's claim the Court found no grounds to decide on the merits of the case, since the temporary suspension of individual enactments or actions until the final decision (Article 45 of the Constitutional Act on the Constitutional Court) is possible when these enactments are issued on the grounds of a law or another regulation the constitutionality and legality of which is being reviewed before the Court. In the specific case the Court is not reviewing the constitutionality and legality of the Building Act pursuant to which the individual enactments, the temporary suspension of which has been proposed, were rendered.

Languages:

Croatian, English.

Identification: CRO-2005-3-009

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 20.10.2005 / **e)** U-III-790/2004 / **f)** / **g)** *Narodne novine* (Official Gazette), 128/05 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

5.3.13.15 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Impartiality.

Keywords of the alphabetical index:

Judge, first instance, participation in appellate proceedings.

Headnotes:

Serious doubts arise as to the impartiality of that judge, if he is involved in appellate proceedings, even if a different judge delivers the judgment. This would be in breach of the right to a fair and independent trial as set out in Article 29 of the Constitution.

Summary:

In response to a constitutional complaint lodged by a natural person, the Constitutional Court quashed the judgment and the ruling of the Zadar County Court, no. Gž-864/03 and referred the case to the Court for retrial. The judgment related to matrimonial property in the case of divorce or separation. The most important aspect of the case, from the constitutional point of view, was the applicant's allegation about the judge's involvement in both the first and the second-instance proceedings.

The Constitutional Court upheld the applicant's claim. It took into account the following provisions of procedural law and the Constitution:

- Article 354.2.1 of the Civil Procedure Act nos. 53/91, 91/92, 112/99, 88/01 and 117/03, hereinafter referred to as "the ZPP") stipulates that civil proceedings are always fundamentally flawed if a judge who ought legally to be exempted from the proceedings (Article 71/1 points 1 to 6), or who was exempted by a court ruling participates in the proceedings, or if a person who is not a judge takes part in the proceedings.

- Article 71.1.5 of the ZPP stipulates that a judge may not preside if he has participated in the same case in proceedings before the lower court or before any other body.

- Article 29.1 of the Constitution bestows the universal right to an independent and fair trial provided by law within a reasonable time span.

The Constitutional Court was at pains to stress that both objective and subjective criteria should be applied when a question has arisen as to the impartiality of a court.

The subjective criterion examines whether a judge has any personal reason for bias in a specific case, or any personal prejudice. No evidence was presented here of any subjective bias on the judge's part, neither was there any suggestion or evidence of a breach of the guarantee of non discrimination. The Court therefore found the applicant's claim to be unfounded relating to the provision of Article 14.1 of the Constitution.

The objective criterion, by contrast, examines whether a court or its composition guarantee such a level of certainty as to exclude any justifiable doubt as to the impartiality of the court. The Court found that the judge in this case had participated in the proceedings before the first-instance court, and later was a member of the appeal panel. The first-instance judgment delivered by this judge was quashed, and she did not participate in the renewed proceedings before the first-instance court. Nonetheless, her participation cannot be regarded as completely objective. She had already expressed her view on the trial in her judgment. This raises serious doubts about her impartiality in the appeal proceedings. The fact that a different judge delivered a judgment in the renewed proceedings at first instance is not relevant.

The Court accordingly found that the applicant's right to the independent and fair trial under Article 29 had been breached. It had expressed the same view in Decision no. U-III-2488/2005 of 6 October 2005.

The Constitutional Court did not examine the possible violation of Article 29.1 of the Constitution since it had already decided upon Article 14.2 of the Constitution.

The Court found that allegations as to violations of Article 26 of the Constitution were not relevant to the case in point. Here, it cited Decision no. U-III-884/04 of 16 December 2004.

Languages:

Croatian, English.

Identification: CRO-2005-3-010

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 08.11.2005 / **e)** U-I-362/2001 / **f)** / **g)** *Narodne novine* (Official Gazette), 138/05 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

3.21 **General Principles** − Equality.
4.7.15.1 **Institutions** − Judicial bodies − Legal assistance and representation of parties − The Bar.
4.7.15.2 **Institutions** − Judicial bodies − Legal assistance and representation of parties − Assistance other than by the Bar.

Keywords of the alphabetical index:

Tax, counsellor, rights / Bar, legal representation, exclusive.

Headnotes:

Tax counselling does not undermine the independence of the legal profession, which, in compliance with the Constitution, provides legal assistance to all who need it. The jurisdiction, rights and obligations of these two institutions are regulated by separate laws. Their respective legal positions cannot be compared in the sense of equality before the law.

It is up to the legislator to decide upon the compulsory examination tax counsellors should take and the regulatory regime they work under.

Summary:

I. The Croatian Bar Association (hereinafter referred to as "HOK") asked the Constitutional Court to assess the constitutionality of several provisions of Articles 2.2, 2.3, 4.3, 7 and 9.1.2 of the Tax Counselling Act 127/00 (hereinafter referred to as "the Act"). The Court found that the above provisions did not infringe Articles 27 and 14.2 of the Constitution.

The HOK argued that the Constitution provides the legal profession with exclusive authority to represent clients before courts. It also contended that a tax counselling qualification cannot replace the qualifications of attorneys (such as the bar examination and practical experience of providing legal assistance). In the HOK's opinion, tax counsellors should only be allowed to perform activities defined in the Act as "limited tax counselling".

A citizen asked for a constitutional review of Article 9.1.2 of the Act, on the basis that it infringed the principle of equality (Article 14.2 of the Constitution). The suggestion was that Article 9.1.2 places authorised Tax Administration inspectors and former employees of the Financial Police (who will have passed the state vocational examination, which has a broader content than the tax counsellors' examination) in an unequal position as regards the tax counsellors' examination. It was also suggested that the examination fee was out of proportion to the low salaries of civil servants who would choose to work as tax counsellors. He proposed that the Constitutional Court should introduce a provision in the Act which would accord more favourable conditions for passing the examination to people who have worked as inspectors for a minimum of five years and who have passed the state vocational examination prescribed for persons with university qualifications.

The relevant provisions of the Act read as follows:

Article 2

(2) Tax counselling is aimed at providing counselling on tax issues, representation in tax proceedings before tax authorities and making tax returns. In addition to tax counselling, bookkeeping activities, preparing financial reports and other related services may also be conducted.

(3) Tax counselling also includes representation before tax authorities and the provision of expert opinions against the decision of the tax authorities.

Article 4

(3) A tax counsellor as defined in paragraph 2 of this article has the authority and responsibility to advise his client on tax issues, to help him to file tax returns and to represent him before tax authorities, to participate in tax disputes before the courts, and to supervise the accuracy of tax and accounting registers kept for the purpose of making tax returns and other tax documents.

Article 7

The following persons may perform tax counselling but have no right to represent clients in tax proceedings before tax authorities and in tax disputes:

1. authorised auditors and auditing companies within their authority under the Auditing Act,
2. companies and auditing services within their scope of activity and
3. employers acting in matters arising from taxes on the salaries of their employees.

Article 9

A tax counsellor shall also comply with the following special requirements:

(2) he must have passed the tax counsellors' examination and acquired the requisite approval from the Bar.

II. The Constitutional Court found that these provisions were in line with Article 27 of the Constitution. They do not undermine the independence of the legal profession as a service whose constitutional duty is to provide legal assistance to all who need it, neither do they place the legal profession in an unequal position before the law (as set out in Article 14.2 of the Constitution). One is dealing here with two different groups of legal subjects regulated respectively by the Legal Profession Act and the Tax Counselling Act. No grounds exist to compare their different legal positions in the sense of equality before the law.

The Court is not competent to review the potential non-compliance between the Tax Counselling Act and the Legal Profession Act in the process of reviewing the constitutionality of the Tax Counselling Act, with particular reference to Article 128 of the Constitution.

The Court pointed out that all civil servants must by law pass a relevant vocational examination. In selecting the examination aspiring tax counsellors must take, the legislator will first decide upon the specific knowledge they will need in order to carry out their work.

Languages:

Croatian, English.

Identification: CRO-2005-3-011

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 23.11.2005 / **e)** U-I-3307/2005 / **f)** / **g)** *Narodne novine* (Official Gazette), 139/05 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Law, adoption, emergency procedure.

Headnotes:

Laws are to be passed by the Croatian Parliament by a majority vote of all its members.

Summary:

I. Numerous applicants asked the Constitutional Court to review the constitutionality of the Public Assembly (Amendments) Act 90/05, hereinafter referred to as “the act”. The applicants included thirty four members of parliament, the Croatian Helsinki Committee for Human Rights from Zagreb, the Croatian School Union Preporod from Zagreb and the Croatian Independent Unions from Zagreb. The Citizens’ Initiative of Matija Gubec had already submitted request and proposals, which it joined to these proceedings.

The applicants all agreed that Article 42 of the Constitution confers the universal right of assembly and peaceful protest in conformity with the law. It is clear from this article that this right belongs to the body of fundamental human rights and freedoms in accordance with domestic law and with international legal instruments adapted to and incorporated in the Croatian legal system. Given the undisputable fact of the number of representatives that had voted in favour of this Act, the applicants suggested that it was unconstitutional and requested its repeal.

II. The Constitutional Court found that the Act was passed under emergency procedures. This means that it could only be legally enacted if seventy seven of the one hundred and fifty two members of parliament voted (this being the number of representatives of the Croatian Parliament at the time of passing the Act). The Act was therefore repealed with effect from 31 March 2006. The Court relied upon previous practice and views expressed in decisions nos. U-I-2566/2003, U-I-2892/2003 of 27 November 2003. These decisions repealed Criminal (Amendments) Act no. 111/03 in the light of Article 82.2 of the Constitution (“….laws that enumerate constitutionally defined human rights and fundamental freedoms, the electoral system, the organisation, authority and operation of government bodies and the organisation and authority of local and regional self-government shall be passed by the Croatian Parliament by a majority vote of all representatives”), and also in the light of Article 42 of the Constitution.

In its statement of reasons for the decision, the Court stated that the act is aimed at constitutionally guaranteed human rights and fundamental freedoms through the regulation of the right of public assembly and that the Act is in force and is being applied. The Court did not review the substantive constitutionality of the Act, only the way in which it had been passed.

Supplementary information:

The Croatian Parliament, under a renewed procedure, passed the unchanged text of the repealed Act, this time in accordance with the stipulated procedure. The applicants have announced their intention to file more requests, this time to review the constitutionality of the Act. It is expected that this time the Court will indeed carry out a constitutional review of the Act on the merit.

Languages:

Croatian, English.

Cyprus
Supreme Court

Important decisions

Identification: CYP-2005-3-003

a) Cyprus / **b)** Supreme Court / **c)** / **d)** 28.09.2005 / **e)** 7655 / **f)** Georghiou v. Police / **g)** to be published in *Cyprus Law Reports* (Official Digest) / **h)** CODICES (Greek).

Keywords of the systematic thesaurus:

5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.13.27 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Right to counsel.

Keywords of the alphabetical index:

Lawyer, choice, obligation.

Headnotes:

The right of an accused to be represented in court by an advocate of his or her choice is safeguarded under the Constitution. The exercise of such a right is related to the right to a fair trial.

Summary:

I. The appellant was convicted for the offence of assault causing serious bodily harm.

The appellant filed an appeal against his conviction before the Supreme Court. He complained that he was deprived of his right to legal representation.

Article 12.5.c of the Constitution stipulates that every person charged with an offence has the right to defend him or herself in person or through a lawyer of his own choosing or, if he has insufficient means to pay for legal assistance, to be given free legal assistance when the interests of justice so require.

II. The Supreme Court in dismissing the appeal held that the right of the appellant to have an advocate of his choice is not unlimited The trial is not dependent

upon the willingness of the appellant to appoint an advocate of his choice, otherwise it would lead to that right becoming a prerequisite for the commencement of the trial process.

The appeal was dismissed.

Languages:

Greek.

Identification: CYP-2005-3-004

a) Cyprus / **b)** Supreme Court / **c)** / **d)** 08.11.2005 / **e)** 3572 / **f)** Kedum v. Republic / **g)** to be published in *Cyprus Law Reports* (Official Digest) / **h)** CODICES (Greek).

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:

Residence, right, family, dependence on work permit / Residence, child, foreign, birth in country of residence.

Headnotes:

Article 15 of the Constitution provides that every person has the right to respect for his or her private and family life and that there shall be no interference with the exercise of this right except such as is in accordance with the law and is necessary only in the interests of the security of the Republic or the constitutional order or public safety or public order or public health or public morals or for the protection of the rights and liberties guaranteed by the Constitution to all citizens.

Summary:

I. The appellant came to Cyprus with his wife and two children and was granted a work permit. His third child was subsequently born in Cyprus.

When his work permit had expired he was asked to leave the country, which he did not, and therefore a deportation order was issued against him.

He appealed against that order, which was dismissed at first instance.

In his appeal to the Supreme Court he invoked Article 15 of the Constitution. He alleged that his right to family life had been infringed.

II. The Supreme Court in dismissing the appeal noted that the appellant's family did not have an independent right to residence. Their right was dependent on the appellant's right to residence and work of the appellant. There were no obstacles to the family members joining the appellant in another country.

In relation to the third child of the appellant, the court observed that the fact that the child was born in Cyprus does not automatically and *per se* give it the right to reside in the country.

The Court concluded that the right to family life of the appellant was adequately respected.

The appeal was dismissed.

Languages:

Greek.

Czech Republic
Constitutional Court

Statistical data
1 September 2005 – 31 December 2005

- Judgment of the plenum: 4
- Judgment of panels: 44
- Other decisions of the plenary Court: 4
- Other decisions by chambers: 1 065
- Other procedural decisions: 67
  Total: 1 184

Important decisions

Identification: CZE-2005-3-011

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 15.03.2005 / **e)** I. ÚS 367/03 / **f)** / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.17 **General Principles** − Weighing of interests.
5.3.19 **Fundamental Rights** − Civil and political rights − Freedom of opinion.
5.3.21 **Fundamental Rights** − Civil and political rights − Freedom of expression.
5.3.31 **Fundamental Rights** − Civil and political rights − Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Fundamental rights, conflict / Value judgment, protection / Constitution, direct effect / Human rights, radiation throughout legal order.

Headnotes:

Anybody who plays an active role in society must accept a greater degree of criticism than other citizens. There is a dual rationale behind this principle. On the one hand, it encourages the public discussion of public affairs and the free forming of opinions. On the other hand, the state accepts that any interference on its part with the freedom of expression, in order to protect the good name of other citizens, must be subsidiary. This means the state can only intervene when this type of damage could not be put right by other means. The problem could, for example, be addressed by using permissible ways of opposing controversial and misleading opinions, rather than state intervention. It is often possible to minimise the damaging consequences of controversial statements by means that are more effective than judicial proceedings.

Summary:

I. A music critic, when giving an interview for a newspaper, made a statement to the effect that the singer, X, had “evidently succeeded in not losing contact with the mafiosi who, in the 70’s and 80’s, propelled her into radio, onto the television, and onto records”. He further expressed the opinion that singer X also availed herself of these contacts from an earlier period. The singer brought an action for the protection of personhood against the critic, but this was rejected on its merits. On appeal, the Superior Court ruled that the critic should send the singer a letter containing an apology and that the apology should be published in the press. The Supreme Court subsequently rejected the critic’s extraordinary appeal on its merits.

The critic petitioned the Constitutional Court, complaining that his rights to a fair trial and to freedom of expression had been breached. He requested that these judgments be quashed.

II. There is consistent jurisprudence from the Constitutional Court to the effect that it has no power to intervene in the judicial work of ordinary courts. It is not the summit of that court system and, therefore, may not arrogate to itself the right of review over their decision-making. However, in arriving at their decisions, the courts must proceed in accordance with the constitutional order. As this did not happen in the case in point, the Constitutional Court found that the critic’s complaint was well-founded.

The constitutionally guaranteed right of freedom of expression is restricted in content by the rights of others. The conflict of both rights can be seen on a sub-constitutional plane. In applying statutory provisions, a judge must always bear in mind the fine balance between these rights and the way the application of a statute can affect that balance. The Constitutional Court has repeatedly pointed out that an important characteristic of the Czech Constitution (and especially the provisions concerning fundamental rights and basic freedoms) is the way it “radiates” through the whole legal order. The purpose of the Constitution is not simply to enumerate fundamental rights and basic freedoms, and to set out

the decision-making apparatus of the state. The Constitution is directly binding in its nature and is a direct source of law. State bodies, or public authorities, must therefore interpret and apply the law from the perspective of the protection of fundamental rights and freedoms.

Freedom of expression and the right to the protection of personhood are both fundamental rights with the same legal force. If there is a conflict between them, the ordinary court must always scrutinise each individual case carefully and decide whether one right has taken unjustifiable precedence over another.

The Constitutional Court observed that in this instance, the ordinary courts had not properly considered the constitutional nature of the case. They had given priority to one fundamental right over another. The encroachment upon the critic's freedom of expression should be deemed to be very serious and as a threat to public discussion.

The ordinary courts considered the statement the critic had made to be a statement of fact. Because, in their view, he had not been able to demonstrate the truth behind this fact, he would not prevail in the dispute. Jurisprudence from the European Court of Human Rights over several years indicates that there is a fundamental difference between a value judgment and a statement of fact. The existence of facts can be demonstrated but not the truth of value judgments. Value judgments do not describe facts; rather they interpret them, to a greater or lesser extent. It may be possible to issue a blanket prohibition on the assertion of certain untrue facts, but in principle the expression of opinions, even controversial ones, enjoys constitutional protection.

A requirement to prove the truth of a value judgment is per se a breach of the right to freedom of expression, as it is not possible to fulfil such a requirement. However, value judgments are not completely immune from attack in the context of legal proceedings arising from the protection of personhood. In deciding whether state intervention in the context of a value judgment contained within a statement would be appropriate, the court would need to consider whether there was sufficient factual basis. Even a value judgment can be excessive, if it is completely lacking in factual basis.

The ordinary courts also gave insufficient consideration to the position of the secondary party. There is far less judicial protection of the reputations of people who are active within the public sphere than there is of the reputation of other people, who have fewer opportunities to enter into public discussion than those who are publicly active.

The Constitutional Court ruled that in interpreting the significance of the word "mafioso" as an assertion of fact, the ordinary court, had acted unconstitutionally, as it had required the proof of a value judgment, and this was not possible in these circumstances.

In view of the above, the Constitutional Court granted the constitutional complaint and overturned the designated decisions.

Languages:

Czech.

Identification: CZE-2005-3-012

a) Czech Republic / **b)** Constitutional Court / **c)** Third Chamber / **d)** 15.09.2005 / **e)** III. ÚS 304/05 / **f)** / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** − Constitutional jurisdiction − Relations with other institutions − Courts.
1.3.4.13 **Constitutional Justice** − Jurisdiction − Types of litigation − Universally binding interpretation of laws.
1.5.6.3.2 **Constitutional Justice** − Decisions − Delivery and publication − Publication − Publication in an official collection.
1.6.3 **Constitutional Justice** − Effects − Effect *erga omnes*.
1.6.7 **Constitutional Justice** − Effects − Influence on State organs.
1.6.9 **Constitutional Justice** − Effects − Consequences for other cases.
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.
5.3.13.6 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Right to a hearing.

Keywords of the alphabetical index:

Trial *in absentia*, right to new trial.

Headnotes:

The precise time when a judgment in criminal proceedings which have been targeted at a fugitive becomes enforceable is not a crucial factor in the applicability of the Criminal Procedure Code. This legislation enables a convicted person to petition to have a criminal judgment issued in proceedings against a fugitive overturned. The principle of fair process requires that priority be given to that interpretation which is most in conformity with the constitutional order; it is therefore necessary to consider as the decisive condition the fact that, after the amendment to the Criminal Procedure Code came into force, the reasons for which the proceedings against a fugitive were held ceased to exist. The precise timing of the enforceability of a criminal judgment handed down in proceedings against a fugitive is not decisive.

The Regional Court breached the Constitution in this case by failing to follow the proposition of law expressed in a previous Constitutional Court judgment. If the court was aware of this proposition, it ought to have followed it, irrespective of whether it had been published in the Collection of Laws and Rulings of the Constitutional Court.

Summary:

I. The Regional Court pronounced the applicant in the proceedings before the Constitutional Court guilty of the criminal offence of fraud and he was given a prison sentence. The criminal proceedings against him were held as proceedings against a fugitive. After he was arrested by the police, he was transferred to serve his sentence of imprisonment by court order, and he was not informed that he could have applied to have the judgment handed down in his absence overturned.

The applicant asked for the judgment and the instruction to be sent to him several times, but the Chairman of the Regional Court informed him that he was not entitled to apply for the judgment to be overturned, as his conviction took place prior to 1 January 2002. The Supreme Court ruling was quoted, by virtue of which the provisions of the Criminal Procedure Code do not apply to criminal judgments pronounced on 31 December 2001 or earlier. The applicant argued that this Supreme Court ruling had been overruled by a Constitutional Court judgment. The Chairman of the Panel subsequently informed the applicant that, although the Regional Court was aware of this Constitutional Court judgment, it had not yet been published.

The applicant contended that the Regional Court did not inform him that it was possible to file a motion to have the judgment set aside. He also argued that the Chairman of the Panel of the Regional Court had failed to respect the Constitutional Court's judgment.

II. The Constitutional Court upheld the applicant's claim.

The Criminal Procedure Code provides for cases where proceedings against a fugitive have resulted in a final judgment of conviction and the grounds upon which the proceedings against a fugitive were held no longer exist. In such cases, the convicted person may, within eight days of the judgment being served upon him, petition the first instance court to quash that judgment and hold a fresh trial. When the judgment is served upon the convicted person, he must be informed of his right to file a motion to overturn the judgment.

The Constitutional Court has already declared in a previous judgment that proceedings against a fugitive are very restrictive of the constitutional principle of fair process. The amendment to the Criminal Procedure Code was made in response to the requirements of the European Convention on Human Rights and the European Court of Human Rights and enshrined the ability of a fugitive to file a motion to quash a final judgment of conviction in his criminal case. According to the jurisprudence of the European Court of Human Rights, "proceedings held in an accused's absence are not in principle incompatible with the Convention if the person concerned can subsequently obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact" (*Poitrimol v. France*, Series A, no. 277-A).

The Supreme Court's position was that the provision in point only applies to those cases where the judgment became enforceable on or after 1 January 2002. However, such a stance fails to take account of a large number of cases where the judgment became enforceable prior to 31 December 2001, and the reasons for which proceedings against a fugitive had been held ceased to exist after that date. Such a conclusion by the Supreme Court is unduly restrictive and limits the right to fair process for those convicted persons for whom the reasons for which proceedings against a fugitive had been held ceased to exist only after the amendment to the Criminal Procedure Code came into effect. If the reasons for instituting proceedings against a fugitive have ceased to exist, the judgment should be served upon the convicted

person and he should, at the same time, be informed of the possibility to petition for it to be overturned. The Constitutional Court had concluded in a previous judgment that such an interpretation is in conflict with the right to fair process.

If a court disregards propositions of law declared by the Constitutional Court, this is a conscious breach of the Constitution especially if such propositions have been duly reported or if they were expressly brought to the court's attention and are generally accessible.

It was held that the Regional Court had infringed the applicant's right to fair process and had failed to respect the Constitutional Court's view and the Constitution. The Constitutional Court therefore granted the constitutional complaint.

Languages:

Czech.

Identification: CZE-2005-3-013

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 08.11.2005 / **e)** Pl. ÚS 28/04 / **f)** / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.16 **General Principles** − Proportionality.
3.17 **General Principles** − Weighing of interests.
3.19 **General Principles** − Margin of appreciation.
5.1.1.4.1 **Fundamental Rights** − General questions − Entitlement to rights − Natural persons − Minors.
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.
5.3.13.9 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Public hearings.
5.3.24 **Fundamental Rights** − Civil and political rights − Right to information.

Keywords of the alphabetical index:

Minor, trial, identity, protection / Criminal proceedings, safeguards.

Headnotes:

The legislature should determine the extent to which it will restrict by law the right to a public hearing and the right to information. The right to a public hearing is a fundamental right of parties to proceedings and not of the court or judge. The educational value of public hearings should not necessarily be balanced against the interest of the perpetrators not to have their identity revealed. The information that is far more essential for educational purposes is the legal assessment of facts, which, despite the contested provisions being in effect, can be obtained through the public announcement of the judgment and can be freely discussed and disseminated without any sort of restriction on content.

Summary:

I. The petitioner is a district court, which sought the annulment of a provision of the Act on the Responsibility of Youths for Illegal Acts and on the Judiciary in Youth Matters (hereinafter the "Act"). The petitioner stated that it is holding proceedings on a criminal matter involving a minor defendant in relation to which it is obliged to apply the Act. In the petitioner's view, a provision of this Act is in conflict with the Constitution and the Charter of Fundamental Rights and Basic Freedoms. On the one hand, this Act provides that no one may, in any manner, make public any information in which the name (or names) and the family name of a minor or any information on the minor, which enables one to identify the minor and that only persons mentioned in the law may attend the main trial and the public hearings, unless the minor requests that the main trial be conducted publicly.

In the petitioner's view, the Act denies and threatens one of the fundamental constitutional safeguards, consisting in the right to a public hearing, and that it grossly conflicts with the provisions of the Constitution, which permits the public to be excluded from courts only in exceptional cases. The petitioner disagrees with the fact that, in consequence of the application of the provisions of the Act, the interests of minors are given preference over that of ensuring the largest number of citizens direct and correct access to information and to the experience of courts. The petitioner believes that neither citizens nor the media should be restricted in their access to information to such a wide extent and in respect of

such a large group of persons solely on the basis of a hypothetical possibility that an accused minor might be unfavourably influenced in his future life by an ongoing criminal prosecution.

II. The Constitutional Court ascertained that Parliament adopted and issued the Act in question within the bounds of its competence as provided by the Constitution and in the constitutionally prescribed manner, it then proceeded to an assessment of the content of the contested provisions of the Act in terms of its conformity with the constitutional order.

The right to have a public hearing has traditionally been perceived in the general legal conscience as an instrument of control by the public of the justice system. In the Constitutional Court's view, even the contested provisions of the Act are in conformity with this tradition. It is up to the minor to decide whether or not to propose that the main trial and hearings be conducted in public. Although, in accordance with the cited provision, formally only the minor can make such a proposal, it cannot be overlooked that a minor may consult his defence council on this issue (bearing in mind that in proceedings against him he is required to be represented by defence counsel). On the other hand, the contested rule does not permit the court to exclude the public from the main trial or hearing, unless there are statutory grounds for this. The Constitutional Court is in agreement with the doctrine on the point that the Act is consistently subordinated to the interests of minors. It does so with regard to the minor's age and intellectual maturity. In an effort to minimalise the stigmatisation of minors in ongoing criminal proceedings, this approach is reflected in the provisions of the Act.

The Constitutional Court also dealt with the problem of the right to information from several perspectives. It took into consideration that in the Czech lands it is traditionally perceived as logical that the boundary of the public, and thus to a certain extent also the possibility to exercise the right to information directly in a court hearing, is limited.

The Constitutional Court is aware of the fact that a public hearing can indirectly serve an educational purpose on the part of a court. This aim should naturally serve to implement the right to information.

The Constitutional Court assessed the contested provisions in terms of the proportionality of the relations, on the one hand, between the interest in the protection of privacy of youths that are being criminally prosecuted and, on the other, the right to information. It came to the conclusion that the legislature had not exceeded the bounds laid down in the Charter and that the relevant provisions are not in conflict with the Constitution. Accordingly, it rejected the district court's proposal on the merits.

Languages:

Czech.

Identification: CZE-2005-3-014

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 08.11.2005 / **e)** I. ÚS 402/05 / **f)** / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

5.3.13.17 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Rules of evidence.
5.3.13.23.1 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Right to remain silent − Right not to incriminate oneself.

Keywords of the alphabetical index:

Evidence, refusal to give / Testimony, refusal / Seizure, evidence.

Headnotes:

The obligation to surrender an item is binding on everyone. It is not permissible to compel somebody who is the subject of a criminal investigation which may lead to indictment or who is already under indictment to comply with this obligation by imposing a fine on them. That would constitute compulsion to provide evidence against oneself. In order to obtain evidence, there is provision within the criminal justice system for an item to be seized, as a precautionary measure. This is something passively endured by the accused. The imposition of a fine, by contrast, would require his or her active participation.

The defence can choose its own strategies in criminal proceedings and whether or not to surrender an item on a voluntary basis to the authorities within the criminal justice system. There can be no circumvention of the right to refuse to testify, even if it is for the benefit of the defence. That principle also

applies by analogy to the acquisition of other types of evidence.

Summary:

I. The applicant was accused in criminal proceedings of evading taxes, fees and other obligatory payments and also of presenting misleading data on her financial affairs and asset position. The police authorities imposed a fine on her, because she had refused to comply with their request to divulge accounting records from her private medical practice. She applied to the state attorney to quash the ruling by the police, but her complaint was rejected on its merits.

The applicant contended that the rulings by the police authorities and the state attorney breached her constitutionally guaranteed right to judicial and other legal protection. At the time the police authorities imposed their fine, the applicant had the status of an accused person, and she made reference to her right to refuse to testify in that matter. She was convinced that she should not have to assemble evidence which might be used against her. She requested that the Constitutional Court overturn both rulings.

II. Her application was upheld. The Constitutional Court had ruled in a previous case that the duty to surrender items is binding on everybody, even on accused persons. At the same time, it found that the right to refuse to testify, in cases where this could give rise to the danger of criminal prosecution against the accused or against a close relative, had deeper ramifications than the prohibition on compelling someone to incriminate themselves through testimony. A citizen is not under an obligation to make available other types of evidence which might be used against him. The Court stated that if the accused does not voluntarily comply with the duty to turn over a piece of evidence, they cannot be compelled to comply with the duty to surrender items.

The Constitutional Court also referred to the situation where an item must be obtained for the purpose of criminal proceedings, and the accused does not voluntarily surrender it (in other words the accused does not fulfil obligation to make public). The item may then be taken from him. The seizure of an item under these circumstances is carried out as a precautionary measure. Any such seizure of an item cannot be interpreted as compulsion to surrender physical evidence against oneself. From this perspective, the seizure of an item has the same nature as other precautionary measures under the Criminal Procedure Code, which are applicable regardless of, or even against, the will of the accused. In these cases, it is not a matter of compelling the accused to turn over evidence against himself; rather it is the gathering of real evidence on a compulsory basis and against the will of the accused.

This type of measure is not at variance with the Constitution. It would be simplistic and incorrect to describe the legal means of securing evidence for the purposes of disciplinary or criminal proceedings, against the will of the person accused in such proceedings, as the illegal and unconstitutional compulsion of the accused to make available evidence against himself. The Constitutional Court has stated that where criminal investigations are almost certainly going to result in an indictment, the accused cannot be compelled, through the imposition of a fine, to cooperate in producing evidence which could be used against him. This is also of necessity the case where someone has already been accused of a particular criminal act *(argumentum a fortiori)*.

The Constitutional Court could not do otherwise than agree with the complainant's reference to her right to refuse to testify. The prohibition against compelling a person to give evidence against him or herself extends beyond cases of the acquisition of evidence which, due to the insufficiency of other evidence, confirm or deny the commission of a criminal act. It also relates to cases where the amount of damage caused should be specified or should be obtained by evidence which is merely supportive of evidence already acquired.

For the reasons stated above, the Constitutional Court overturned the rulings of the police authorities and the State Attorney's Office.

Languages:

Czech.

Identification: CZE-2005-3-015

a) Czech Republic / **b)** Constitutional Court / **c)** First Chamber / **d)** 11.11.2005 / **e)** I. ÚS 453/03 / **f)** / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

2.3 **Sources of Constitutional Law** − Techniques of review.
5.1.1 **Fundamental Rights** − General questions − Entitlement to rights.
5.3.21 **Fundamental Rights** − Civil and political rights − Freedom of expression.
5.3.31 **Fundamental Rights** − Civil and political rights − Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Freedom of expression, holder of right / Politician, reputation, right.

Headnotes:

When persons who are active in the public sphere criticise public affairs, there is a constitutional presumption that the criticism is in conformity with the constitution. The presumption of constitutional conformity only protects value judgments; it does not apply to the assertion of facts. To the extent that such assertions form the basis for the criticism, the critic must himself demonstrate the truth behind them.

In deciding whether the publication of information was legitimate, it is important to scrutinise the motive for publication. If the main motivation for publication was to damage somebody's reputation, if the disseminator of the information did not himself believe the information, or if he acted recklessly in making it available, without having properly concerned himself with the truth behind it, then the conclusion cannot be drawn that publication was legitimate.

Summary:

I. A petition was presented to the Constitutional Court, contesting certain decisions by an ordinary court on the grounds that they breached the applicant's rights to personal honour and reputation and to judicial protection.

The appeal court modified the first instance court's judgment in such a way that it rejected on its merits the action which the applicant had filed against the defendant (the secondary party in these proceedings) and in which he demanded that an apology be published in the daily press and that a sum of money be paid. The Supreme Court rejected the complainant's extraordinary appeal on the merits.

Several verbal attacks had been made against the applicant in the media by the secondary party, who at that time was Prime Minister. In these attacks it was explicitly stated that the applicant had a contract of a confidential nature with a certain energy firm and wrote articles at its behest. This was described as a form of corruption.

The applicant felt that the allegations of corruption caused him considerable harm and undermined his honour and reputation both in professional circles and in society as a whole.

II. The Constitutional Court upheld the constitutional complaint.

The Constitutional Court had to decide whether the ordinary courts encroached upon the applicant's fundamental right to uphold his honour and reputation by affording protection to the fundamental right of free expression exercised by the secondary party.

When he made the statements under dispute, the secondary party was the Prime Minister. Responsibility for the statements cannot, however, be ascribed to the government because the matter did not fall within the government's competence. The government has no investigative powers, so that, if the government, any of its members, or even the Prime Minister obtains information concerning conduct which could be considered as a criminal act, it is not authorised to concern itself with it, in the sense of investigating it. Neither is it authorised to make a legal assessment of the information and to report on its conclusions to the public. To the extent that certain members of the government have engaged in such conduct, they have overstepped the bounds of their authority. This is *ultra vires* conduct, for which the government cannot be held responsible. Any member of the government engaging in such conduct is responsible for it in an individual capacity.

As a general rule, if anybody wishes to make public defamatory information about another person, such conduct cannot be considered to be either reasonable or legitimate, unless he can demonstrate that he had reasonable grounds for relying upon the truthfulness of the defamatory information which he disseminated. He or she would have to show that he or she took the proper available measures to verify the truth behind the information, and that he or she him or herself had reason to believe that the defamatory information was true.

The protection of reputation or honour must be perceived as the protection of a public good. It is thus in the public interest for the honour and reputation of persons active in public life not be discussed in a factually biased context.

The Constitutional Court took account of the fact that the applicant is a journalist, somebody active in public life whose professional activity, in particular, may be the subject of public criticism. It was incumbent on the secondary party to prove the truth of the alleged facts and his critical opinion was subject to the test of proportionality.

The higher standards against which the appropriateness of the secondary party's opinion was measured resulted from his official status at the time. Somebody with that status would not be judged against the same standards as, for example, the media.

The Constitutional Court found that the applicant's rights had been breached, in particular his fundamental right to the protection of his honour and of his reputation. His constitutional complaint was accordingly upheld and the contested rulings quashed.

The majority opinion of the judges was that the appeal court's interpretation was unacceptable under constitutional law, because it had followed formal, propositional logic instead of examining the actual meaning of the statement as perceived by the addressee. It had also overlooked the possible negative impact of such conduct on the applicant's personal life.

Languages:

Czech.

Denmark
Supreme Court

Important decisions

Identification: DEN-2005-3-002

a) Denmark / **b)** Supreme Court / **c)** / **d)** 19.08.2005 / **e)** 357/2004 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen* 2005, 3184; CODICES (Danish).

Keywords of the systematic thesaurus:

5.1.1.3 **Fundamental Rights** − General questions − Entitlement to rights − Foreigners.
5.2 **Fundamental Rights** − Equality.
5.3.3 **Fundamental Rights** − Civil and political rights − Prohibition of torture and inhuman and degrading treatment.
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, offender / Expulsion, foreigner, under criminal procedure.

Headnotes:

A refusal to give a residence permit to a stateless person who had been convicted of homicide did not violate Articles 3, 8 and 14 ECHR. As to Article 8 ECHR, this was based *inter alia* on the character and the gravity of the offence committed by the convicted person and the fact that he had only established a family life after the expulsion order.

Summary:

I. The defendant, A., is a stateless Palestinian born in Israel in 1964. He came to Denmark in 1988. He was granted a provisional residence permit when he married a Danish citizen, but after they separated in 1990, A.'s residence permit was not renewed.

In June 1992, A. was convicted of homicide and sentenced to placement in a special ward for the mentally ill. He was also permanently expelled from

Denmark. In October 1994, the County Court of Nykøbing Sjælland ruled that he should be detained in a mental hospital, rather than in a special ward. In January 1997, the County Court of Roskilde decided that A. should be discharged on probation, and in August 1998 the same court permanently discharged him.

In 1994 A. became engaged to another Danish citizen. From 1997 onwards he lived permanently with her and her two children.

In October 1998, A. requested that the expulsion order be repealed. The County Court of Roskilde rejected his request. The High Court of Eastern Denmark confirmed this decision in December 1998. The Danish authorities tried to deport A. to Israel and Jordan, but neither country would accept him. As deportation seemed impossible, A. was granted *"tålt ophold"*, which effectively meant that his presence in Denmark was tolerated but he had not been granted the right to stay there.

In August 2003 the Ministry of Refugee, Immigration and Integration Affairs rejected A.'s application for a new residence permit. The lawfulness of this decision was assessed by the courts.

II. The Supreme Court found that the rejection did not constitute inhuman treatment as described in Article 3 ECHR. Considering the character and gravity of the offence committed by A. as well as the fact that A. had only established a family life after his expulsion had been ordered, the Supreme Court held that the rejection did not contravene Article 8 ECHR. As A. had been expelled and did not have the right to stay in Denmark, the rejection was not incompatible with Article 14 ECHR either.

Languages:

Danish.

Identification: DEN-2005-3-003

a) Denmark / **b)** Supreme Court / **c)** / **d)** 02.09.2005 / **e)** 70/2005 / **f)** / **g)** / **h)** *Ugeskrift for Retsvæsen* 2005, 3329; CODICES (Danish).

Keywords of the systematic thesaurus:

4.7.4.1.6 **Institutions** − Judicial bodies − Organisation − Members − Status.
5.3.13.15 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Impartiality.

Keywords of the alphabetical index:

Judge, exclusion / Impartiality, subjective / Retrial, judge, colleague of judge at first trial.

Headnotes:

The mere fact that colleagues of the judges of the original trial sit in a retrial of a case does not mean that they should be disqualified. This is also in accordance with Article 6 ECHR.

Summary:

I. On 14 January 2004, the defendant, T., was convicted by the High Court of Eastern Denmark for an attempted violation of Section 191 of the Danish Penal Code, which concerns distribution of narcotics. On 24 June 2004, the Supreme Court repealed that judgment due to insufficiencies in the indictment and remitted the case to the High Court of Eastern Denmark for retrial.

The retrial was conducted by judges and jurors who had not been involved in the original proceedings. On 2 September 2005, the High Court of Eastern Denmark again found T. guilty of the charge, and sentenced him to six years in prison and permanent expulsion from Denmark. T. appealed to the Supreme Court and pleaded *inter alia* that the High Court of Eastern Denmark had not been an impartial court in the second proceedings against him, as the Court had already found him guilty once. Although the retrial was heard by new judges, they should still be considered as disqualified as their colleagues had already convicted him.

The judge who had presided over the case the second time it was heard by the High Court made a statement to the Supreme Court, saying that in his instructions to the jury he had not informed them of the result of the original proceedings against T. He had also stressed that the jurors, in deciding the question of guilt, should only take into account the evidence put before them in the present case.

II. The Supreme Court emphasised that the judges at the retrial had not been involved in the original proceedings against T. The mere fact that they were

colleagues of the judges who had conducted the original proceedings did not disqualify them. The Supreme Court did not find that there were any circumstances of the present case which could raise questions as to the complete impartiality of the judges. The Supreme Court therefore held that the High Court of Eastern Denmark had not been disqualified according to the rules of the Danish Administration of Justice Act. The right to a fair trial before an impartial court protected by Article 6 ECHR could not lead to a different result. The Supreme Court therefore upheld the judgment of the High Court of Eastern Denmark.

Languages:

Danish.

Estonia
Supreme Court

Important decisions

Identification: EST-2005-3-001

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 19.04.2005 / **e)** 3-4-1-1-05 / **f)** Petition of the Chancellor of Justice to declare Article 701 of Local Government Council Election Act and Article 1.1, the first sentence of Article 5.1 and Article 6.2 of Political Parties Act partly unconstitutional / **g)** *Riigi Teataja* III, 2005, 13, 128 / **h)** http://www.nc.ee; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

1.2.1 **Constitutional Justice** − Types of claim − Claim by a public body.
1.3.1 **Constitutional Justice** − Jurisdiction − Scope of review.
2.2.1.6 **Sources of Constitutional Law** − Hierarchy − Hierarchy as between national and non-national sources − Community law and domestic law.
3.3 **General Principles** − Democracy.
3.16 **General Principles** − Proportionality.
4.8.4.1 **Institutions** − Federalism, regionalism and local self-government − Basic principles − Autonomy.
4.9.6 **Institutions** − Elections and instruments of direct democracy − Representation of minorities.
4.9.7.3 **Institutions** − Elections and instruments of direct democracy − Preliminary procedures − Registration of parties and candidates.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.2.1.4 **Fundamental Rights** − Equality − Scope of application − Elections.
5.3.41.2 **Fundamental Rights** − Civil and political rights − Electoral rights − Right to stand for election.

Keywords of the alphabetical index:

Election, local, candidate / Accountability, political.

Headnotes:

The requirement for as wide a representation as possible of diverse political interests is vital for the functioning of democracy.

In the current legal and social conditions of Estonia, the aim of ensuring political accountability does not justify the restriction of the principles of local autonomy and equal right to stand as a candidate in the elections of local government councils.

The Chancellor of Justice has no competence to request the Supreme Court to declare an Act unconstitutional on the grounds that it is in conflict with European Union Law.

Summary:

I. On 21 December 2004 the Chancellor of Justice presented a petition to the Supreme Court on Article 70.1 of the Local Government Council Election Act (hereinafter 'LGCEA') and Article 1.1, the first sentence of Article 5.1 and Article 6.2 of the Political Parties Act (hereinafter 'PPA'). He suggested that they were in conflict with the Constitution and with the Treaty establishing the European Community, and invalid to the extent that they do not allow the formation of election coalitions of citizens in local government council elections nor political parties with a membership of less than one thousand persons, to decide upon and organise local issues, which EU citizens would also be able to join.

Article 6.2 of PPA establishes as a prerequisite for the registration of a political party a minimum membership of one thousand. This came into effect on 16 July 1994. The wording of Articles 1.1 and 5.1 of PPA came into force on the same date.

The Local Government Council Election Act came into force on 6 May 2002. It differs from previous regulations in that it allows persons to stand for election in local government elections only under the auspices of a political party or as independent candidates. On the basis of a petition of the Chancellor of Justice, in its judgment of 15 July 2002 in matter no. 3-4-1-7-02 (RT III 2002, 22, 251 [EST-2002-2-006]) the Constitutional Review Chamber of the Supreme Court declared the Local Government Council Election Act unconstitutional to the extent that it did not allow citizens' election coalitions to participate in local government elections.

On 30 July 2002 the Estonian Parliament amended the Local Government Council Election Act, allowing not only political parties but also citizens' election coalitions to submit their lists in local government elections. According to Article 70.1 of LGCEA, established by this amendment, the right of election coalitions to present lists of candidates expired on 1 January 2005.

II. The Court began by examining the restriction on standing as a candidate in local government council elections and then turned to that part of the petition relating to Article 48 of the Constitution. The Court then examined the petition the Chancellor of Justice had submitted. Finally, the competence of the Chancellor of Justice to review the conformity of Article 5.1 of PPA with European Union law was analysed.

In conjunction with the principle of equal treatment, under Article 12 of the Constitution, the principle of uniform elections means that equal possibilities must be afforded to all candidates for standing as candidates and for succeeding in the elections. Because of the proportional electoral system used in Estonia's local elections, those standing as individual candidates are in a different situation from those who stand as candidates in the lists of political parties.

Under the Constitution, local government is based on the idea of a community, with a duty to resolve the problems of the community and to manage day to day life. If the possibility of representing communal interests is made dependent on the decisions of political parties active at a national level, the representation of local interests may be in jeopardy. This in turn may be in conflict with the principle of autonomy of local government as established in Article 154 of the Constitution. Where there is a potential conflict between state and local interests, a member of a local government council must be able to resolve local issues independently and in the interests of their community.

Under Article 70.1 of LGCEA, only political parties may submit lists of candidates in local elections. Although the Political Parties Act does not prohibit the residents of a rural municipality or city to found a political party to exercise local power, the restrictions (especially the requirement of a minimum membership of one thousand members) render it practically impossible to found a political party at local government level.

The principle of local autonomy and the principle of equal right to stand as a candidate are not absolute rules. The rights arising from these principles may be limited if there is a constitutional value protected by the restriction and if the restriction is necessary in a democratic society. The infringement of the principle of local autonomy as a general constitutional principle is also permissible if it is justified by the achievement of an essential constitutional value.

Giving the right of submitting lists only to political parties, on the basis of the Political Parties Act and the Local Government Council Election Act, is a measure necessary for guaranteeing political accountability.

Therefore the Court examined whether restrictions on the right to stand as a candidate and of the principle of local autonomy as a way of increasing political accountability are sufficiently proportional in the narrow sense. It was found necessary to take into account the extent of the restriction of the right to stand as a candidate and of the principle of local autonomy, and the weight of these values in comparison with the need to guarantee political accountability.

Restrictions of the right to stand as a candidate prevent persons from participating in the elections. In the context of a proportional election system it is not reasonable to compare an independent candidate with a list as the election results indicate that only a very small number of candidates achieve the simple quota required for being elected. The fact that only political parties stand as candidates in local elections jeopardises the representative nature of local bodies of self-government.

The restriction of the right to stand as a candidate and of local autonomy is extensive. Although guaranteeing political accountability is a constitutional value, it is not a primary value arising from the principle of democracy. Besides political accountability, the requirement that different political interests be represented as widely as possible in political decision-making, is vital for the functioning of democracy in Estonia's political system.

The Court concluded that in the current legal and social conditions of Estonia the aim of ensuring political accountability does not justify the restriction of the principle of local autonomy and equal right to stand as a candidate in elections of local government councils. The Court declared Article 70.1 of Local Government Council Election Act invalid.

In relation to the requirement of a minimum membership of one thousand members for the registration of a political party under the PPA, the Court took the view that in principle several options are open to the legislator to rectify the unconstitutional situation. The Court accordingly limited the scope of its decision and found that it was sufficient to declare Article 70.1 of Local Government Council Election Act invalid.

Finally the Court dealt with the suggestion by the Chancellor of Justice that Article 5.1 of PPA is in conflict with European Union law. The Court dismissed the request as neither the Chancellor of Justice Act nor the Constitutional Review Court Procedure Act give the Chancellor of Justice the competence to request that the Supreme Court declare an Act unconstitutional on the ground that it is in conflict with the European Union law.

Supplementary information:

- Dissenting opinion of Justice Jüri Põld
- Dissenting opinion of Justices Julia Laffranque, Tõnu Anton, Peeter Jerofejev, Hannes Kiris, Indrek Koolmeister and Harri Salmann
- Dissenting opinion of Justice Lea Kivi

Cross-references:

- Judgment of the Constitutional Review Chamber no. 3-4-1-7-02 (RT III 2002, 22, 251) of 15.07.2002, *Bulletin* 2002/2 [EST-2002-2-006].

Languages:

Estonian, English.

Identification: EST-2005-3-002

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 01.09.2005 / **e)** 3-4-1-13-05 / **f)** Petition of the President of the Republic to declare the Local Government Council Election Act Amendment Act, passed by the *Riigikogu* on 28 June 2005, unconstitutional / **g)** *Riigi Teataja* III, 2005, 26, 262 / **h)** http://www.nc.ee; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

1.3.4.5.4 **Constitutional Justice** − Jurisdiction − Types of litigation − Electoral disputes − Local elections.
4.9.9.3 **Institutions** − Elections and instruments of direct democracy − Voting procedures − Voting.
4.9.9.7 **Institutions** − Elections and instruments of direct democracy − Voting procedures − Method of voting.
5.2.1.4 **Fundamental Rights** − Equality − Scope of application − Elections.

Keywords of the alphabetical index:

Election, vote, electronic voting / Election, voters, equality.

Headnotes:

The principle of equal treatment in the context of elections does not require absolutely equal conditions for performing the act of voting. This is not possible in principle and not required by the Constitution.

Introduction of electronic voting without allowing the possibility of changing a vote given by electronic means may endanger the principles of free voting and secret voting.

Summary:

I. On 27 March 2002 the Estonian Parliament passed the Local Government Council Election Act (hereinafter 'LGCEA'), which enabled voters holding a certificate for giving a digital signature to vote electronically on the webpage of the National Electoral Committee on the days prescribed for advance polls. On 12 May 2005 Parliament passed the Local Government Council Election Act Amendment Act (hereinafter 'LGCEAAA') and supplemented LGCEA, *inter alia* with Article 50.6, which provided for a voter's right to change their vote, given by electronic means, either by a new vote by electronic means during advance polls, by a ballot paper during advance polls or by voting by a ballot paper on polling day until 16.00.

The President of the Republic refused to promulgate the Act due to a conflict with the principle of uniformity of local government council elections, established in Article 156.1 of the Constitution, as it did not guarantee all voters equal possibilities for the performance of the act of voting. On 15 June 2005 the Parliament again passed the Local Government Council Election Act Amendment Act, and amended Article 50.6 of the Local Government Council Election Act, enabling voters to change votes given by electronic means by voting again either by electronic means or by a ballot paper from the sixth to the fourth day before polling day.

On 28 June 2005 Parliament again passed the Act without amendment and on 12 July 2005 the President of the Republic again refused to promulgate it. He asked the Supreme Court to declare it to be unconstitutional.

II. Firstly, the Court stated that the principle of uniform elections means that all voters must have equal possibilities to influence voting results. The principle of uniformity primarily means that all persons with the right to vote must have an equal number of votes and that all votes must have equal weight in deciding the division of seats in a representative body.

The Court found that the system of electronic voting guarantees that only one vote per voter shall be taken into account whilst also ensuring that the voting remains secret.

Electronic voting guarantees equal weight of votes as despite repeated electronic voting a voter has no greater influence over voting results than voters using other voting methods. A vote given by electronic means shall be counted as one vote.

The Court then examined whether the possibility to change votes given by electronic means amounts to an unconstitutional infringement of the right to equality and the principle of uniform voting.

The Court found that the principle of equal treatment in the context of electing representative bodies does not mean that absolutely equal possibilities for performing the voting act in equal manner should be guaranteed to all those eligible to vote. In fact, those using different voting methods provided by law (advance polls, voting outside their residential polling station, voting in custodial institutions, home voting, voting in a foreign state) are in different situations. The guarantee of absolute actual equality of persons upon exercising the right to vote is not possible in principle and not required by the Constitution.

The possibility afforded to those voting electronically to make unlimited changes to their votes could be construed as an infringement of the rights to equality and of uniformity. However, this is not sufficient to outweigh the aim of increasing participation in elections and introducing new technology to the electoral process. The Court took the view that the possibility of changing one's electronic vote is necessary for guaranteeing the freedom of elections and secrecy of voting.

The Court dismissed the petition of the President of the Republic.

Cross-references:

- Reference to Recommendation Rec. (2004) 11 of the Committee of Ministers of the Council of Europe to member states on legal, operational and technical standards for e-voting.

Languages:

Estonian, English.

Finland
Supreme Administrative Court

Statistical data
1 September 2005 – 31 December 2005

Total number of decisions was 1 729 during the reference period. The number of precedents to be published in the Court's Yearbook was 34.

Important decisions

Identification: FIN-2005-3-002

a) Finland / **b)** Supreme Administrative Court / **c)** / **d)** 05.12.2005 / **e)** 2005/87 / **f)** / **g)** *Korkeimman hallinto-oikeuden vuosikirja* (Official Digest), 2005 / **h)** CODICES (Finnish).

Keywords of the systematic thesaurus:

5.1.1.3 **Fundamental Rights** − General questions − Entitlement to rights − Foreigners.
5.3.9 **Fundamental Rights** − Civil and political rights − Right of residence.
5.3.33 **Fundamental Rights** − Civil and political rights − Right to family life.

Keywords of the alphabetical index:

Foreigner, residence / Marriage, minor, right / Residence, permit / Marriage, minor, abroad, recognition / Marriage, minor, right to choose spouse / Family life, minor, establishment by marriage, residence.

Headnotes:

The fact that in certain countries marriage may be entered into by a person who is still a child under Finnish law, does not mean that the persons concerned should be granted a residence permit on the grounds of such marriage under the same conditions as persons who have been married after having reached the age of 18 years.

Summary:

Person A applied for a residence permit for Finland on the basis of family ties, on the grounds that he had married in another country his fifteen year old cousin B who had been living in Finland since 1996, without prior permission from the Ministry of Justice for the marriage. The Directorate of Immigration refused the residence permit. The regional Administrative Court overturned the decision and referred the case back to the Directorate of Immigration for re-examination.

The Supreme Administrative Court granted the Directorate of Immigration leave to appeal. The Supreme Administrative Court then overturned the decision of the regional Administrative Court and upheld the decision of the Directorate of Immigration.

The Supreme Administrative Court noted that the documentary evidence showed that the marriage was valid in the country where it was solemnised and was therefore also valid in Finland, under Section 115.1 of the Marriage Act. However, validity under civil law has no direct effect on the assessment of the question of the residence permit. Neither spouse was a citizen of the country where the marriage was solemnised, nor did they live in that country. The fact that in certain countries marriage may be entered into by somebody who is still a child under Finnish law cannot result in the persons concerned being granted a residence permit on the grounds of such a marriage under the same conditions as persons who have been married after having reached the age of 18 years.

The Supreme Administrative Court also noted that the best interests of the child must be taken into account, in accordance with Section 6 of the Aliens Act. B lived with her parents in Finland. As a minor, she was dependent on her parents at the time she entered into marriage to such an extent that she could not have given her free and informed consent to the marriage, neither did she have the right to get married without the prior consent of the Ministry of Justice. Considering the provisions of the international human rights conventions mentioned below, B's cultural background cannot be used to justify the fact that she had, as a child, been taken out of Finland to a third country with which she had no ties and been married to a person whom allegedly she had not even met since she was a little child before she moved to Finland. Marriage that has clearly been entered into before the age of 18 and an application for a residence permit on that ground may also be deemed an attempt to evade the immigration regulations as referred to in Section 36.2 of the Aliens Act. The Supreme Administrative Court considered the right of immigrant girls, irrespective of their cultural

background and religion, to choose their spouse with their free and informed consent, as well as the provisions of Sections 114.1, 37.1, 6.1 and 36.2 of the Aliens Act, Sections 4, 115.1, 117.2 and 139.2 of the Marriage Act, Article 1.1 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Article 23.3 of the International Covenant on Civil and Political Rights, and Articles 16.1.b and 16.2 of the Convention on the Elimination of All Forms of Discrimination against Women, and the facts of the case as a whole. It accordingly found it necessary to overturn the decision of the regional Administrative Court and to uphold the decision of the Directorate of Immigration.

Languages:

Finnish.

France
Constitutional Council

Important decisions

Identification: FRA-2005-3-008

a) France / **b)** Constitutional Council / **c)** / **d)** 13.10.2005 / **e)** 2005-524/525 DC / **f)** International commitments concerning abolition of the death penalty / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 20.10.2005, 16609 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

2.2.1.1 **Sources of Constitutional Law** − Hierarchy − Hierarchy as between national and non-national sources − Treaties and constitutions.
3.1 **General Principles** − Sovereignty.
4.1 **Institutions** − Constituent assembly or equivalent body.
4.16.1 **Institutions** − International relations − Transfer of powers to international institutions.

Keywords of the alphabetical index:

Treaty, ratification, constitutional obstacle / Constitutional revision, required for ratification / Death penalty, abolition, final / Sovereignty, essential conditions of exercise / International commitment, irrevocability.

Headnotes:

Amendment of the Constitution is necessary for ratification of any international agreement containing clauses which are contrary to the Constitution, violate citizens' rights and freedoms guaranteed by the Constitution, or interfere with conditions essential to the exercise of national sovereignty. Those conditions are violated by irrevocable acceptance of an international agreement which affects an inherent aspect of sovereignty.

Although Protocol no. 13 ECHR concerning the abolition of the death penalty in all circumstances admits no derogations or reservations, it can still be denounced on conditions specified in the Convention

This being so, it does not interfere with conditions essential to the exercise of national sovereignty.

Summary:

The President of the Republic applied to the Constitutional Council under Article 54 of the Constitution for a ruling as to whether amendment of the Constitution was required for ratification of two international agreements on abolition of the death penalty: Protocol no. 13 ECHR concerning the abolition of the death penalty in all circumstances, adopted by the Council of Europe on 3 May 2002, which follows on Protocol no. 6 ECHR; and the second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, adopted by the General Assembly of the United Nations on 15 December 1989, and known as the second New York Protocol. While noting that the Protocols did not interfere with constitutional rights or contain clauses contrary to the Constitution, the Council held that they would violate conditions essential to the exercise of national sovereignty if they bound France irrevocably in cases where an exceptional danger threatened the existence of the nation.

Noting that Protocol no. 13 could be denounced in such cases, the Council concluded from this that it did not violate conditions essential to the exercise of national sovereignty. In fact, Article 5 of the Protocol provides for application of Article 58 of the Convention, which permits denunciation on six months' notice, once five years have expired since the Convention's coming into force for the denouncing state.

The situation regarding the second New York Protocol is different, since neither the Protocol nor the Covenant to which it is appended includes a denunciation clause. The Constitutional Council accordingly decided that ratifying it would affect conditions essential to the exercise of national sovereignty, and would thus require amendment of the Constitution.

Supplementary information:

In his New Year message to the Constitutional Council of 3 January 2006, the President of the Republic indicated that he intended to initiate the procedure for amendment of the Constitution, inserting a clause stating that the death penalty is abolished in all circumstances.

Cross-references:

- Decision no. 85-188 DC of 22.05.1985;
- Decision no. 98-408 DC of 22.01.1999, *Bulletin* 1999/1 [FRA-1999-1-002].

Languages:

French.

Identification: FRA-2005-3-009

a) France / **b)** Constitutional Council / **c) / d)** 08.12.2005 / **e)** 2005-527 DC / **f)** Act on the treatment of repeated criminal offences / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 13.12.2005, 19162 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

Penalty, personalisation / Penalty, enforcement / Penalty, judicial supervision / Electronic tagging / Recidivism, prevention / Penalty, severity, unnecessary / Sexual abuse / Detention, order.

Headnotes:

Under the new judicial supervision system, various constraints, including electronic tagging, may be imposed on convicted persons when they are released, if there is a serious risk of their committing further offences. This serves to enforce the sentence passed by the trial court, and is not in itself a sentence or penalty. Firstly, it applies only for the period covered by the unserved part of the sentence;

secondly, it is ordered by the court responsible for execution of the sentence and is based, not on the convicted person's guilt, but on the threat which he presents to the community, and is intended solely to prevent him from committing further offences. Because this is so, the legislator's extension of these measures to persons convicted of offences pre-dating the Act does not violate the principle that penalties must not be retroactive.

Electronic tagging of persons subject to judicial supervision is not a punitive measure, but must still respect the principle − derived from Articles 4 and 9 of the Declaration of 1789 − that no unduly harsh restrictions must be imposed on freedom of the individual. It applies only to persons sentenced to ten or more years in prison for certain strictly defined offences of particular gravity – and requires their consent. The constraints involved are not intolerable, and are consistent with the aim pursued, which is to prevent persons in serious danger of committing further offences from doing so. The legislator has also taken adequate precautions to ensure that such persons are not treated with unnecessary severity.

The new Article 465-1 of the Code of Criminal Procedure provides that criminal courts − unless they decide otherwise, giving special reasons for doing so − are to make detention orders against persons sentenced to immediate imprisonment for violent or sexual offences with earlier convictions for similar offences. This measure is not incompatible with the principle of presumption of innocence guaranteed by Article 9 of the Declaration of 1789, since it accompanies a sentence of immediate imprisonment passed by the trial court when it decides that the defendant's guilt has been established. Nor is it excessive, having regard, firstly, to the seriousness of the offences in question and, secondly, to the aggravating circumstance of recidivism.

The fact that courts are required to give reasons for not making such orders does not violate the Constitution.

Summary:

Asked by more than sixty senators for a ruling on the Act on the treatment of repeated criminal offences, the Constitutional Council dismissed their objections to immediate application of the new electronic tagging system to persons already convicted, and to the making of detention orders at hearings by criminal courts (which must give reasons for deciding not to do so) against recidivists committing certain particularly serious crimes.

Electronic tagging was introduced, by Section 13 of the Act referred to the Council, for dangerous criminals sentenced to 10 or more years in prison for crimes or offences for which judicial supervision is prescribed (murder or manslaughter accompanied by rape, torture or barbaric acts; simple or aggravated rape; aggravated sexual assault committed by persons with previous convictions, etc.). The measure is designed to ensure that highly dangerous criminals are not simply "turned loose", which experts regard as the chief cause of recidivism.

Immediate application of the new system to persons already convicted was contested as violating the principle – derived from Article 8 of the Declaration of 1789 − that new or more severe penalties must not be made retroactive.

The Constitutional Council rejected this argument. It regards electronic tagging as a measure for enforcement of the original sentence, whose duration it may not exceed (it applies only during the remitted part of the sentence).

It also ruled that the measure could not be regarded as punitive, and so subject to the constitutional rules on sentences and penalties. It is not ordered by a trial court, is not a disciplinary measure, refers to dangerousness not guilt, and is preventive, not punitive, in its aims.

However, the principle that unduly severe restrictions must not be imposed on freedom of the individual and respect for privacy (Articles 4 and 9 of the Declaration of 1789) did apply. In this case, the restrictions imposed on those rights were neither arbitrary nor disproportionate. In particular, the Council noted that the measure was in keeping with the end pursued and might be ordered only in situations of the utmost gravity, that it was based on assessment, in consultation with medical experts, of the threat presented by the person concerned, and that it required the latter's consent.

The applicants also objected to trial courts' ordering the immediate detention of re-offenders charged with sex offences, premeditated assault or any other crime with violence as an aggravating circumstance (unless they decided, giving reasons, not to do so). They invoked the principles of personalisation of penalties, independence of the courts and presumption of innocence.

The Council rejected this argument, since the contested Act did not oblige courts to make detention orders at hearings, but simply required them to give reasons for not doing so.

It also held that the Act did not subject the persons concerned to "unnecessarily harsh treatment" within the meaning of Article 9 of the Declaration of 1789. The legislator had committed no obvious error of judgment in presuming − given the seriousness of the offence and the existence of previous convictions – that the prison sentence passed on the convicted person should normally be enforced at once, without waiting for a possible judgment on appeal.

Cross-references:

- Decision no. 2005-520 DC of 22.07.2005, clause 3, *Bulletin* 2005/2 [FRA-2005-2-005];
- Decision no. 2004-492 DC of 02.03.2004, the "Perben II" Act, introductory clause 124, *Bulletin* 2004/1 [FRA-2004-1-002];
- Decision no. 2003-467 DC of 13.03.2003, Act on internal security, particularly introductory clause 49, *Bulletin* 2003/1 [FRA-2003-1-003];
- Decision no. 2002-461 DC of 29.08.2002, the "Perben I" Act, introductory clause 65, *Bulletin* 2002/2 [FRA-2002-2-006];
- Decision no. 99-410 DC of 15.03.1999, clauses 40 to 42, *Bulletin* 1999/1 [FRA-1999-1-004];
- Decision no. 93-334 DC of 20.01.1994, Act introducing a non-remissible sentence and relating to the new Criminal Code and certain Rules of Criminal Procedure, introductory clauses 7 to 15, *Bulletin* 1994/1 [FRA-1994-1-003];
- Decision no. 86-215 DC of 03.09.1986, Act on action against crime, introductory clauses 22 to 24;
- Decision no. 78-98 DC of 22.11.1978, Act amending certain provisions of the Code of Criminal Procedure relating to the execution of prison sentences, introductory clauses 4 and 5.

Languages:

French.

Identification: FRA-2005-3-010

a) France / **b)** Constitutional Council / **c)** / **d)** 15.12.2005 / **e)** 2005-528 DC / **f)** Social Security Finance Act for 2006 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 20.12.2005, 19561 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

2.3.2 **Sources of Constitutional Law** − Techniques of review − Concept of constitutionality dependent on a specified interpretation.
3.10 **General Principles** − Certainty of the law.
3.17 **General Principles** − Weighing of interests.
5.1.1.3 **Fundamental Rights** − General questions − Entitlement to rights − Foreigners.
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.
5.4.19 **Fundamental Rights** − Economic, social and cultural rights − Right to health.

Keywords of the alphabetical index:

Social security, funding, truthfulness / Social security, hospitalisation, contributions by insured persons / Family, reunification, right to lead a normal family life / Truthfulness, principle.

Headnotes:

The general conditions for the financial balance of the social security for the current and the coming year must be established in a truthful manner. "Truthfulness" means that there is no intention to misrepresent the main aspects of this balance, and is assessed with reference to the information available when the social security finance bill is tabled and examined.

The complaint that the right to health care is violated by a provision which merely adjusts the rules on charging of an insured person's contribution to flat-rate hospital fees, without amending the law on which assessment of that contribution is based, is unfounded.

Paragraph 10 of the Preamble to the 1946 Constitution, which states that "the nation shall provide individuals and families with the conditions necessary for their development", means that foreigners who are continuously and lawfully resident in France have the same right to lead a normal family life as nationals. There is no constitutional principle or rule which gives foreigners a genuine and absolute right to enter and reside on the national territory. It is the legislator's task to reconcile the maintenance of public order, which is a constitutional objective, with the right to lead a normal family life.

The procedure for family reunion legally guarantees the right of foreigners continuously and lawfully resident in France to lead a normal family life there. It does not violate either Paragraph 10 of the Preamble

to the 1946 Constitution or the principle of equality, since it lays down appropriate and proportionate rules on this question. The legislator's intention, in making a distinction between children who enter France under the family reunion procedure, and children who enter in violation of that procedure, was to ensure that the procedure itself did not cease to be effective. His way of reconciling the constitutional requirements involved was not manifestly unbalanced. The complaint that the principle of equality had been violated was rejected.

However, when the situation of children who have already entered France is regularised in accordance with the family reunion procedure, this must confer entitlement to family benefits (subject to certain provisos).

Under Article 34.20 of the Constitution: "Social security finance acts shall determine the general conditions for the financial balance of the social security and, in the light of their revenue forecasts, shall determine expenditure targets in the manner and with the reservations specified in an institutional act". That act was adopted on 2 August 2005. Provisions therein which are outside the scope of the social security finance acts, and particularly those whose effects on receipts or expenditure are too indirect, were declared unconstitutional.

Summary:

The applications lodged with the Constitutional Council on 29 and 30 November 2005 were concerned with the validity of the second part of the Social Security Finance Act for 2006, and with Sections 56 and 89 of that Act. The Constitutional Council also examined, of its own motion, provisions whose inclusion in the Act seemed questionable.

1. The principle is that the general conditions for the financial balance of the social security for the current and coming year must be established in a truthful manner. Without exercising expert supervision, the Constitutional Council verifies that the explanations made are reasonable and coherent. Truthfulness means that there is no intention to misrepresent the main features of that balance. The Council makes sure that Government took due account, in setting the national health insurance expenditure target, of the information available when the bill was tabled. While Parliament examines the bill, Government has a duty to inform it of any legislative or other changes which are likely to affect the general conditions for the balance, and must correct its original estimates accordingly.

In this instance, the national health insurance expenditure target included by Government in that part of the Finance Bill for 2006, which referred to the current year was consistent with the conclusions reached by the Social Security Audit Board when it met before the Council of Ministers discussed the matter. It also took account of all the information available for the various schemes. Specifically, the estimates indicated that health care expenditure in towns would fall considerably short of the initial target, leaving sums which could then be used to cover estimated over-spending on the same scale by health care establishments. There was nothing in later information to suggest that this assessment was mistaken – and the principle of truthfulness was therefore respected.

2. Section 56 of the Act determines the fixed contribution which insured persons pay towards standard hospital fees. In questioning this provision, the applicants were actually questioning a draft regulation, to which they objected strongly: the introduction of a contribution of up to 18 euros for acts costing at least 91 euros (e.g. a 20% residual payment by an insured person on an act costing 90 euros – the very same rate as that normally applied during periods in hospital).

However, their complaints were invalid, since they can only be brought against the projected regulation, which is not a matter for the Constitutional Council and does not necessarily follow from Section 56.

3. Section 89, based on a government amendment submitted to the Senate, amplified Article L.512-2 of the Social Security Code.

Section 89 makes it clear that family benefits will now be paid to (lawfully resident) foreign parents only in the case of: children born in France, children of holders of the "private and family life" residence card (who have entered France at the latest with that parent), and children in protected categories (refugees, stateless persons, etc.). Otherwise, family benefits are paid only for children who join their parents under the family reunion procedure.

The applicants contested Section 89 on the ground that it violated the individual's right to lead a normal family life, violated the principle of equality and was based on a manifest error of assessment.

The Council decided that Section 89 was constitutionally valid for the following reasons:

- the right to family reunion may be restricted for reasons connected with the need to maintain public order and protect public health (both

constitutional objectives), and may also be made conditional on a foreigner's being able to offer his under-age children decent living and housing conditions;

- the family reunion procedure, which lays down appropriate and reasonable rules on verification that this is the case, provides a legal guarantee that the right of foreigners continuously and lawfully resident in France to lead a normal family life will be respected;

- the parliamentary papers show that the contested provision reflects the fear that paying family benefits for children who enter France in violation of the rules on family reunion may encourage parents to send for children whose living conditions in France can no longer be verified, and so generally make it harder for foreigners to lead a normal family life in France;

- in reaching these conclusions, the legislator has not blatantly failed to strike a balance between the various constitutional requirements involved;

- finally, having regard to the aim pursued by the legislator, the principle of equality was not violated.

However, Section 89 was recognised as being constitutionally valid only with the following proviso: children whose situation is regularised in accordance with the code on admission and residence of foreigners and on the right of asylum (*in situ* family reunion) must be regarded as having entered lawfully under the family reunion procedure, and so confer entitlement to family benefits.

4. Of its own motion, the Constitutional Council also rejected certain provisions which were out of place in the Social Security Finance Act.

In fact, under Article 34.20 of the Constitution: "Social security finance acts shall determine the general conditions for the financial balance for the social security and, in the light of their revenue forecasts, shall determine expenditure targets in the manner and with the reservations specified in an institutional act." This was the framework in which the Institutional Act on Social Security Finance Acts of 2 August 2005 defined and limited the content of social security finance acts.

In this case, the Council rejected several provisions on supplementary insurance bodies, which are not involved in the funding of social security.

It also rejected a number of provisions aimed at stopping the unlawful employment of foreigners, on the ground that their effect on receipts was not sufficiently direct.

Finally, it rejected measures supplementing the general civil service regulations and providing for longer paid maternity leave in certain cases, on the ground that their effects on expenditure of the social security bodies were either nil or insufficiently direct.

Cross-references:

- Decision n° 2004-504 DC of 12.08.2004, *Bulletin* 2004/2 [FRA-2004-2-009];
- Decision n° 97-393 DC of 18.12.1997 (cons. 34), *Bulletin* 1997/3 [FRA-1997-3-006];
- Decision n° 93-325 DC of 13.08.1993, *Bulletin* 1993/2 [FRA-1993-2-007].

Languages:

French.

Identification: FRA-2005-3-011

a) France / **b)** Constitutional Council / **c)** / **d)** 15.12.2005 / **e)** 2005-529 DC / **f)** State Authorities Act altering the dates for renewal of the Senate / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 16.12.2005, 19358 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

4.5.3.4 **Institutions** − Legislative bodies − Composition − Term of office of members.
4.8.4 **Institutions** − Federalism, regionalism and local self-government − Basic principles.
4.9 **Institutions** − Elections and instruments of direct democracy.

Keywords of the alphabetical index:

Election, parliament, second chamber, timetable, term of office, promulgation / Election, parliament, second chamber, electoral college, local and regional authorities, representativeness.

Headnotes:

The institutional legislator, who is responsible under Article 25 of the Constitution for fixing the term for which each house of Parliament is elected, may modify that term in the public interest, provided that constitutional rules and principles are respected. The Constitutional Council does not have general assessment and decision-making powers of the same kind as those of parliament.

It is clear from Articles 3 and 24 of the Constitution that the Senate, which represents the Republic's territorial authorities, must be elected by an electoral body which is itself chosen by those authorities. The institutional legislator was thus correct in assuming, since the local elections had been postponed to March 2008, that election of that third of the Senate's membership whose terms would expire in 2007 must also be postponed, to ensure that the senators concerned were not appointed mainly by elected representatives serving beyond their normal term. The role entrusted to the Senate by Article 24 of the Constitution might also justify postponement by one year − as an exceptional and transitional measure − of the renewals scheduled for 2010 and 2013, to ensure that the election of senators, and election by the public of most of their electoral college, coincided more closely in future. It is not for the Constitutional Council, which exercises limited supervision of the legislator's decisions, to give a ruling as to whether this aim could have been achieved by other means, provided that the methods adopted are not manifestly out of keeping with the aim pursued.

Summary:

Consulted by the Prime Minister, who is required to do so by Articles 46.5 and 61.1 of the Constitution, the Constitutional Council approved the Institutional Act which modifies the dates for renewal of the Senate, extending the senators' current terms by one year.

The Act was intended to remedy a situation unprecedented in the history of the Vth Republic, whereby various elections were due to be held very close together in 2007. Within a period of just six months, the following were due for election: municipal councillors (March), some Department councillors (March), the President of the Republic (April and May), the members of parliament (June), and one-third of the senators (September).

This tight schedule would have imposed an unexampled burden on public authorities, candidates and political parties, creating a serious danger that mistakes would be made, campaigns and issues be confused, and voters lose interest. On 7 July 2005, the Constitutional Council publicly called for lightening of the timetable. It pointed out that holding so many elections within the same period would be unduly hard on voters and authorities alike, and that local elections would be held at the very time when presidential candidates were canvassing support (they must be sponsored by 500 local elected representatives on conditions specified in Section 3-I of Act no. 62-1292 of 6 November 1962).

It was thus necessary to postpone the local elections, and this – since senators are chosen by local and regional authority representatives – automatically raised the question of postponing the Senate elections as well. Under Article 24 of the Constitution, the Senate "represents the territorial authorities of the Republic". Essentially comprising members of local and regional assemblies, its representative character would not have been indisputably guaranteed if some of its members had been selected by local representatives serving beyond their normal term (whose own representative character would thus have "lost its bloom").

Two bills were tabled in Parliament on 2 August 2005: an ordinary bill extending the mandates of municipal and Department councillors by one year, which was not referred to the Constitutional Council, and an institutional bill extending the mandate of senators.

Adoption of the institutional bill required the Senate's agreement under Article 46.4 of the Constitution, which stipulates that institutional acts relating to the Senate must be passed in identical terms by both houses.

The adopted text extends the current mandates of all senators by one year. This applies, not only to senators elected in 1998, whose terms would normally expire in 2007, as proposed by the Government, but also to senators elected in 2001 and 2004.

Considering that institutional acts can modify the terms of either house in the public interest, provided that the Constitution is respected, the Council noted that it did not have the same general powers to assess and take decisions as Parliament. Since its supervisory powers were limited, it decided that the solution adopted by the legislator was not clearly out of keeping with the legitimate aims pursued.

Supplementary information:

This text connects with the reform of the Senate adopted in 2003, which reduces the term for which senators are elected from nine to six years, and replaces three-yearly renewal of one-third of the membership with three-yearly renewal of half the

membership − ensuring completion of the reform in 2013, as planned. In the long term, it will prevent senators from being chosen by electors whose own term of office is drawing to a close, since it will be many years before the various elections are again held close together (2032).

Languages:

French.

Identification: FRA-2005-3-012

a) France / **b)** Constitutional Council / **c)** / **d)** 29.12.2005 / **e)** 2005-530 DC / **f)** Finance Act for 2006 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 31.12.2005, 20705 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

2.3.1 **Sources of Constitutional Law** − Techniques of review − Concept of manifest error in assessing evidence or exercising discretion.
2.3.2 **Sources of Constitutional Law** − Techniques of review − Concept of constitutionality dependent on a specified interpretation.
3.10 **General Principles** − Certainty of the law.
3.11 **General Principles** − Vested and/or acquired rights.
3.12 **General Principles** − Clarity and precision of legal provisions.
4.8.4.1 **Institutions** − Federalism, regionalism and local self-government − Basic principles − Autonomy.
4.8.7.1 **Institutions** − Federalism, regionalism and local self-government − Budgetary and financial aspects − Finance.
4.10.7 **Institutions** − Public finances − Taxation.
5.2.1.1 **Fundamental Rights** − Equality − Scope of application − Public burdens.
5.3.13 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial.
5.3.38.4 **Fundamental Rights** − Civil and political rights − Non-retrospective effect of law − Taxation law.
5.3.42 **Fundamental Rights** − Civil and political rights − Rights in respect of taxation.
5.4.8 **Fundamental Rights** − Economic, social and cultural rights − Freedom of contract.

Keywords of the alphabetical index:

Budget, nomenclature, missions, programmes / Tax, exemption, questioning of / Tax, ceiling / Act, clarity, intelligibility, excessive complexity / Territorial authority, own resources / Proviso, injunction to the legislator.

Headnotes:

Under Section 7 of the Institutional Act on the Finance Acts of 1 August 2001: "The appropriations provided by the Finance Acts to cover charges on the state budget shall be grouped by missions, and shall be the responsibility of one or more departments or ministries. A mission shall comprise a set of programmes which together serve to implement a given public policy. Only provisions in finance acts introduced by Government may create missions". Government must define the scope of missions, and set them up on the basis of funds provided by one or more ministries. In this case, the criteria applied in defining the scope of missions were not invalidated by any manifest error of judgment.

Sections 7 and 47 of the Institutional Act on the Finance Acts of 1 August 2001 indicate that a mission may not consist of just one programme. However, the "single-programme" missions referred to in the Finance Act for 2006 reflect the introduction of new budgetary nomenclature. To give the authorities concerned time to make the necessary adjustments and solve the problems inherent in any such reform, these missions and the new institutional regulations may not take effect until 2007.

When taking decisions within his area of competence, the legislator is always at liberty to amend or rescind existing legislation – but he may not remove legal guarantees on constitutional requirements. Specifically, he would violate Article 16 of the Declaration of the rights of man and of the citizen of 1789 if he interfered with established rights without adequate "public interest" reasons for doing so. Section 7 of the Finance Act for 2006, which does away with tax exemption for interest paid under certain home-purchase saving schemes, produces no retroactive effects and does not interfere with established rights in a manner inconsistent with the Constitution.

Section 74 of the Finance Act for 2006 is designed to ensure that direct taxation does not absorb more than a certain percentage of household income, and provides that direct taxes may not exceed 60% of the taxpayer's income. Far from contravening the principle of fiscal equality, this section actually prevents a very definite violation of that principle. The

requirements of Article 13 of the Declaration of the rights of man and of the citizen of 1789 would not be respected if taxation became extortionate or imposed on certain taxpayers a burden in excess of their capacity to pay.

Equality before the law, and the assurance of the law's being observed required by Article 16 of the Declaration of the rights of man and of the citizen of 1789, would both be lacking if citizens had an inadequate knowledge of the laws applying to them, and those laws were so complex that they could not gauge their effects. Such complexity would restrict exercise of the rights and freedoms guaranteed by Articles 4 and 5 of the Declaration.

A tax law so complex that ordinary people cannot understand it also violates Article 14 of the Declaration of the rights of man and of the citizen of 1789 (concerning citizens' consent to pay taxes). Section 78 of the Finance Act for 2006, which introduces upper limits on tax concessions, is a case in point. There is no sufficient "public interest" reason for its excessive complexity − and it was therefore declared unconstitutional.

The Constitutional Council must necessarily reject any law which interferes with the decisive character of certain territorial authorities' own resources. However, Section 85 of the Finance Act for 2006, which reforms the application of ceilings, based on added value, to professional taxes, and specifies arrangements for state coverage of the lost tax revenue, does not − for this sole reason – produce consequences so serious that the financial autonomy of certain territorial authorities is reduced to an extent which breaks the rule.

If the report which the government is required to send Parliament showed that the reform restricted a territorial authority's ability to manage its own affairs freely to an extent incompatible with Article 72 of the Constitution, then the authorities would have to take corrective action.

Summary:

1. The application referred to the year when the Institutional Act on the Finance Acts (*Loi organique sur les lois de finances* = LOLF) of 1 August first took effect.

The applicants complained that the new budgetary nomenclature, which divided expenditure into missions, themselves broken down into programmes, had not been respected. Specifically, they criticised the structure of the mission "ecology and sustainable development", arguing that many other appropriations which contributed to protection of the environment should be included in it.

The Council rejected this argument, considering that defining missions was a matter for Government. The latter's decisions on the structure of missions would be open to criticism only if flawed by manifest errors of judgment, i.e. errors so serious that they violated the spirit of the LOLF, and indeed the truthfulness of the Finance Act. That was not the case in this instance.

The Council was asked whether single-programme missions violated Section 7 of the LOLF, which provides that "a mission shall comprise a set of programmes which together serve to implement a specific public policy". The applicants claimed that there were six missions which violated this principle.

Both the letter and spirit of the LOLF suggested that it should be stringently applied. The Council decided, however, that this presentation of missions reflected the introduction of a new budgetary nomenclature, and that the authorities should be given time to make the necessary adjustments and solve the problems inherent in any such reform. There were thus no grounds for rejection that year.

2. The applicants also contested various aspects of the reform of direct taxation.

Their first complaint concerned the abolition of tax exemption for interest paid on house-purchase savings plans open for over twelve years. They argued that this constituted a breach of contract. However, this argument was invalidated by the fact that, although the interest rates and state premiums attaching to those schemes are indeed covered by contract, tax exemption for interest is not.

Nonetheless, the measure could affect the principle that the law must be observed, proclaimed in Article 16 of the Declaration of the rights of man and of the citizen of 1789, or the "legal security" of people with house-purchase savings plans.

While the legislator is always at liberty to amend or rescind existing laws, the Council ruled that he would violate the principle that the law must be observed, proclaimed in Article 16 of the Declaration of the rights of man and of the citizen of 1789 if he interfered with established rights without adequate "public interest" reasons for doing so.

Such was not the case in this instance: firstly, the measure was not retroactive, since it did not affect interest generated by plans prior to 1 January 2006; secondly, it could reasonably be argued that these tax concessions would no longer be justified if, after a

sufficiently lengthy interval, the savings in question had not been used for their intended public-interest purpose, i.e. to help the plan-holder to purchase a home.

One of the main features of the income tax reform is the introduction of a tax ceiling *("bouclier fiscal")* (Section 74). This provision, which the applicants contested, sets an upper limit on the proportion of household income payable in direct taxation, and provides for the refund of tax paid in excess of 60% of income (in practice, this should benefit: people on low incomes, who pay relatively very high local taxes, or who are subject to wealth tax because they own their principal residence; and, at the other extreme, some 7,000 taxpayers in the highest income bracket).

The applicants' claim that the principle of fiscal equality had been violated was rejected. Article 13 of the Declaration of the rights of man and of the citizen of 1789 would be violated if taxation became extortionate or made demands on certain taxpayers which exceeded their ability to pay. Essentially, therefore, the section complained of, far from violating fiscal equality, itself prevents a definite violation of such equality.

However, the Council rejected the whole of Section 78 of the Finance Act, which dealt with tax concession ceilings, and was designed to restrict the taxpayer's ability to avail simultaneously of various advantages resulting in tax reduction or the tax burden linked to specific regimes. This section, running to over nine pages and including numerous references, was totally unintelligible to taxpayers.

The Council states that the Act's excessive complexity restricts the exercise of rights and freedoms, particularly equality before the law and assurance that the law will be observed. A tax law violates Article 14 of the Declaration of the rights of man and of the citizen of 1789 when it is unduly complex, e.g. when it requires taxpayers to make certain choices, and their final tax bill depends on their making the right ones. Due to its excessive complexity, this section creates uncertainty, and is a source of legal insecurity.

Finally, the Council was consulted on the reform which exempted firms from paying professional tax in excess of 3.5% of added value, with only part of the lost revenue being refunded by the state to the local authorities concerned.

This reform was contested on the ground that it violated the principle of equality, and the right of territorial authorities to manage their own affairs freely, guaranteed by Article 72-2 of the Constitution, which states: "The tax revenue and other own resources of territorial units shall, for each category of territorial unit, represent a decisive share of their resources" (under the Institutional Act of 29 July 2004, this share may not fall below the 2003 level).

The contested provision is unfavourable to territorial authorities, but its effects in this respect are only slight. Nonetheless, the Council − since their permanent financial autonomy is a constitutional objective – entered two provisos:

- If the evaluation report, which government must submit to Parliament under the Institutional Act, indicated that altered circumstances had produced a situation in which certain territorial authorities' own resources had fallen below the level observed in 2003, then the following year's Finance Act would have to include corrective measures;
- Corrective action would also be needed if it appeared that the reform restricted an authority's ability to manage its own affairs freely to an extent incompatible with Article 72 of the Constitution.

Subject to these two provisos, the contested section, which pursues an objective of general economic interest (making France more competitive in fiscal terms), and is based on objective, rational criteria directly connected with that objective, is not unconstitutional.

Languages:

French.

Identification: FRA-2005-3-013

a) France / **b)** Constitutional Council / **c)** / **d)** 29.12.2005 / **e)** 2005-531 DC / **f)** Amending Finance Act for 2005 / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 31.12.2005, 20730 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

3.4 **General Principles** − Separation of powers.
3.10 **General Principles** − Certainty of the law.
4.10.7 **Institutions** − Public finances − Taxation.

5.3.13 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial.
5.3.42 **Fundamental Rights** − Civil and political rights − Rights in respect of taxation.

Keywords of the alphabetical index:

Value-added tax, method of assessment / Transport, refund of motorway charges / Transport, road haulier, motorway charges / Law, in conflict with judicial decision.

Headnotes:

The parliamentary papers indicate that Section 111 of the Amending Finance Act for 2005, which provides for assessment of VAT "outside" motorway charges, is designed to render a judgment given by the Court of Justice of the European Communities (CJEC) on 12 September 2000, and a decision given by the State Council on 29 June 2005, ineffective for the period prior to 1 January 2001. It accordingly violates the principle of separation of powers and the principle that the law must be observed, proclaimed in Article 16 of the Declaration of the rights of man and of the citizen of 1789, and must thus be rejected.

Summary:

Section 111 of the Amending Finance Act for 2005 was attacked by more than 60 senators. This provision made deduction of VAT conditional on its having been paid in addition to the sum originally owing. It is general in scope, but the parliamentary papers show that it originated in a specific dispute – that concerning VAT on motorway charges between 1996 and 2000 – and was intended to undermine, retroactively, the final character of decisions given by the Court of Justice of the European Communities and the State Council (Supreme Administrative Court).

Up to 1 January 2001, motorway charges were not subject to VAT in French law – and so were not paid by road hauliers in France. From 2001, French law came into line with Community law, and VAT was introduced.

The road hauliers applied for restitution of the tax for the period prior to 2001. The Government argued that the tax was payable in addition to ("outside") the motorway charges, and that the hauliers must pay it retrospectively before they could deduct it. The sums involved for the latter were estimated at 1,000 million euros. But the State Council, basing itself on a judgment given by the Court of Justice on 12 September 2000 (on an appeal alleging violation) ruled, on 29 June 2005, that VAT was assumed to be included in the motorway charge and should be assessed as part of it; this meant that the hauliers were entitled to deduct it.

The applicants argued that Section 111 violated Article 16 of the Declaration of the rights of man and of the citizen of 1789 and the principle of fiscal equality, and also the rights recognised by the Court of Justice of the European Communities and the State Council.

The legislator can certainly apply the solution adopted by Section 111 in future. However, by applying it retroactively and undermining the effects of the judgments given by the Court of Justice of the European Communities and the State Council, he violated the principle that the law must be observed, proclaimed in Article 16 of the Declaration of the rights of man and of the citizen of 1789, and the right of appeal and separation of powers, which derive from the same article. In so doing, the legislator violated the principles of legal security, legitimate confidence and the right to a fair hearing.

The Constitutional Council has consistently ruled that retroactive fiscal legislation may be adopted only if it: respects final judgments given in the past, is sufficiently in the public interest, and does not deprive constitutional requirements of legal guarantees.

Section 111 of the Amending Finance Act for 2005 disregards a final court decision, and so violates the principle of separation of powers and the principle that the law must be observed, both protected by Article 16 of the Declaration of the rights of man and of the citizen of 1789. It was accordingly declared unconstitutional.

Cross-references:

- Decision no. 2004-509 DC of 13.01.2005, clauses 31 to 33, *Bulletin* 2005/1 [FRA-2005-1-001];
- Decision no. 98-404 DC of 18.12.1998, clause 5, *Bulletin* 1998/3 [FRA-1998-3-008];
- Decision no. 97-393 DC of 18.12.1997, clauses 47 to 52, *Bulletin* 1997/3 [FRA-1997-3-006];
- Decision no. 96-375 DC of 09.04.1996, clauses 6 to 11, *Bulletin* 1996/1 [FRA-1996-1-002].

Languages:

French.

Germany
Federal Constitutional Court

Important decisions

Identification: GER-2005-3-003

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 25.10.2005 / **e)** 1 BvR 1696/98 / **f)** Stasi Dispute Case (Manfred Stolpe) / **g)** / **h)** *Archiv für Presserecht* (AfP) 2005, 544-548; *Deutsches Verwaltungsblatt* (DVBl.) 2006, 43-47; *Neue Juristische Wochenschrift* (NJW) 2006, 207-211; CODICES (German).

Keywords of the systematic thesaurus:

5.3.13 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial.
5.3.21 **Fundamental Rights** − Civil and political rights − Freedom of expression.
5.3.31 **Fundamental Rights** − Civil and political rights − Right to respect for one's honour and reputation.

Keywords of the alphabetical index:

Information, truthfulness, obligation to verify / Media, television, freedom of expression / Media, information, standard of care / Statement, factual ambiguity / Right, forbearance / State, security service / Defamation, statement, ambiguous / Personality, right / Duty of care.

Headnotes:

If an ambiguous expression of opinion violates the right of personality of another, a right to its future forbearance - in contradistinction to a finding in respect of a statement made in the past, consisting for instance in a punishment order or an order to pay compensation or to recant - is not ruled out simply because it also allows for an alternative interpretation which does not result in an impairment of personality.

Summary:

I. The complainant was a representative of the church during the existence of the German Democratic Republic. In this capacity, he maintained contacts with the Ministry for State Security from 1969 to 1989. Later, he became *Minister-President* of the Federal State of Brandenburg. During the complainant's time in office as *Minister-President*, a representative of a political party stated in a television programme that the complainant had spent twenty years in the employ of the state security service.

The complainant's action for future forbearance of these statements was rejected by the Federal Court of Justice at final instance. The Federal Court of Justice found that the statement was ambiguous in meaning. It could be taken to mean that the complainant had been active for the state security service, as his employer, on the basis of a formal declaration of undertaking. However, it could equally be understood in such a way that the complainant had provided services to the Ministry for State Security, without such a formal undertaking, by deliberately providing information on third parties or specific events. This second interpretation was said to be more favourable for the party who was targeted by the forbearance action, and was therefore taken as the basis for the legal evaluation. When all the necessary interests were weighed up, it was found that the interest in making the statement should prevail; especially it was the complainant himself who had opted to enter the arena of public debate.

The complainant filed a constitutional complaint against the judgment of the Federal Court of Justice, alleging a violation of his general right of personality (Article 2.1 in conjunction with Article 1.1 of the Basic Law), as well as of the right to a hearing in court (Article 103.1 of the Basic Law), the right to effective legal protection and to a fair trial (Article 2.1 in conjunction with Article 20.3 of the Basic Law).

II. The First Panel of the Federal Constitutional Court admitted the complaint for decision and overturned the judgment of the Federal Court of Justice where the action had been rejected. The case was referred back to the Federal Court of Justice. The Federal Constitutional Court gave the following grounds:

The judgment of the Federal Court of Justice violates the complainant's general right of personality under Article 2.1 in conjunction with Article 1.1 of the Basic Law.

Implicit within this right are rights to control over the way one's personality is portrayed, social standing and also personal dignity. A major guarantee is constituted by protection against false statements which are likely to jeopardise a person's standing, in particular their public reputation. Court rulings such as the judgment of the Federal Court of Justice,

which permit statements which are of relevance to personality, against which the persons concerned defended themselves on the grounds that they were false, have a bearing on the general right of personality.

The Federal Court of Justice based its ruling on the standards developed by the Federal Constitutional Court for examination of the criminal and civil law sanctions imposed by courts in cases of ambiguous statements that had been made in the past. In doing so, however, it did not take into account that these statements are not equally applicable to claims for forbearance of making future statements.

When examining criminal and civil law sanctions for statements of opinion made in the past, the Federal Constitutional Court presumes that freedom of opinion is violated in the case of ambiguous statements if a court uses as a basis the meaning which leads to a conviction, without having first ruled out with conclusive reasoning those meanings which would not give rise to a sanction. If formulations or the circumstances under which the statement was made allow an interpretation which does not violate the right of personality, then a criminal or civil law sanction violates Article 5.1.1 of the Basic Law (freedom of opinion). If somebody expressing an opinion has to fear state sanctions in case their statement is given a meaning which they did not intend it to have, there would be a negative impact on the general exercise of the fundamental right to freedom of opinion, quite apart from an infringement of their individual right to opinion.

However, when courts are deciding as to whether someone should desist from making further statements, there is no equivalent requirement of protection in the case of the individual exercise of fundamental rights and the functioning of the process of formation of opinion. It should be considered here that the person making the statement has the possibility to express himself clearly in future, thereby clarifying the content of the statement the legal examination is to be based on. If an ambiguous expression of opinion violates the right of personality of another, a right to its future forbearance is not eliminated just because it also allows for a different interpretation which does not entail a violation of personality, or which only entails a lesser violation of personality. The Federal Court of Justice did not sufficiently consider this point. It should have based its examination on the interpretation constituting a greater violation of the right of personality.

In addition, the weighing up carried out by the Federal Court of Justice did not meet the constitutional requirements. As also found by the Federal Court of Justice, the statement that the complainant had been in the employ of the state security service is a serious violation of personality rights. In the case of factual claims, the truth of which cannot be conclusively determined, a potentially untruthful assertion cannot be prohibited if the person making the statement has carried out sufficiently careful research into the truth prior to making and disseminating their assertion. Rigorous requirements concerning the duty of care apply where the right to personality may be breached.

The Federal Court of Justice did not meet these requirements as to the general right of personality in assessing the extent of the duty of truth and care. The nature of the complainant's activity in his dealings with the state security service was contentious even in the light of the different interpretation chosen by the Federal Court of Justice which led to the presumption of a lesser encroachment. The statements on the matter disseminated by public agencies were as controversial as the media reporting. In the interest of the protection of the personality of the person concerned, the person making the statement is henceforth to be required, if they assume a specific view of known facts violating the right of personality, to emphasise that this view is disputed and that the facts have not been fully clarified. The duty of truth is not overstated if the person making the statement has to reveal, when making the statement of opinion in the future, that it does not have a secure basis in fact with regard to the facts asserted therein.

The allegations of violation of rights to a hearing in court, to effective legal protection and to a fair trial were rejected. The Federal Court of Justice did not refer the case back to the trial court in order to afford the complainant the opportunity to apply for evidence to be taken on the interpretation of the statement on which the Federal Court of Justice based its findings, but this did not mean that the rights had been breached.

Languages:

German.

Identification: GER-2005-3-004

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 03.11.2005 / **e)** 1 BvR 691/03 / **f)** Choice of the First Name / **g)** / **h)** *Zeitschrift für das gesamte Familienrecht* 2005, 2049-2051; CODICES (German).

Keywords of the systematic thesaurus:

5.3.32 **Fundamental Rights** − Civil and political rights − Right to private life.
5.3.33 **Fundamental Rights** − Civil and political rights − Right to family life.

Keywords of the alphabetical index:

Child, best interest, choice of first name / Parents, right to choose their child's first name / Name, choice of a surname as a first name.

Headnotes:

The right of parents to take care of their child (Article 6.2.1 of the Basic Law) also includes the right to choose a first name. The state may only limit this right where its exercise may not be in the child's best interests.

Summary:

I. A complaint was filed by parents with custody rights of a son born in September 2001 and by their son. The parents wanted to give their son the names "Anderson", "Bernd" and "Peter" as first names. However, the registrar refused to record the name "Anderson" because the name was a surname.

The parents' appeal against this decision was successful before the Local Court and the Regional Court. However, the Higher Regional Court overturned the Regional Court's decision and referred the case back to the Regional Court. The Regional Court then rejected the complainants' application for registration of the first name "Anderson". The complainants' appeal against this decision was unsuccessful.

The complainants lodged a constitutional complaint against the decisions of the Regional Court and the Higher Regional Court, on the basis that their parental rights had been breached, pursuant to Article 6.2.1 of the Basic Law. The son alleged a violation of his right of personality pursuant to Article 2.1 in conjunction with Article 1.1 of the Basic Law.

II. The First Chamber of the First Panel of the Federal Constitutional Court admitted the constitutional complaint for decision and found in favour of the complainants. The matter was referred back to the Higher Regional Court for a new decision. The reasoning behind the First Chamber's decision can be summarised as follows:

The decisions violate the fundamental rights of the parents lodging this complaint, as set out in Article 6.2.1 of the Basic Law. The right of parents to take care of their child also includes the right to choose a first name. Parents are in principle free to do this. The state may only limit this right where its exercise may not be in the child's best interests. In supervising the exercise of this right pursuant to Article 6.2.2 of the Basic Law, the state is not only entitled, but also obliged to protect a child as the subject of a fundamental right from an irresponsible choice of name by its parents. Article 6.2 of the Basic Law does not provide a basis for a deeper encroachment upon the parental right to determine a child's first name.

The Higher Regional Court and the Regional Court which followed it did not recognise these requirements. The Higher Regional Court justified its decision on the grounds that "Anderson" was common as a surname but not as a first name in Germany, and so to record it as a first name would not be in keeping with one of the functions of a name, which is to indicate whether it is a first name or a surname. In so doing, the Higher Regional Court reached its conclusion on the basis of the public interest rather than on the basis of the best interests of the child. Only the best interests of the child are decisive. The Higher Regional Court did not take account of the fact that the first name "Anderson" would be used in conjunction with two other names, "Bernd" and "Peter". Both can be clearly identified as first names. Moreover, the courts did not sufficiently investigate the question of whether in Germany, "Anderson" is in fact recognised as a first name or can be recognised as such at all, – particularly in view of Germany's increasing internationalisation. No danger to the child's best interests could be perceived here, which could justify encroachment upon the parental right to choose a child's name.

The decisions also violate the son's general right of personality pursuant to Article 2.2 in conjunction with Article 1.1 of the Basic Law. This right includes the right to be given a first name and its protection, and it is exercised by the parents as fiduciaries. The courts violated this right because, in making their decisions, they were not guided by the best interests of the child.

Languages:

German.

Identification: GER-2005-3-005

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the Second Panel / **d)** 22.11.2005 / **e)** 2 BvR 1090/05 / **f)** Extradition (Vietnamese arrest warrant) / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.9 **General Principles** − Rule of law.
5.3.13.1.3 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Scope − Criminal proceedings.
5.3.13.6 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Right to a hearing.
5.3.33 **Fundamental Rights** − Civil and political rights − Right to family life.

Keywords of the alphabetical index:

Extradition, obstacle, conformity of criminal proceedings with rule of law / Arrest, warrant, foreign / Criminal proceedings, contrived / Judicial assistance, international, criminal matters / Evidence, for the charge, examination / Criminal proceedings, minimum standards under public international law / Public order, constitutional principles.

Headnotes:

The duty of the courts to take note of the applications and submissions of the parties to proceedings and to consider them in their decision corresponds to the right to a hearing in court pursuant to Article 103.1 of the Basic Law. If, in the reasons for its decision, a court does not deal with the core elements of one party's submission on the facts in relation to an issue which is of central importance to the proceedings, this suggests that the submission was not considered unless it was irrelevant or obviously unsubstantiated according to the legal viewpoint of the court.

Summary:

I. The complainant is a Vietnamese national and has – apart from some long stays in Vietnam – lived in Germany since 1994. Two of her children, born in 1983 and 2002 respectively, also live in Germany. The complainant is alleged to have been the girlfriend of a leader of a Vietnamese ring of cigarette smugglers in Berlin in 1995/1996. She was sentenced for theft and handling tax-evaded goods. In 1998 she gave evidence against a leader of the Vietnamese smuggling ring in German criminal proceedings.

In early 2004, the Vietnamese authorities requested extradition of the complainant on the basis of a Vietnamese arrest warrant on account of the purchase of heroin in seven cases in the years 1998 and 1999. The complainant was duly arrested in Germany.

She applied for a declaration that the extradition request was inadmissible because criminal proceedings in Vietnam did not meet the minimum standards of the rule of law. She alleged that the criminal accusations against her had been contrived so as to eliminate her as a witness in the proceedings being brought against members of the Vietnamese cigarette mafia in Germany. She claimed that all the statements incriminating her had been made by one co-accused who had already been executed and that his confession had not been obtained in a manner which conformed to the principles of the rule of law. The Court of Appeal from which the complainant sought relief found that there was no reason to examine the grounds for the suspicion of a criminal offence and declared that the extradition was admissible.

The complainant lodged a constitutional complaint against the decision of the Court of Appeal. In particular, she alleged a violation of her right to a hearing in court (Article 103.1 of the Basic Law), the right to protection of the family (Article 6.1 of the Basic Law) and a violation of the prohibition of arbitrariness (Article 3.1 of the Basic Law).

II. The constitutional complaint was successful. The decision of the Court of Appeal was overturned. The reasons given by the First Chamber of the Second Panel of the Federal Constitutional Court can be summarised thus:

> The Court of Appeal's decision violated the complainant's right to a hearing in court pursuant to Article 103.1 of the Basic Law. In general it had not sufficiently considered her submissions on the conformity of criminal proceedings in Vietnam with the principles of the rule of law, especially the

submissions on drug offences and her case. The complainant had repeatedly submitted current and extensive information from recognised human rights' organisations and various government agencies in respect of the above.

The complainant's submissions on the conformity of criminal proceedings in Vietnam with the principles of the rule of law are important from two points of view for the decision on her extradition.

On the one hand, German courts are bound by the Constitution to examine whether extradition is in conformity with the minimum standards under public international law that are binding in the Federal Republic of Germany pursuant to Article 25 of the Basic Law and with the constitutional principles of public order.

On the other hand, the complainant's submission on conformity with the principles of the rule of law are relevant for the question of whether the Court of Appeal had to examine the evidence for the charge pursuant to Article 10.2 of the Act on International Judicial Assistance in Criminal Matters. Such an examination is necessary if there are sufficient indications that the complainant is likely to face proceedings in Vietnam which violate unconditionally required principles recognised by all states governed by the rule of law and thus minimum standards under public international law within the meaning of Article 25 of the Basic Law, and an examination of the evidence for the charge would shed light on the above. The possibility cannot be ruled out that the Court of Appeal might have concluded differently if it made a comprehensive evaluation of the information submitted by the complainant and took her entire submission into account.

Otherwise the decision of the Court of Appeal is not constitutionally objectionable. The complainant's submissions to the effect that the Court's assessment of the facts breached the prohibition of arbitrariness pursuant to Article 3.1 of the Basic Law are rejected. The Court of Appeal provided sound reasons for finding that the prerequisites for extradition were fulfilled and that there were no obstacles to the same. The Court was also able to show convincingly that the extradition would not violate minimum standards under public international law and unconditionally required constitutional principles due to the threat of unbearably cruel or harsh punishment. Finally, the Court of Appeal's reasoning that the fundamental right to protection of the family (Article 6.1 of the Basic Law) did not stand in the way of extradition was also in conformity with the case-law of the Federal Constitutional Court.

Languages:

German.

Identification: GER-2005-3-006

a) Germany / **b)** Federal Constitutional Court / **c)** First Chamber of the First Panel / **d)** 29.11.2005 / **e)** 1 BvR 1444/01 / **f)** Stepchild adoption case / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.17 **General Principles** − Weighing of interests.
5.2.2 **Fundamental Rights** − Equality − Criteria of distinction.
5.3.33 **Fundamental Rights** − Civil and political rights − Right to family life.

Keywords of the alphabetical index:

Child, born out of wedlock / Adoption, consent of the natural father / Authority, parental / Child, best interest / Father, having custody and father not having custody, distinction.

Headnotes:

The consent of the father of a child born out of wedlock to the adoption of his child may be substituted by court order only where adoption would offer the child such a material advantage that a parent taking reasonable care of his child would not insist on maintaining the relationship. This stems from requirements under constitutional law, which are based on the principle of equality, of a comprehensive weighing of the interests of the child and those of the father.

Summary:

I. The complainant is the father of a son born out of wedlock in January 1987. He acknowledged his paternity immediately after the birth. At the time, he was living in a household with the mother of the child. The mother left him in 1989 and married her current husband in 1990. The last contact of the complainant with his son to which the mother consented took

place in May 1990. She prevented any further visits. Eventually, the man she had married applied to the Local Court to adopt the child.

In principle, the consent of both parents is required for adoption. In specific exceptional cases, however, the law permits adoption to take place against a parent's will. In the event of a parent's especially grievous, complete failure in his responsibility for the child, the consent of this parent can be substituted by the Guardianship Court. For fathers of children born out of wedlock who do not have, and never had, custody, §1748.4 of the Civil Code contains a special provision. In such cases, the consent of the father must be substituted where it would be disproportionately disadvantageous to the child if the adoption did not take place. On the basis of this regulation, the Local Court substituted the complainant's consent to the adoption of his son by the husband of the mother. The complainant's appeals against this decision were rejected by the Regional Court and the Higher Regional Court.

The complainant filed a constitutional complaint against the decisions of the ordinary courts and indirectly also against § 1748.4 of the Civil Code. He challenged a violation of the principle of equality (Article 3.1 of the Basic Law) and of his parental right (Article 6.2.1 of the Basic Law).

II. The constitutional complaint was upheld. The Federal Constitutional Court overturned the orders of the Local Court, the Regional Court and the Higher Regional Court on the following basis:

> § 1748.4 of the Civil Code provides that the consent of the father of an illegitimate child who has at no time had custody may be substituted subject to less rigorous requirements than those applying to other fathers. The provision is compatible with the principle of equality because the statute is amenable to an interpretation in conformity with the Constitution that can prevent unequal treatment. The Federal Court of Justice already stated in a ruling on 23 March 2005 that the weighing of the interests of the father and the child, as required by the Constitution, calls for assuming a "disproportionate disadvantage" in the meaning of Article 1784.4 of the Civil Code only in very specific cases, when applications for adoption are being considered. According to the Federal Court of Justice, a disproportionate disadvantage in this context only exists where adoption would offer the child such a material advantage that a parent taking reasonable care of his child would not insist on maintaining the relationship. The Federal Court of Justice stated that on the father's side it would be necessary to consider whether and to what extent there was or had been a living relationship between the father and the child or what reasons had prevented the father from developing or maintaining such a relationship. On the facts, the Federal Court of Justice clarified here that § 1748.4 of the Civil Code also requires the prior conduct of the father to be taken into account. Thus, the Federal Court of Justice has taken account of the requirement under constitutional law of a weighing up of the interests of the child and those of the father. This avoids material unequal treatment of fathers of illegitimate children who do not have custody as against other groups of fathers.

The decisions in point do not, however, satisfy the constitutionally required standards of interpretation of § 1748.4 of the Civil Code following from the principle of equality (Article 3.1 of the Basic Law). When they weighed the interests of the father and those of the child in this case, the non-constitutional courts did not take appropriate account of the child's constitutionally protected interests. They restricted themselves to establishing that in effect no father and child relationship had existed between the complainant and the child for eleven years. They did not take into account the fact that the complainant had lived with the child for some time at least and fulfilled his parental responsibility. The courts clearly did not examine the reasons which prevented the father from maintaining a father-child relationship, which is what they are required to do under the Constitution.

Cross-references:

- Decision of the Federal Court of Justice, 23.03.2005, *Neue Juristische Wochenschrift* – NJW 2005, 1781-1784.

Languages:

German.

Identification: GER-2005-3-007

a) Germany / **b)** Federal Constitutional Court / **c)** Third Chamber of the Second Panel / **d)** 05.12.2005 / **e)** 2 BvR 1964/05 / **f)** Excessive pre-trial detention case / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.1.4.4 **Constitutional Justice** − Constitutional jurisdiction − Relations with other institutions − Courts.
1.6.7 **Constitutional Justice** − Effects − Influence on State organs.
3.9 **General Principles** − Rule of law.
3.16 **General Principles** − Proportionality.
5.3.5.1.3 **Fundamental Rights** − Civil and political rights − Individual liberty − Deprivation of liberty − Detention pending trial.
5.3.13.13 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Trial/decision within reasonable time.

Keywords of the alphabetical index:

Expediency, requirement / Detention, pending-trial, length, excessive, due to procedural error / Proceedings, appellate, justification for length of proceedings.

Headnotes:

From the point of view of the requirement of expedition in detention matters, it is in principle not constitutionally objectionable if the time which has elapsed as the result of the conduct of appellate proceedings is not added to the determined excessive length of proceedings. However, this is not the case if the purpose of the appellate proceedings was to correct a procedural error which was obviously the fault of the judicial authorities. In these cases, the length of the appellate proceedings in relation to the entire length of the proceedings must be taken into account in deciding the question of whether the expedition requirement in detention matters has been violated.

Summary:

I. The complainant has been in pre-trial detention since 2 August 1997. He is accused of having deliberately caused a gas explosion in July 1997, which destroyed a block of flats owned by him, killed six tenants and seriously injured two others. After proceedings lasting over four years, the Regional Court sentenced him to life imprisonment on 16 August 2001 for causing an explosion resulting in death in conjunction with murder in six cases and attempted murder in two cases arising from the same act.

The complainant appealed to the Federal Court of Justice which on 24 July 2003 overturned the decision of the Regional Court on account of a procedural error. The Federal Court of Justice held that the evidence of a witness before the investigating judge should not have been taken into account in the judgment because contrary to criminal procedural provisions the complainant and his representative at the time had not been informed of the date of the interrogation. The matter was referred back to the Regional Court for another hearing and decision. The new hearing against the complainant commenced on 6 February 2004 and is ongoing.

The complainant's application for a stay of execution of the arrest warrant was unsuccessful before the Regional Court and the Higher Regional Court. In response to his constitutional complaint, the Federal Constitutional Court overturned the decision of the Higher Regional Court and referred the matter back to the Higher Regional Court for a decision (Order of 23 September 2005, case no. 2 BvR 1315/05). On 8 November 2005 the Higher Regional Court again dismissed the complaint against detention. Upon re-examining the records of the case, it found that the judicial authorities could not be accused of any avoidable procedural delays.

The complainant lodged a constitutional complaint against the decisions of the Regional Court and the Higher Regional Court, alleging a violation of his fundamental right to freedom (Article 2.2.2 of the Basic Law).

II. The Federal Constitutional Court admitted the constitutional complaint and found in favour of the defendant. The orders of the Higher Regional Court, the order of the Regional Court and the arrest warrant of the Local Court were overturned. The Federal Constitutional Court ordered the immediate release of the complainant from detention.

Its reasoning was essentially as follows:

Article 2.2.2 of the Basic Law guarantees the freedom of the person. The requirement of expedition which applies in criminal matters is anchored in this fundamental right to freedom. Thus the right to freedom of an accused person awaiting sentence must always be used as a corrective for the necessary and expedient restrictions on freedom that are required within the framework of a criminal prosecution. In this connection, the principle of proportionality places limits on the length of imprisonment irrespective of the punishment to be expected. As the length of pre-trial detention increases so too as a rule will the importance of the right to freedom vis-à-vis the interest in effective criminal prosecution.

The requirement of expedition covers the entire criminal proceedings. As a rule a finding by the

prosecuting authorities and courts that there has been a delay in proceedings which is in violation of the principle of the rule of law compels them to take this into account in enforcing the state's right to punish.

The challenged decisions do not satisfy these requirements and violate the complainant's fundamental right to freedom pursuant to Article 2.2.2 of the Basic Law. The Higher Regional Court did not take into account the fact that the decision to overturn and refer back the first instance decision amounted to a procedural delay for which the state is responsible simply because the judgment handed down contained procedural errors.

Contrary to the opinion of the Higher Regional Court, it is not possible to successfully argue against the above that the prolonging of the proceedings due to the decision in the appellate proceedings to overturn the first judgment was a characteristic of the appellate system in a state governed by the rule of law and that it could thus not amount to a violation of the requirement of expedition in detention matters. It is not constitutionally objectionable not to add the time elapsed as the result of the conduct of appellate proceedings to the determined excessive length of proceedings. However, an exception must be made to the above where the appellate proceedings were for the purpose of correcting a procedural error obviously made by the judicial authorities. Contrary to the view of the Higher Regional Court, the error does not have to be a glaring procedural error. The decisive question is: in whose sphere of influence does the error lie – the complainant's or that of the judicial authorities? Since in this case only the judicial authorities knew about the imminent interrogation of the witness by the investigating judge, only they could also fulfil the duty to inform. The procedural error resulting from failure to perform this duty and from the later use of the investigating judge's statements can thus only be blamed on the judicial authorities.

This prolonged the proceedings by almost twenty-five months (calculated from the time when the appeal against the first instance decision of 16 August 2001 was lodged to the time when the file came back to the prosecutor's office at the end of the appellate proceedings on 4 September 2003). One is no longer dealing here with a small delay which might just about justify the continuation of pre-trial detention, viewed against the seriousness of the crimes. Even if for no other reason than this, a violation of the expedition requirement in detention matters occurred which must necessarily result in the cancellation of the arrest warrant due to non-conformity with proportionality principles.

Irrespective of the above, there were many serious violations in the proceedings of the requirement for expedition in detention matters. Even one such violation would suffice to justify cancellation of detention; grouped together this is most certainly the case.

To the extent that the Higher Regional Court disregarded in its decisions the binding effect of the previous decision of the Federal Constitutional Court of 23 September 2005, Article 20.3 of the Basic Law (principle of the rule of law) had also been breached.

Cross-references:

- Decision of the Federal Constitutional Court, 23.11.2005, case no. 2 BvR 1315/05, *Neue Juristische Wochenschrift* 2005, 3485-3488.

Languages:

German.

Identification: GER-2005-3-008

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the Second Panel / **d)** 08.12.2005 / **e)** 2 BvR 1001/04 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

5.1.1.4.1 **Fundamental Rights** − General questions − Entitlement to rights − Natural persons − Minors.
5.3.9 **Fundamental Rights** − Civil and political rights − Right of residence.
5.3.33 **Fundamental Rights** − Civil and political rights − Right to family life.

Keywords of the alphabetical index:

Expulsion, prohibition due to access right to child / Right of access, family life / Parent, without custody rights, right of residence / Child, best interest / Residence, right, exclusion / Child, family tie / Authority, parental, obstacle to expulsion of parent.

Headnotes:

The constitutional duty of the state to protect the family corresponds to the subject's fundamental right to have public authorities and courts take into account his family ties to persons living in the territory of the Federal Republic of Germany when deciding upon his application for residence.

Summary:

I. The complainant is a national of Serbia and Montenegro and has lived in Germany since 1999. He was married to a German national but is now divorced from her. The parties had a daughter together who is now five years old. The mother has custody of the girl. The complainant lives and works in a different city from his former wife and his daughter. However, he has access to his daughter every two weeks and maintains regular contact with her by telephone.

The foreigners' authority rejected his application to extend his residence permit because the complainant and his daughter were not living together as a family unit. He appealed to the Administrative Court and the Higher Administrative Court. Both courts refused to grant him temporary relief for the same reason.

The complainant lodged a constitutional complaint against these decisions. He alleged breaches of his right to protection of the family (Article 6.1 of the Basic Law) and his parental right (Article 6.2.1 of the Basic Law).

II. The constitutional complaint was successful. The Federal Constitutional Court overturned the orders of the Administrative Court and the Higher Administrative Court. Its reasoning was essentially as follows:

> The challenged decisions violate the complainant's fundamental rights under Articles 6.1 and 6.2.1 of the Basic Law. It is true that Article 6 of the Basic Law does not grant a direct right to residence. Nevertheless, its underlying general principles, according to which the state must protect and promote the family, must be taken into account by the foreigners' authority when deciding on measures to discontinue a person's residence. The public authority has a duty to pay sufficient attention in its considerations to the family ties of a foreigner seeking residence to persons who are legitimately living in the territory of the Federal Republic of Germany. The degree of attention paid will depend on the strength of the ties.
>
> However, formal and legal family ties are not sufficient for the protective effect of Article 6 of the Basic Law to have an effect under foreigners' law. Rather, the bond between the family members is the decisive factor, and it has to be examined on a case by case basis. It is not permissible to classify a family relationship automatically as a cohabitation relationship for raising children, which is in principle worthy of protection under foreigners' law, or as a mutual support relationship, or as a mere casual relationship which has no protective effect under the law concerning residence. Personal contact with one's child in the exercise of one's right to access is – independently of having custody rights or living together under one roof – the expression and consequence of the natural right of a parent and is thus protected by Article 6.2.1 of the Basic Law.
>
> The 1997 reform of the law concerning parents and children made the best interests of the child the prime consideration and the relationship of each parent to his or her child was recognised as being worthy in principle of protection and promotion. The increased recognition of the significance of a child's right to access to both of its parents has also had effects on the interpretation and application of provisions of foreigners' law. Therefore, decisions under residence law must also mainly be based on the child's perspective. Whether there really is a personal bond which should be maintained in the best interests of the child must be examined in each individual case. In this connection it must be assumed that a child's personal contact with a parent who lives separately from it is as a rule beneficial for the development of its personality and that a child needs both its parents.
>
> If the challenged decisions are measured against these principles, they do not stand up to review under constitutional law. The Administrative Court reached its decision merely on the basis of abstract criteria without assessing the specific circumstances of the individual case. The Higher Administrative Court found that there was no cohabitation as a family unit. Its reasons were that the father could not be considered to assume tasks related to the care and raising of his daughter by seeing her every two weeks and speaking to her occasionally on the phone. In this connection the Court ignored the fact that in reforming the family law, the legislature made it clear that access not involving direct personal contact can and should occur – for example through contact by letter and telephone. Within the framework of an assessment of the facts in conformity with the Basic Law, reasonable consideration should in addition be given to the fact that in the event that the complainant returned to his home country, it is likely that his personal contact with his child would be broken off.

Languages:

German.

Identification: GER-2005-3-009

a) Germany / **b)** Federal Constitutional Court / **c)** Second Chamber of the Second Panel / **d)** 13.12.2005 / **e)** 2 BvR 447/05 / **f)** / **g)** / **h)** CODICES (German).

Keywords of the systematic thesaurus:

5.3.5.1.1 **Fundamental Rights** − Civil and political rights − Individual liberty − Deprivation of liberty − Arrest.
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:

Demonstration, sit-down, deprivation of liberty / Police custody, legality / Police, duty to seek judicial permission for arrest.

Headnotes:

The legal guarantees in the event of detention contained in Article 104 of the Basic Law allow for deprivation of liberty without a prior judicial order only in exceptional cases. In these cases, a judicial decision must be obtained subsequently without delay. This means, firstly, that the police must obtain the judicial order without delay and, secondly, that the judge's conduct of the matter must comply with the requirement of expeditiousness.

Summary:

I. In November 2001, the complainant, and around two hundred others, took part in a street sit-down demonstration against the transport of radioactive waste (the Castor transport).

When she failed to comply with an order to move on, the police took her into custody from 10.20 a.m. to 8.23 a.m. of the following day; during this period, no judge considered her case.

The complainant subsequently applied to the Local Court and the Regional Court for a declaration that the deprivation of liberty and the manner in which it was carried out were unlawful. However, her applications were rejected by the ordinary courts.

In her constitutional complaint, the complainant challenged these judicial decisions. She argued that there had been breaches of her fundamental right of freedom of the person under Article 2.2.2 of the Basic Law in conjunction with Article 104.2 of the Basic Law, and of her fundamental right to effective legal protection under Article 19.4 of the Basic Law.

II. The constitutional complaint was successful. The Federal Constitutional Court overturned the orders of the Local Court and the Regional Court and referred the matter back to the Regional Court for a new decision. The grounds stated are essentially the following:

- The challenged judicial decisions violate the complainant's fundamental right under Article 2.2 of the Basic Law in conjunction with Article 104.2 of the Basic Law.

Article 104.2.1 of the Basic Law provides that in principle deprivation of liberty requires a prior judicial order. Article 104.2.2 of the Basic Law provides that in exceptional cases a subsequent judicial decision is admissible, but this is sufficient only if it would not be possible to achieve the constitutionally admissible aim pursued by means of the deprivation of liberty in any other way. In this case, Article 104.2.2 of the Basic Law requires that the judge's decision is to be obtained subsequently without delay: this means, without any delay that is not objectively justified. On the one hand, the requirement of expeditiousness imposes an obligation on the police to obtain a judicial decision without delay. On the other hand, the further conduct of the matter by the judge must comply with the requirements of expeditiousness. Moreover, it is an indispensable requirement of procedure under the rule of law that decisions that relate to the deprivation of personal liberty are based on sufficient judicial inquiry into the facts.

In the challenged orders of the Local Court and the Regional Court, insufficient account was taken of these requirements. The findings made by the courts do not show that the constitutional requirement of expeditiousness that follows from Article 104.2.2 of the Basic Law was satisfied in the complainant's case.

Firstly, the courts did not sufficiently analyse the sequence of events in the police procedure. Periods of several hours in the course of the custody were not accounted for. The complainant was taken into custody at 10.20 a.m., and at 1.19 p.m. the transporter arrived at the prisoners' assembly point. A data entry sheet – not drawn up until 9.10 p.m. – states that the complainant was taken into custody at 4.25 p.m. The application by the regional government for a judicial decision as to the admissibility of the measure depriving the complainant of her liberty bears the same date. However, it was received at the Local Court only on the next day; the precise time could not be established. The statements of the non-constitutional courts on the sequence of events are limited to general, blanket justifications and do not consider the specific case. In order to do justice to the great importance of requiring a judicial decision as a protection against unjustified deprivations of liberty, the Local Court should have established the concrete circumstances of the delays that occurred, which made it impossible for the application relating to the admissibility and continuation of the taking into custody to be submitted to the court without delay.

The management of the duty judge scheme also raises questions of a constitutional nature. In view of the mass demonstrations against the transport of nuclear waste that were to be expected, the duty judge system ought not to have been restricted to daytime hours. Arrangements for night-time should also have been made, for it was to be expected that the taking into custody of a large number of people could not be handled appropriately during the daytime.

The challenged decisions also violate the complainant's right to effective legal protection (Article 19.4 of the Basic Law). The complainant submitted that the manner in which she was taken into custody was equivalent to a form of punishment. It is inherent in this submission that the custody could have been imposed with better conditions if there had been appropriate planning, better organisation and coordination and if the complainant had been accommodated elsewhere. In this way, the complainant raised questions of fact; the courts did not investigate these questions. They should have determined the reasons why the location of the prisoners' assembly point was chosen, what its capacity was and the question of suitable furnishing, and, taking account of the concerns expressed by the authorities and their scope of discretion in assessment and making predictions, they should have given consideration to these reasons.

Languages:

German.

Greece
Council of State

Important decisions

Identification: GRE-2005-3-001

a) Greece / **b)** Council of State / **c)** Plenary Session / **d)** 04.11.2005 / **e)** 3665/2005 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.16 **General Principles** − Proportionality.
3.18 **General Principles** − General interest.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.4.4 **Fundamental Rights** − Economic, social and cultural rights − Freedom to choose one's profession.
5.4.6 **Fundamental Rights** − Economic, social and cultural rights − Commercial and industrial freedom.
5.4.19 **Fundamental Rights** − Economic, social and cultural rights − Right to health.

Keywords of the alphabetical index:

Profession, access, conditions / Licence, granting.

Headnotes:

Setting population criteria governing the procedures of pharmacy licensing, i.e. access to the profession of pharmacist, with the aim to secure the sustainability of already existing pharmacies and to protect public health, is not in line with Article 5.1 of the Constitution. In particular, when the established restriction does not refer simply to the exercise, but also to access to the profession, the proportionality principle requires that the necessity to impose a restriction is clear and easily understood.

Summary:

The Court was called to rule on the constitutionality of Law no. 1963/1991, which sets certain population criteria concerning the granting of pharmacy licences, i.e. access to the profession of pharmacist. According to the introductory report of the Law in question, the establishment of such criteria aimed at securing the sustainability of already existing pharmacies and furthermore, at protecting public health.

The Court found the said restrictions to be unconstitutional. Article 5.1 of the Constitution guarantees personal and economic freedom as an individual right. The freedom to choose and exercise a certain profession, as a necessary element of the development of one's personality, constitutes a more specific manifestation of this freedom. The legislator may impose restrictions to the freedom to choose and exercise one's profession on the condition that these restrictions are set in a general and objective way, are in the public interest or in the interest of society, and relate closely to the subject matter and the character of the regulated professional activity. The legislative restrictions to this freedom may not have, as their sole objective, the protection of the economic interests of those who already carry out a profession, to the detriment of those interested to choose the same profession. Furthermore, such legislative restrictions should respect the constitutional principle of proportionality. This is all the more important when the legislation regulates the entry to a profession on prescribed conditions, the principle of proportionality requires that the necessity to impose such an extraordinary restriction is clear and easily understood.

According to a separate consenting opinion, the legislative restrictions in question are contrary to the Constitution because they obviously do not relate to the protection of public health, since they do not concern the proper exercise of health-related professional activities, but rather to the setting of a ban to the profession. A related opinion suggested that concerns of sustainability of existing pharmacies would probably justify the taking of measures to protect public health, according to Article 21.3 of the Constitution, but not the setting of restrictions to economic freedom enshrined in Article 5 of the Constitution. A different opinion brought forward the idea that the rising number of pharmacies and the associated rise in their proportion to the population of certain areas, does not necessarily imperil their sustainability and consequently, the necessity of the establishment of such a stringent restriction to economic freedom is not apparent.

The dissenting opinion was based on the idea that it is precisely the significant rise in the number of pharmacies, especially in relation to the rise in the population, that threatens the sustainability of existing pharmacies and has a bearing on public health. According to this view, the established legislative restrictions appear to be justified; for the rest, the appreciation of the aforementioned facts by the legislator may not be the object of constitutional review by the Court. Another dissenting opinion even suggested that the setting of population criteria serves the rational distribution of pharmacies across the country with the aim to cover the needs of the

entire population in pharmaceutical products, in accordance with the state's duty of care for the health of its citizens, under Article 21.3 of the Constitution.

Languages:

Greek.

Identification: GRE-2005-3-002

a) Greece / **b)** Council of State / **c)** Assembly / **d)** 27.06.2005 / **e)** 1991/2005 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.16 **General Principles** − Proportionality.
3.18 **General Principles** − General interest.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.4.4 **Fundamental Rights** − Economic, social and cultural rights − Freedom to choose one's profession.
5.4.6 **Fundamental Rights** − Economic, social and cultural rights − Commercial and industrial freedom.
5.4.19 **Fundamental Rights** − Economic, social and cultural rights − Right to health.

Keywords of the alphabetical index:

Profession, access, licence, requirement / Licence, granting.

Headnotes:

Legislative restrictions to economic freedom, which amount to a total ban on business use of optical stores, by refusing to grant companies licences to found and operate optical stores in their name, do not appear to be necessary in order to secure the intended aim, which is to protect public health. They are also contrary to Article 5.1 of the Constitution.

Summary:

The Court was called to rule on the constitutionality of certain legislative provisions, which made the granting of a licence to operate an optical store conditional upon a licence to exercise the profession of optician. The outcome of such provisions was that only qualified opticians were allowed to be in charge of an optical store as an enterprise.

The Court started by elaborating on the normative value of Article 5.1 of the Constitution. The said article guarantees the protection of economic freedom, including the freedom to exercise entrepreneurial or professional activities. This constitutional guarantee does not preclude the establishment, by means of legislative or administrative rules, of restrictions to economic freedom in the public interest, such as the protection of public health, on the condition that these restrictions respect the principle of proportionality (Article 25.1 of the revised Constitution). According to this view, the above-mentioned legislative provisions were deemed to be unconstitutional: the protection of public health, which is the intended aim of the legislative introduction of the said restrictions to economic freedom according to the relevant parliamentary reports, is fully secured via the obligatory management of optical stores by qualified opticians, who also carry the scientific responsibility for the store and who are obliged to appoint, as their replacement, holders of a licence to exercise the optician's profession. Any additional restrictions to running an optical store as a form of entrepreneurial activity do not appear necessary and in fact, go beyond the intended aim of the protection of public health. According to the specified opinion of some judges, the said legislative provisions are unconstitutional because they render impossible the business use of optical stores as economic units by natural or legal persons other than the holders of licences to found and operate such stores. The legislative establishment of the obligation of the holder of an optical licence to personally run the store, in terms both of internal management and scientific direction, secures the real control of the enterprise by a qualified professional (in case the store operates in the form of a company) and offers adequate protection of public health in the general interest.

Languages:

Greek.

Hungary
Constitutional Court

Statistical data
1 September 2005 – 31 December 2005

Number of decisions:

- Decisions by the plenary Court published in the Official Gazette: 12
- Decisions by chambers published in the Official Gazette: 4
- Number of other decisions by the plenary Court: 38
- Number of other decisions by chambers: 11
- Number of other procedural orders: 36

Total number of decisions: 91

Important decisions

Identification: HUN-2005-3-004

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 29.09.2005 / **e)** 34/2005 / **f)** / **g)** 2005/130 / **h)**.

Keywords of the systematic thesaurus:

4.9.6 **Institutions** − Elections and instruments of direct democracy − Representation of minorities.
5.2.1.4 **Fundamental Rights** − Equality − Scope of application − Elections.
5.2.3 **Fundamental Rights** − Equality − Affirmative action.
5.3.41.1 **Fundamental Rights** − Civil and political rights − Electoral rights − Right to vote.
5.3.41.2 **Fundamental Rights** − Civil and political rights − Electoral rights − Right to stand for election.
5.3.45 **Fundamental Rights** − Civil and political rights − Protection of minorities and persons belonging to minorities.

Keywords of the alphabetical index:

Election, minority self-government / Election, equality of votes.

Headnotes:

There are no rules in the Constitution on the way in which minority self-governments should be created. The state does have to secure the participation of minorities in public affairs; this requirement is closely linked to the basic notions of democracy, human rights and the rule of law. The electoral framework has to reflect the special characteristics of the minorities as well as the administrative and electoral features of the country. The existing international obligations do not preclude limitations on the right to vote, but this cannot result in discrimination against minorities.

Summary:

I. Parliament adopted the Act on the modification of the election of representatives to minority self-governments, and other acts relating to national and ethnic minorities (hereinafter referred to as “the Act”) on 13 June 2005. The President sent it to the Constitutional Court to be reviewed, prior to its promulgation.

In his petition the President commented on Article 68.3 of the Act which allows an elected member of a local authority – if enough people voted in the course of the election of minority self-governments – to become a member of the minority self-government simply by making a statement. He suggested this might be in breach of Articles 2.1, 44.1, 70.1, 70.2 and 71.1 of the Constitution.

II. The Constitutional Court found that Article 68.3 of the Act is unconstitutional. The Court stressed that there are no rules in the Constitution on how minority self-governments should be created. However, in assessing the case, one has to consider Hungary’s international obligations and the type of international expectations which have to be met. The Court found that the state has to secure by whatever means the participation of minorities in public affairs; this requirement is closely linked to the basic notions of democracy, human rights and rule of law; as well as the administrative and electoral features of the country, the special characteristics of the minorities have to be reflected in the electoral framework; and finally, the existing international obligations do not preclude the limitation of the right to vote, but this cannot result in discrimination against minorities.

The principle of equal suffrage is enshrined in Article 71.1 of the Constitution. The Court stressed that, by comparison with Article 70/A of the Constitution (a general non-discrimination clause), this is a special rule which guarantees that every voter has the same number of votes as the others, and his vote has the same value when it comes to

counting the votes cast. Article 68.3 ascribed a double right to vote to members of assemblies of the local authorities. The constitutional review focused on the issue of whether the effective exercise of the constitutional rights of people belonging to ethnic and national minorities can constitutionally result in the breach of the 'one person, one vote' principle.

According to the settled case law of the Constitutional Court the standard test in similar cases involving institutional protection is not the "necessity-proportionality" test, it depends instead on the constitutional tasks of the institution at issue. Applying the above reasoning the Court found that Article 68.3 of the Act is not the only possible solution, it is not necessary and is contrary to Article 71.1 of the Constitution.

The Court also found that the requirements of legitimate exercise of power and the rule of law apply not only to state institutions, but also to local authorities.

Supplementary information:

On 17 October 2005, the parliament re-adopted the Act (Act CXIV of 2005 on the Election of Members of Minority Self-government, and on the Modification of Certain Laws Relating to National and Ethnic Minorities), incorporating the guidelines provided by the Constitutional Court. Article 2.1 of the Act accords the right to vote in the election of minority self-governments to anybody who:

a. belongs to a national or ethnic minority defined in the Act on the rights of national and ethnic minorities, and expresses his affiliation to that minority;
b. is a Hungarian citizen;
c. is entitled to vote in the election of local authorities and mayors, and
d. is listed in the electoral register of minorities.

A minority self-government election can take place if at least thirty people are listed in the register in a given settlement. There can be a maximum of five possible minority representatives, and each voter can vote for five candidates. The Act introduces an electoral voting system: members of the minority self-governments of the settlements of the region have the right to vote and to be voted for. A regional self-governmental election is held if at least ten settlements in the region have minority self-governments. At regional level nine representatives are elected. The national minority self-government is elected in a similar system as the regional. A minority may have national self-government, if it has minority self-governments in at least four settlements. The number of representatives varies according to the number of self-governments organised at a local level.

The local electoral offices maintain the registry of voters entitled to participate in the election of minority self-governments. A voter's name can only appear in one minority registry; otherwise all his registrations are invalid. The request for registration must contain the following: the voter's name, address, identity number, his statement on affiliation to a minority, and his signature. The head of the local electoral office decides on registration; he is entitled to check the person's citizenship and right to vote. If the request contains all the elements prescribed by law, registration cannot be rejected. A complaint against rejection may be filed with the head of the local electoral office (in other words, with the person who made the original decision).

Languages:

Hungarian.

Identification: HUN-2005-3-005

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 29.09.2006 / **e)** 35/2005 / **f)** / **g)** 2005/130 / **h)**.

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

Keywords of the alphabetical index:

Expropriation, compensation, taxation / Law, adopted in different social context, unconstitutionality.

Headnotes:

Article 13.2 of the Constitution, read in conjunction with Article 8.2 of the Constitution, obliges the state to exercise objective institutional protection to pass adequate legislation setting out the procedural and substantive rules of full, unconditional and immediate compensation in case of expropriation.

Summary:

I. The petition initiated the *ex post facto* constitutional review of a provision of Act C of 2000 on Accounting (hereinafter referred to as "the Act"). Article 77.1 of the Act deals with other income, means and revenues not forming part of net sales revenues arising in the course of regular business activity and which are shown neither under "income from financial transactions" nor under "extraordinary income". Article 77.2.b of the Act stipulates that compensation is to be regarded as 'other income'. The petitioner argued that Article 13.2 of the Constitution requires full and unconditional compensation in case of expropriation. This requirement would not be met because compensation counted as other income is subject to corporate taxation.

II. On examining Article 77.2.b of the Act, the Constitutional Court stated that the rule in question is of an accounting and recording nature, which gives participants in the market access to objective information on the financial and earnings position of the undertakings. Consequently, it does not affect the constitutional requirement of compensation.

Because the laws relating to expropriation were passed before the democratic transition, the Constitutional Court *ex officio* reviewed the compatibility of the Law Decree with Article 13 of the Constitution.

The Court pointed out that the Law Decree was passed in a different social, economic and legal climate. Then, only the state carried out public interest tasks, and this was central to the regulatory system. The political transformation over the past fifteen years has resulted in natural persons or corporations carrying out most of these functions. The scope of assets and proprietors as subjects of expropriation has also changed. The Law Decree was amended several times but its underlying regulatory concept has not changed.

The legislator must guarantee that expropriation is only permitted where there is no other way of achieving a purpose that is indeed in the public interest. The fact that the Law Decree permits expropriation if it relates to a generally defined state function fulfilled either by the central or local government does not in itself mean that expropriation is in the public interest. Furthermore, Article 13.2 of the Constitution allows for full, unconditional and immediate compensation, a safeguard of the right to property as a fundamental right. The Constitution provides a guarantee for the proprietor in case his property is confiscated.

The Law Decree does not provide this type of guarantee and the Constitutional Court established an unconstitutional omission. Parliament will need to pass the requisite legislation by 30 June 2007.

Languages:

Hungarian.

Identification: HUN-2005-3-006

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 05.10.2005 / **e)** 36/2005 / **f)** / **g)** 2005/132 / **h)**.

Keywords of the systematic thesaurus:

5.3.1 **Fundamental Rights** − Civil and political rights − Right to dignity.
5.3.13.19 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Equality of arms.
5.3.32 **Fundamental Rights** − Civil and political rights − Right to private life.
5.3.32.1 **Fundamental Rights** − Civil and political rights − Right to private life − Protection of personal data.

Keywords of the alphabetical index:

Privacy, security camera in private sphere / Data, recorded, prolonged storage.

Headnotes:

There is no compelling circumstance under which the extension of monitoring to the intimate sphere could be constitutionally permissible. The right to property and its protection cannot be an adequate reason either.

Summary:

I. The President proposed the constitutional review of the Act on the Protection of Persons and Safeguarding, and on Certain Activities of Private Detectives (henceforth, the Act).

The President was concerned that the Act's provisions on electronic monitoring devices did not adequately protect fundamental rights. As a result it violated Articles 54.1 and 59.1 of the Constitution. Article 30.3 of the Act was unconstitutional, because the regulation of the consent needed for electronic monitoring violated the right to human dignity and the protection of one's private life. The President was also concerned that the provisions concerning the duration of storage of recordings made with electronic monitoring devices allowed for storage for an unjustifiable length of time. This contravenes the constitutional principle of purposefulness, and resulted in a kind of stockpiling. He questioned the compliance of Article 31.4 of the Act with the Constitution, as it only allowed the subject control over the way information was used for an unjustifiably short time. This could be at variance with the right to informational self-determination, and in certain cases Article 57.3 of the Constitution.

II. The Court first examined the provisions of the Act concerning electronic monitoring devices.

The Act states that technical devices are only to be deployed to the extent necessary. It also prohibits the disproportionate restriction of the right to control over the way information is used. The Act only requires the subject's consent to the making of the record. Consent in this context can be by behaviour from which a certain inference can be drawn. Article 30.3 is drawn up in such a way that if consent is given to a recording by behaviour, this does not infringe the right to human dignity. Moreover, the provision is not sufficient to fully withdraw intimate situations from inspection. The Court went on to say that the phrasing of Article 30.3 on inferring consent from behaviour, even consent to be monitored in intimate situations, violates the right to human dignity. There are several other ways of protecting the right to property and the prevention of criminal offences which do not violate the right to human dignity, but still afford effective technical protection for property.

Article 31.2 provides that sound and video recordings are to be erased after a maximum of thirty days unless:

1. the client performs certain financial, postal work (in that case it is sixty days);
2. the court or another official body uses the recording as evidence in a legal case;
3. the subject requests the material to be stored for a longer period.

In determining the duration of storage the Act makes no distinction between the fields of activity of the property owners and the nature of the institution, neither does it take into account the value of the protected property and the extent to which it is under threat. According to the Court the duration of storage should be determined not only by reference to the activity of the client but also the extent to which the property is already protected. In any case if the surveillance is taking place in order to protect property which is only under threat in a general sense, storage for thirty days could result in a disproportionate restriction of the right to protection of personal data. For this reason Article 31.2 of the Act violates Article 59.1 of the Constitution.

The Court also assessed whether prolonged storage of data contravened the right to human dignity. The legal restriction on the length of time recordings can be stored is designed not only to prevent data being stored for the sake of it, but also to protect the individual, as it reduces the possibility of recordings being manipulated.

The point at which it is acceptable to restrict fundamental rights differs according to whether the recordings are being made or being stored. In the case of inspection and record-making the level of restriction is lower. The inviolability of the private sphere is of primary importance in setting the constitutional limits of the activity.

When the recordings are stored, the level of restriction is higher. Recordings made in the course of protecting property of people who are not behaving unlawfully can be highly sensitive. The nature of recordings lends itself to improper usage, violating the right to private life.

The Court looked at the short time available for postponing the erasing of data and the fact that the subject can only make a statement within a certain part of the period of storage. It ruled that this infringes the right to control over the way information is used. When electronic monitoring devices are used, the subjects have rights over the recordings made and stored on them, even if someone else handles them. However, the provisions of the Act mean that this right can only be exercised in part of the period of storage. There is considerable encroachment on the right to control over the way information is used, and so the phrase of the Act "within three working days" is unconstitutional.

In particular, the phrase runs against Article 57.3 of the Constitution. If the property owner believes a criminal offence is taking place, they should hand the person over to the officials, or inform an official body of the offence. If criminal proceedings are launched as a result, the property owner in possession of the recordings must hand them over to the authorities without delay. If the officials did not ask for the

recordings, and the subject was out of time to request postponement of the destruction of the recordings, it would no longer be possible to use them as evidence for the defence in the proceedings. This would mean that the accused and the prosecutor did not have the same opportunities, and this violates the principle of equality of arms.

Justice Kukorelli gave a concurring opinion in which he was supported by Justice Kiss. Kukorelli suggested that legal entities under private law have no right to collect personal data in private property with the purposes of criminal prosecution or prevention of an offence. There are other ways of achieving these ends which are less restrictive of the right to human dignity. An example could be the electronic protection of goods or labels. The electronic monitoring allowed in private premises by the Act was unnecessary, and thus unconstitutional. This applied even when the subject gave their consent, as they were not really free to choose, they had no opportunity to agree on conditions concerning fundamental rights as equal partners, for example when out shopping in shopping centres.

Cross-references:

- Decision no. 22/2004, *Bulletin* 2004/2 [HUN-2004-2-006].

Languages:

Hungarian.

Identification: HUN-2005-3-007

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 05.10.2005 / **e)** 37/2005 / **f)** / **g)** 2005/132 / **h)**.

Keywords of the systematic thesaurus:

5.3.13.2 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Effective remedy.
5.3.24 **Fundamental Rights** − Civil and political rights − Right to information.
5.3.32.1 **Fundamental Rights** − Civil and political rights − Right to private life − Protection of personal data.

Keywords of the alphabetical index:

Justice, transitional / Data, personal, secret services of the communist regime, employee / Data, personal, publicity, limited.

Headnotes:

It is against the constitutional right to personal data protection to make public personal data processed by the Historical Archives of the Hungarian State Security on employees, collaborators and operative personnel who worked or were in contact with the Secret Services of the communist regime.

Summary:

I. On 30 May 2005 parliament adopted the Amendment of Act III of 2003 on the Disclosure of the Secret Service Activities of the Communist Regime and on the Establishment of the Historical Archives of the Hungarian State Security (hereinafter referred to as “the Amendment”). The President of the Republic referred the adopted but not yet promulgated Amendment to the Constitutional Court for review.

He found that the purpose of Article 2.1 of the Amendment is to make public personal data processed by the Historical Archives of the Hungarian State Security on professional employees, collaborators and operative personnel who worked or were in contact with the Secret Services of the communist regime. Publication of this data would have been necessary to identify these people. The President was concerned that publication would violate the right to protection of personal data guaranteed by Article 59.1 of the Constitution. The President could not identify any constitutional purpose that would have made restriction of this fundamental right necessary and proportionate. He also argued that employees, collaborators and operative personnel played very different roles within the State Secret Services. He therefore initiated a differentiated constitutional review in relation to the groups. The President contended that the amendment does not provide for remedy prior to publication, and this violates the right to remedy guaranteed by Article 57.5 of the Constitution.

Act III of 2003 defines an employee as any person, who was in a professional service relationship with the organisations which produced the documents within the scope of this Act. Both “secret” and “strictly secret” staff members are included. “Collaborator” is defined as any person, who provided reports secretly under cover and using a false name to the above organisations or signed a declaration of being hired to

this effect or was rewarded for this activity. “Operative personnel” are defined as any person described as “voluntary contact” or “occasional contact” by the organisations in question.

II. The Constitutional Court ruled that the Amendment was unconstitutional and could therefore not become effective. In its reasoning the Court relied on its earlier decision (Decision 60/1994 XII. 24), hereinafter referred to as “the precedent”. Here it was emphasised that piercing the veil of the Secret Services Archives does not mean that all data processed in the archives necessarily becomes data of public interest. Whether or not someone’s personal data becomes public depends on whether the person in question is still active in the political sphere. The current provisions of Act III of 2003 strike the correct balance between the right to protection of personal data and freedom of information by applying the following mechanism for a gradual increase in publicity:

- documents processed in the Archives containing no personal data can be freely perused and publicised;
- there is no need for anonymity in documents which are necessary for the identification of employees, operative personnel and collaborators who have an active public life. These can therefore be made public;
- individuals under surveillance, third parties, employees, operative personnel and collaborators can peruse and make public personal data within documentation in the Archives, with which he has an exclusive connection;
- those under surveillance may peruse, but not make public, the data necessary to identify a collaborator, operative personnel or employees with whom he has a connection;
- data can be studied or publicised which records or describes personal contacts established between the person under observation and the third party (including data gathered at personal meetings and in conversation). The consent of the person under surveillance and the third party would have to be obtained.

The Amendment casts aside this gradual approach by granting unqualified priority to the right of freedom of information. The right to protection of personal data can be limited if restriction would serve to protect the right to control over data of persons under surveillance or the requirement in the precedent that data relating to activities of public figures which are against the rule of law is considered data of public interest within the meaning of Article 61 of the Constitution. The Constitutional Court found no constitutional purpose that would have made it necessary for parliament to open all the personal data of employees, collaborators and operative personnel to the public gaze. Anonymity is not necessary for documents which are necessary for the identification of employees, operative personnel and collaborators who are active within the public domain. These can therefore be made public and somebody under surveillance may peruse but not publicise the data necessary for identifying a collaborator, an operative or an employee with whom he has a connection. The precedent requires no further publicity and so this type of unqualified publicity of personal data violates Article 59.1 of the Constitution.

The Constitutional Court considered the right of remedy. It concluded that the decision concerning the publication of personal data on the website of the Archives counts as an official decision within the meaning of Article 57.5 of the Constitution. Since the legislation failed to provide procedural guarantees as to the genuine nature of the published personal data, Article 8 of the Amendment violates Article 57.5 of the Constitution.

Cross-references:

- Decision no. 60/1994, *Bulletin* 1994/3 [HUN-1994-3-019].

Languages:

Hungarian.

Identification: HUN-2005-3-008

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 14.11.2005 / **e)** 41/2005 / **f)** / **g)** 2005/142 / **h)**.

Keywords of the systematic thesaurus:

4.6.8.1 **Institutions** − Executive bodies − Sectoral decentralisation − Universities.
5.4.1 **Fundamental Rights** − Economic, social and cultural rights − Freedom to teach.
5.4.2 **Fundamental Rights** − Economic, social and cultural rights − Right to education.
5.4.21 **Fundamental Rights** − Economic, social and cultural rights − Scientific freedom.

Keywords of the alphabetical index:

Autonomy, higher education institution / University, restructuring / University, dissolution / University, decision-making body / University, minister of education, authority.

Headnotes:

Scientific, teaching and studying activities can enjoy autonomy and independence, as can operational, economic and restructuring activities carried out by institutions of higher education. It is not necessarily unconstitutional if certain efficiency criteria are taken into account in the course of distributing state subsidies provided these stand up to scientific scrutiny. These criteria can never be based only on considerations of market utility or political expedience. It is also not unconstitutional to supervise the scientific or teaching activity of higher education institutions on economic grounds or to order certain efficiency measures.

Summary:

I. On 23 May 2005 Parliament passed a new Act on higher education (hereinafter referred to as "the Act"). The President of the Republic referred the Act, which had been adopted but not promulgated, to the Constitutional Court for review. The President was concerned that the new strategic decision-making bodies, the institutional councils of the state-run higher education institutions introduced by the Act, would receive powers which could violate the autonomy of higher education institutions, and therefore also Article 70/G.1 of the Constitution. Article 70/G.2 states that only scientists are entitled to decide upon questions of scientific truth and to determine the scientific value of research. The President accordingly suggested that it would be unconstitutional if the Government were authorised to decide which scientific fields can launch doctoral programmes. Another provision within the Act empowers the Minister of Education to restructure or dissolve a higher education institution if it does not comply with the requirement of economic and rational management. This can happen if the higher education institution exceeds its budget. The President suggested this provision might contravene Article 70/G of the Constitution. The authority given to the Minister could also run against Articles 57.1 and 70/K of the Constitution, since no remedy is provided against such decisions. Finally, he suggested that the requirement of legal certainty could be infringed, as it was not clear when the Act was to become effective and the old act on higher education would lose its effect.

II. The Court concurred with the concerns voiced by the President and ruled that the Act is unconstitutional and cannot become effective.

According to the Act, the provisions of the old act on higher education were only to be applied from the day the Act was to come into force, namely 1 September 2005. If the Act had not been introduced, this would clearly contravene the requirement of certainty, as laid down by Article 2.1 of the Constitution.

The Court based its reasoning as to the autonomy of state-run higher education institutions on its earlier decisions. In Decision 34/1994 (VI. 24) it emphasised that freedom of scientific and artistic expression and the freedom to learn and to teach fall within the scope of fundamental communication rights.

In Decision 861/B/1996 the Court ruled that higher institutions are entitled to exercise these freedoms, thus ensuring for professors, researchers and students the freedom of teaching, research, study and creative artistic activity.

The structure of the new strategic decision-making body, the institutional council, was considered. The Senate of the higher education institution appoints more than half of the members of the institutional council; the Minister of Education appoints other members. The president of the institutional council is the Rector. With the exception of the rector, students or employees of the institution cannot be members of the institutional council. Members of the council do not have to be involved in teaching or to have a scientific degree. Specialisation in the given field is a precondition only in a few cases. The Court concluded that the institutional council cannot be regarded as a self-governing body of the higher education institution. It does, however, have several powers with a direct impact on the scientific environment of the institution. Consequently, handing over of strategic powers over innovative research and development and the Council's right to restructure or dissolve uneconomically operating units or activities within an institution contradicts Article 70/G of the Constitution. The institutional council would otherwise be free to subordinate scientific, teaching and research activities to its own self-defined market considerations.

The Court also found the Government's power to decide upon those scientific fields that can launch doctoral programs is at variance with the Constitution. It jeopardises the possibility of receiving scientific degrees in certain fields and undermines the professionalism of certain areas of science.

The provisions authorising the Minister of Education to restructure or dissolve a higher education institution in certain cases were also found unconstitutional. The Minister could dissolve an institution either if:

1. it does not comply with the requirement of economic and rational management (for instance if it exceeds its budget) or

2. the entrance examinations are unsuccessful in three consecutive years. This would happen if the actual number of students does not amount to seventy per cent of the number of students who can theoretically be admitted to the institution.

The Court stressed that the requirement to comply with economic and rational management does not necessarily violate the Constitution. However, this requirement has to be defined in a normative way that corresponds with scientific considerations.

Precise normative conditions would dictate that the future operation, restructuring and dissolving of higher education institutions would fall within the authority of the Minister of Education. The centralisation of these competences to the management supervisor encroaches upon institutional autonomy and therefore contradicts Article 70/G of the Constitution.

Since the Minister of Education cannot theoretically have such functions the Court did not review that part of the Act pertaining to the availability of legal remedies against such management supervisory acts.

Supplementary information:

Justice Kovács gave a concurring opinion. In his view, the Court should have examined *ex officio* the compliance of the provisions with the international obligations Hungary has to fulfil.

Justice Kiss gave a dissenting opinion. He contended that the new act on higher education sets out clearly the conditions under which the Minister of Education can reorganise and dissolve higher education institutions. The Minister's power is therefore not arbitrary. He went on to say that the provisions concerning the new strategic decision-making body – the institutional council – are also in harmony with the Constitution. The state has a duty to provide an effective system of higher education and, in so doing, it has the right and the duty to ensure that the system is productive. The fact that the institutional council cannot be regarded as a self-governing body of the higher education institution is not in itself contrary to the Constitution. Such a council, even if it is outside the higher education system, can safeguard the freedom of science and could also counteract the danger of stagnation within a higher education institution.

Cross-references:

- Decision no. 34/1994, *Bulletin* 1994/2 [HUN-1994-2-010].

Languages:

Hungarian.

Identification: HUN-2005-3-009

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 14.11.2005 / **e)** 42/2005 / **f)** / **g)** 2005/149 / **h)**.

Keywords of the systematic thesaurus:

1.3.1.1 **Constitutional Justice** − Jurisdiction − Scope of review − Extension.
1.3.5.12 **Constitutional Justice** − Jurisdiction − The subject of review − Court decisions.
3.4 **General Principles** − Separation of powers.
3.9 **General Principles** − Rule of law.
3.13 **General Principles** − Legality.
4.7.4.3.1 **Institutions** − Judicial bodies − Organisation − Prosecutors / State counsel − Powers.
4.7.7 **Institutions** − Judicial bodies − Supreme court.
5.2.2 **Fundamental Rights** − Equality − Criteria of distinction.
5.3.39 **Fundamental Rights** − Civil and political rights − Right to property.

Keywords of the alphabetical index:

Supreme Court, uniformity decision, review / Prosecution, obligatory nature / Prosecution, crime, task of the prosecutor / Prosecutor, power, exercise, other state organs.

Headnotes:

The Court has, for the first time, reviewed the constitutionality of a uniformity decision by the

Supreme Court. Uniformity decisions by the Supreme Court aim at securing a uniform and comprehensive interpretation of certain laws, and according to Article 47.2 of the Constitution, they are binding upon lower courts.

Summary:

I. Certain provisions of Act XIX of 1998 on Criminal Procedures (hereinafter referred to as "the Act") governing the position of aggrieved parties and private prosecutors and the uniformity decision on this point by the Supreme Court were challenged on the following grounds:

> The state represents the interests of all citizens. When it is party to criminal proceedings, it is performing this duty. The task of prosecuting crimes usually falls to the public prosecutors. The wording of the Act does not reflect this notion. The definition of the aggrieved party and his right to substitute the public prosecutor in certain cases suggest that the institution of private prosecutor has the sole purpose of enforcing private interests. In extreme situations – if state property rights are in jeopardy – the state itself can act as a private prosecutor. For these reasons, this right is limited to natural and legal persons. The Chief Prosecutor of Hungary petitioned the Constitutional Court to assess the constitutionality of Part I of the uniformity decision. As concerns Part II of the uniformity decision, the petitioner argued that insufficient distinction was drawn in the decision to the difference between the state being directly affected by a crime or only through one of its organs. The suggestion was made that as the uniformity decision contains terms that are not precisely defined, it contravenes the principle of rule of law.

II. The Court reviewed the meaning attributed to the disputed provision of the Act by the uniformity decision and its compliance with the Constitution. The Court emphasised that the defence of society's legal order is primarily the task of the state, and thus the state has an obligation to prosecute crimes. This obligation stems from the principle of rule of law and the right to a fair trial. Prosecution by its very nature affects individual rights, so it must be strictly defined, both substantially and procedurally. The public prosecutor and the accessory private prosecutor have different roles in criminal proceedings. Private prosecutors do not have to take on the constitutional burdens of the public prosecutor neither do they have to be objective. The Court also looked at issues relating to the right to peaceful enjoyment of property and the prohibition on discriminating between public and private forms of property without sufficiently serious constitutional justification. This could result in heavier sanctions in the case of certain forms of public property.

The Court found that although the provisions of the Act were in line with the Constitution, the interpretation the uniformity decision gave to them did not comply with it. It empowered organs and institutions to take on a prosecutor's role, which are not entitled by the Constitution to do so. This authorisation is at odds with the principle of separation of powers and infringes the constitutional status of public prosecutors. The uniformity decision unnecessarily limits the constitutional protection offered by the public prosecutor acting under its constitutional mandate. The role of prosecution cannot be vested in any other state organ than the public prosecution: it is unacceptable that in cases where there is no basis for public prosecution, another state organ takes over the task as an accessory private prosecutor.

Furthermore, Article II of the uniformity decision is unconstitutional. It effectively creates a new norm, and goes beyond the boundaries of interpretation.

Supplementary information:

Justice Harmathy gave a dissenting opinion. In his opinion, the uniformity decision does not create a new legal norm, but simply interprets the provisions of the Act. Therefore, the Court should not have overturned the uniformity decision. Justice Tersztyánszky, in a separate opinion, asserted that the Constitutional Court did not have competence to review the constitutionality of a legal norm's judicial interpretation. If a legal norm with a given content is unconstitutional, then the Constitutional Court should annul the legal norm itself.

Languages:

Hungarian.

Identification: HUN-2005-3-010

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 14.11.2005 / **e)** 43/2005 / **f)** / **g)** 2005/149 / **h)**.

Keywords of the systematic thesaurus:

3.16 **General Principles** − Proportionality.
3.19 **General Principles** − Margin of appreciation.
5.3.1 **Fundamental Rights** − Civil and political rights − Right to dignity.
5.3.32 **Fundamental Rights** − Civil and political rights − Right to private life.
5.4.19 **Fundamental Rights** − Economic, social and cultural rights − Right to health.

Keywords of the alphabetical index:

Sterilisation, voluntary, limitation.

Headnotes:

Individuals are free to make choices – in line with the limitations laid down by the Constitution – over family life, marriage and child rearing. The state cannot assume responsibility for individuals' decisions on contraception and the advantages and disadvantages of the various means. This would be paternalism on an unjustified scale.

Summary:

I. Two petitions requested the constitutional review of the legal regulation of voluntary sterilisation. Article 187.2 of the Act on Health Care of 1997 (hereinafter described as "the Act") prevents those under thirty five or with less than three children from undergoing voluntary sterilisation. One of the petitions suggested that such an unjustified restriction on the basis of age and number of children infringed the right to human dignity guaranteed in Article 54.1 of the Constitution. The other petition invoked Article 70/A of the Constitution, on the prohibition of discrimination, as the provisions in the Act are arbitrary and discriminatory. Article 187.5 of the Act obliges the spouse or partner of someone wanting to undergo this procedure to be informed and to consent to voluntary sterilisation. The petitioners argued that this violates the right to private life, as it compels the person asking for sterilisation to share this intimate and momentous decision with another person.

II. First, the Court looked at the rules on voluntary sterilisation in other democratic countries. With only a few exceptions, legislators have left ample room for manoeuvre in the exercise of the right to self-determination. Thus, anybody capable of making decisions in a legal sense is entitled to voluntary sterilisation, regardless of age, marital status and number of children. However, the age limit for decisions about voluntary sterilisation is not necessarily the same as the general age limit for capability of making one's own decisions.

The majority opinion emphasised that human dignity involves the right to self-determination and the ability to make choices, based on free and informed consent, over one's own body and fate. The Court proceeded to examine the conditions the Act imposes on voluntary sterilisation, from the point of view of the right to self-determination.

States may wish to impose restrictions for demographic reasons and their obligation to protect health. The judges took the view that preventing disadvantageous demographic trends is a legitimate legislative aim, but in a democratic state this cannot be achieved by the restriction of the right to self-determination. It could instead be achieved by regulating payment of public taxes, social politics, and the development of a culture of birth control. Restriction of the right to self-determination is clearly an unnecessary means in this context.

With regard to the state's obligation to protect health, the Court found that the articles of the Constitution governing the protection of children (Article 67.1 of the Constitution), the protection of the interests of the young (Articles 16 and 67.3 of the Constitution) and the state's obligation to protect health (Article 70/D of the Constitution) have to be taken into account. It is possible that the Act excludes a group of legally capable persons from exercising this kind of right to self-determination, on the basis that persons under restriction do not have any element of choice over voluntary sterilisation.

The Court found the provision of the Act making the possibility of voluntary sterilisation dependent on the number of children unconstitutional. It is not for the state to decide on the ideal number of children its citizens should have.

The Court was of the opinion that on the basis of the Constitution it was not unreasonable for the Act to prohibit surgical operations which were not necessary and which could damage health. Voluntary sterilisation, however, could not be viewed simply as an operation resulting in the damage of health. The aim of voluntary sterilisation was not necessarily the protection of health. Besides the individual's physical health their mental state, family and other circumstances had to be taken into account. There is no provision in the Act for weighing other circumstances.

In view of the above, the Court declared that the state's obligation to protect health can allow it to restrict voluntary sterilisation with the purpose of

birth control. However, Article 187.2 of the Act exceeds the limits that are made justifiable by constitutional aims. The Court could not pronounce upon the specific legal regulations the protection of the interests of the young and securing the capacity to make decisions might require, but in the present case it could only conclude that the stipulation that the person must already have three children was out of proportion to the legitimate aims, and accordingly unconstitutional.

The drafting of the provision meant that the Court could not evaluate the two individual legal conditions in isolation. If the phrase which had been ruled unconstitutional "having given birth to three children" was removed, the provision would be more restrictive than ever. It would result in people under thirty five being unable to opt for voluntary sterilisation even if they had already given birth to three children.

Article 187.5 of the Act, dealing with the duty to inform a spouse or partner, was not found unconstitutional by the Court. Only the person requesting voluntary sterilisation takes the decision, and so the spouse or partner has no real right to consent or refuse. The Court pointed out that it had only studied this provision in the light of Article 54.1 of the Constitution. It had not looked at the right to privacy and the protection of personal data under Article 59.1.

Three Justices gave dissenting opinions. Justice Harmathy put more emphasis on the state's obligation to protect health than the majority. The age limit of voluntary sterilisation is based on medical experience. The restriction based on the number of children is required by the financial and other difficulties of larger families. Therefore, neither restriction could be held arbitrary.

Justice Vasadi's dissenting opinion emphasised that voluntary sterilisation not done for reasons of health can result in a deficiency which damages human dignity, and which is not included in the right to self-determination. There are other means of birth control which do not include final handicap or damage of health and so the restriction of voluntary sterilisation could not be questioned constitutionally.

Justice Kovács in his dissenting opinion emphasised that voluntary sterilisation was practically final, as fertility could only very rarely be restored. Infertility treatment has to be paid for and so the possibility to reverse decisions made thoughtlessly or in a different situation is only available for wealthier families.

Languages:

Hungarian.

Italy
Constitutional Court

Important decisions

Identification: ITA-2005-3-003

a) Italy / **b)** Constitutional Court / **c)** / **d)** 28.11.2005 / **e)** 432/2005 / **f)** / **g)** *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 07.12.2005 / **h)** CODICES (Italian).

Keywords of the systematic thesaurus:

3.20 **General Principles** − Reasonableness.
5.1.1.3 **Fundamental Rights** − General questions − Entitlement to rights − Foreigners.
5.2.2.4 **Fundamental Rights** − Equality − Criteria of distinction − Citizenship or nationality.
5.3.6 **Fundamental Rights** − Civil and political rights − Freedom of movement.
5.4.3 **Fundamental Rights** − Economic, social and cultural rights − Right to work.
5.4.19 **Fundamental Rights** − Economic, social and cultural rights − Right to health.

Keywords of the alphabetical index:

Disabled person, benefit, right / Transport, public, disabled, benefits.

Headnotes:

The exclusion of foreigners from social benefits for the disabled (free public transport) is unreasonable since the measure is aimed at disabled persons, owing to the limitations inherent in their condition, and it should not be possible to exclude certain disabled persons on grounds of nationality.

Summary:

The Administrative Court of Lombardy raised the issue of the constitutionality of a Lombardy Region law which granted civilian disabled persons resident in the region the right to use public transport free of charge but did not include resident foreign nationals among those able to benefit from this scheme. The court criticised the inconsistency between this provision and Article 32 of the Constitution, which describes the right to health as a "fundamental right of the individual" and draws no distinction between nationals and foreigners; Article 3 of the Constitution, because different treatment of individuals in the same situation of disability, without any justification, conflicts with the principle of "reasonableness" embodied in that article; Article 35 of the Constitution, which, in protecting work, implicitly encourages measures to facilitate access for disabled persons to medical treatment to restore them to health, since that is a prerequisite for returning to work; Article 117.2.a of the Constitution, because the impugned provision, by introducing different rules for nationals and foreigners, violates the constitutional requirement that national law should determine the basic level of benefits relating to civil and social rights, which are to be guaranteed throughout the national territory.

The Court held that the constitutionality issue was well-founded.

The rationale behind the measure granting free use of public transport is to facilitate access to local means of transport for anybody suffering from a serious disability: it is a social measure designed to improve their living conditions.

The Lombardy Region referred in its defence to the case-law of the Constitutional Court condemning all discrimination between nationals and foreigners in all cases where inviolable rights are concerned (Judgment no. 62 of 1994, among many others). Parliament may enact rules applicable only to nationals (or only to foreigners) provided that the enjoyment of those fundamental rights is not affected.

Where the right to health is concerned, the Court has ruled in favour of granting a "hard core" of rights to foreigners, regardless of whether or not they comply with the rules governing admission to and residence in the territory of the state. This means that even if a foreigner's presence in Italy is unlawful, he or she is entitled to receive any emergency care needed (Judgment no. 252 of 2001, *Bulletin* 2001/2 [ITA-2001-2-006]). In the case before the Court, the Lombardy Region argues that the right to free transport is not a constitutional requirement and does not constitute a "basic level of benefits relating to civil and social rights", which must be determined by the state (Article 117.2.m) and it falls outside the jurisdiction of the region.

The measure adopted by the region is therefore not intended primarily to meet travel needs for health or work reasons, but falls within the category of social measures pertaining to the principle of solidarity. The Lombardy region believes that since fundamental

rights are not at issue it is perfectly legitimate to weigh the granting of the benefit to the greatest possible number of people against necessarily limited funds.

The Court points out, however, that in all cases the decision to restrict the benefit must be reasonable: in the instant case, whereas it seems reasonable to require disabled persons to be resident in the region in order to be entitled to the benefit, the Court considers that the exclusion of foreigners is unreasonable since the measure is aimed at disabled persons, owing to the limitations inherent in their condition, and it should not be possible to exclude certain disabled persons on grounds of nationality.

In addition, the Court points out that the consolidated provisions on immigration and the status of foreign nationals (Legislative Decree no. 286 of 1998) lays down, in Article 41, the principle that foreign nationals holding a residence card valid for more than one year and minors entered on the same card are entitled to the same social security benefits as nationals, including those intended, *inter alia*, for disabled persons. This principle is binding on regional parliaments as a "fundamental principle" for the matters falling within their ambit, which include regional transport. Although the division of responsibilities between the state and the regions was modified following the reform of Part V of the Constitution, this principle does not allow for any derogation, unless the regional law introducing a derogation puts forward a case justifying such derogation. This is not the case in the law in question. The law in question must therefore be declared unconstitutional as being inconsistent with Article 3 of the Constitution, owing to a lack of "reasonableness".

Languages:

Italian.

Latvia
Constitutional Court

Important decisions

Identification: LAT-2005-3-006

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 04.11.2005 / **e)** 2005-09-01 / **f)** On the Compliance of the Condition Incorporated in Section 7.1.1 of the Law on State Social Allowances – "if this person is not employed (is not considered to be an employee or self-employed person in accordance with the Law on State Social Insurance) or is employed and is on parental leave" with Articles 91, 106 and 110 of the Republic of Latvia *Satversme* (Constitution) / **g)** *Latvijas Vestnesis* (Official Gazette), no. 189(3335), 08.11.2005 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

1.6.5.5 **Constitutional Justice** − Effects − Temporal effect − Postponement of temporal effect.
3.16 **General Principles** − Proportionality.
3.17 **General Principles** − Weighing of interests.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.44 **Fundamental Rights** − Civil and political rights − Rights of the child.
5.4.14 **Fundamental Rights** − Economic, social and cultural rights − Right to social security.

Keywords of the alphabetical index:

Childcare, allowance / Family, protection, social and economic / Employment, work, part-time.

Headnotes:

The provision in dispute restricts the right of part-time workers to receive childcare allowance. In so doing, it denies the right to social and economic protection for the family in case of childbirth, which is guaranteed in Article 110 of the Constitution and in other legislation.

Such a restriction is incompatible with Article 110 of the Constitution. Whilst the means chosen by the legislator are on the whole appropriate for reaching a legitimate aim, they create fundamental restrictions

on human rights. The legitimate aim could be reached by means with a less restrictive effect.

Summary:

I. The claimants were entitled to childcare allowances, by virtue of the Law on State Social Allowances. However, they had to choose whether to receive them while on parental leave or whether to continue their professional activities, combining them with childcare. The claimants chose to continue with their professional activities, as this would have a profound impact on their future lives and those of their families, and to do this on a part-time basis. They managed successfully to combine work with childcare. However, families in the situation described above are denied state social allowance.

The claimants drew attention to the condition incorporated into Section 7.1.1 of the Law on State Social Allowances "if the person is not employed (is not considered to be an employee or a self-employed person in accordance with the Law "On State Social Insurance") or is employed and is on parental leave" (hereinafter referred to as "the impugned norm"). They argued that this was incompatible with Articles 91, 106 and 110 of the Constitution.

The claimants also suggested that the impugned norm restricts the rights established in Article 106 of the Constitution, because it forces parents to give up work if they wish to receive a childcare allowance.

They argued that Article 110 of the Constitution establishes that the State shall provide the best possible conditions for the family – for parents and children. The impugned norm is at variance with this principle, as it protects the interests of newborn babies on a short term basis but does not protect the interests of the family in the long term. The claimants submitted that the legitimate aim could be reached by using less restrictive measures – for instance by allowing parents to work part-time. They also contended that the impugned norm creates less favourable consequences for one gender, as only women make use of childcare leave and only women can breastfeed a child. This means the fundamental rights set out in Article 91 of the Constitution are also breached.

II. The Constitutional Court explained that Article 110 of the Constitution and the international conventions to which Latvia is a signatory impose a positive duty on the State to create and maintain a system which has as its aim the social and economic protection of the family. Such a system has been created in Latvia, and several types of allowance are established within the legislation, ensuring material allowances for families. The legislator, in dealing with the rights of a family, has allowed for several protection mechanisms such as benefits and grants. These rights have become individual rights. A person may require realisation of these rights from the State and may also defend them in Court.

The Court stated that in restricting the right of part time workers to receive childcare allowance, the impugned norm denies the right to social and economic protection of the family in the sphere of childbirth, which is guaranteed in Article 110 of the Constitution and other legislation. Such a restriction should be viewed as a restriction of the fundamental rights guaranteed under the Constitution. The Court therefore had to assess whether the restriction within the impugned norm meets the following requirements:

a. Is it governed by law?
b. Is it necessary in order to achieve a legitimate aim of the State?
c. Does it comply with the principle of proportionality?

The Court ruled that the restriction is governed by law and that the impugned norm (amounting to a prohibition on working) does have a legitimate aim, namely the protection of the rights of a child. The idea behind the restriction is to make sure that parents take adequate care of their child until it reaches its first birthday.

The Court took the view that the means, chosen by the State are directed towards reaching the legitimate aim. However, there may be other cases where being employed on a part-time basis could be very important for the claimant of an allowance, in terms of maintaining their professional qualifications and being able to access the job market again at an appropriate level at the end of parental leave. Although the means chosen by the legislator are on the whole appropriate for reaching the legitimate aim, they have the effect of creating fundamental restrictions on the realisation of human rights.

The Court emphasised that the legitimate aim could be reached by means which were less restrictive of human rights.

The provision included in Section 7.1.1 of the Law on State Social Allowances– "if this person is not employed (is not considered to be an employee or self-employed person in accordance with the Law on State Social Insurance) or is employed and is on parental leave" was held to be incompatible with Article 110 of the Constitution and null and void from 1 March 2006.

With regard to the claimants in the case in point, it was held that the above provision is incompatible with Article 110 of the Constitution and null and void with effect from 8 March 2005.

Cross-references:

- Case no. 2004-02-0106, 11.10.2004, *Bulletin* 2004/3 [LAT-2004-3-007].

Languages:

Latvian, English (translation by the Court).

Identification: LAT-2005-3-007

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 21.11.2005 / **e)** 2005-03-0306 / **f)** On the Compliance of the Cabinet of Ministers' Regulations no. 417 of 22 April 2004 on "Amendments to the Cabinet of Ministers' Regulations no. 74 of 19 February 2002 "The Payment Procedure for the Labour of Inmates at the Institutions of Imprisonment" with Articles 91 and 107 of the Latvian Constitution and Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms / **g)** *Latvijas Vestnesis* (Official Gazette), no. 189(3347), 25.11.2005 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

3.4 **General Principles** − Separation of powers.
3.12 **General Principles** − Clarity and precision of legal provisions.
3.13 **General Principles** − Legality.
4.6.2 **Institutions** − Executive bodies − Powers.
5.1.1.4.3 **Fundamental Rights** − General questions − Entitlement to rights − Natural persons − Prisoners.
5.2.2 **Fundamental Rights** − Equality − Criteria of distinction.
5.4.5 **Fundamental Rights** − Economic, social and cultural rights − Freedom to work for remuneration.

Keywords of the alphabetical index:

Prisoner, wage / Salary, minimum / Wage, minimum / Remuneration, fair, principle.

Headnotes:

Until the legislator has decided, both legally and politically, that a different wage can be set for work of the same importance or quality, carried out by convicted persons as compared with other persons, employed under contracts and until the legislator has authorised the Cabinet of Ministers to set such a wage, the Cabinet of Ministers is not competent to set a different minimum wage for convicted persons.

Summary:

I. Section 51 of the Latvian Penalty Execution Code contains a provision to the effect that convicted persons shall be paid under the procedure determined by the Cabinet of Ministers for the work they do. It goes on to say that the minimum monthly salary of a convicted person and the minimum hourly rate shall not be less than 40% of the State minimum monthly salary (calculated on an hourly rate), as determined by the Cabinet of Ministers. It further states that a convicted person shall receive a salary in the amount of 40% of the monthly salary (calculated at an hourly rate) of an employee, which has been calculated in accordance with the legislation governing the payment of salary to employees of institutions financed by the state budget.

Several prisoners submitted a constitutional claim, contending that the setting of different rates of pay for work of equal importance or quality is at variance with the principle of fair remuneration for labour, as set out in the Constitution and various international instruments.

The Cabinet of Ministers argued that convicted persons have a specific legal status, determined by separate legal regulations. Convicted persons do not automatically enjoy the same employment rights or social guarantees as employees in general.

Under Article 107 of the Constitution, every employed person has the right to receive commensurate remuneration for the work they do, which shall not be less than the minimum wage established by the State. They are also entitled to paid annual leave. The Constitutional Court was asked to assess whether the impugned norm complies with the right incorporated in Article 107 of the Constitution, namely to receive commensurate remuneration which is not less than the minimum wage established by the State.

II. The Constitutional Court pointed out that the Cabinet of Ministers has established the minimum wage to be paid to convicted persons, in the

impugned norm. This norm will only be compatible with Article 107 of the Constitution if the regulations in which it is contained have been enacted under the correct procedure. Such a conclusion can be drawn because Article 107 of the Constitution does not *expressis verbis* determine the minimum wage, but indicates that the minimum wage shall be set by the State. The legislator's authority to set the minimum wage is included in the Constitution. Article 107 determines that the decision on the minimum wage is to be taken by the legislator and thus employers are prohibited from paying smaller wages than those set out in the legislation.

The Court emphasised that the impugned norm could only be regarded as a normative act, issued under due procedure, if the Cabinet of Ministers' Regulations complied with the following provisions.

Firstly, the Cabinet of Ministers must have specific legal authorisation from the legislator to issue regulations. The authorisation will direct the content of the regulations.

Secondly, the Cabinet issues Regulations to promote the implementation of law. Norms cannot be regarded as remedies for the way the law is implemented and should not therefore be included in Regulations.

Thirdly, the Cabinet can only issue Regulations in certain instances, governed by law and within the framework of the law. These Regulations must be compatible with the Constitution and with other legislation.

Fourthly, Cabinet Regulations must be published and clearly formulated, so that those affected by them can understand their rights and obligations.

In passing this norm, the Cabinet of Ministers did not observe the limits of the authorisation and thus the decision they took on minimum wages for prison inmates was *ultra vires*. The impugned norm should not therefore be considered as a legal norm, passed under due procedure, and it is at variance with Article 64 of the Constitution.

The Court declared the impugned norm to be incompatible with Article 64 of the Constitution and to be null and void from the moment of its publication.

Cross-references:

- Case no. 2004-03-(98), 10.06.1998, *Bulletin* 1998/2 [LAT-1998-2-004];
- Case no. 2003-05(99), 01.10.1999, *Bulletin* 1999/3 [LAT-1999-3-004];
- Case no. 2000-07-0409, 03.04.2001, *Bulletin* 2001/1 [LAT-2001-1-002];
- Case no. 2002-01-03, 20.05.2002;
- Case no. 2002-04-03, 11.10.2002, *Bulletin* 2002/3 [LAT-2002-3-008];
- Case no. 2003-15-0106, 23.04.2004, *Bulletin* 2004/1 [LAT-2004-1-004].

Languages:

Latvian, English (translation by the Court).

Liechtenstein
State Council

Important decisions

Identification: LIE-2005-3-004

a) Liechtenstein / **b)** State Council / **c)** / **d)** 31.10.2005 / **e)** StGH 2004/76 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

3.12 **General Principles** − Clarity and precision of legal provisions.
3.16 **General Principles** − Proportionality.
3.17 **General Principles** − Weighing of interests.
3.18 **General Principles** − General interest.
5.4.4 **Fundamental Rights** − Economic, social and cultural rights − Freedom to choose one's profession.
5.4.6 **Fundamental Rights** − Economic, social and cultural rights − Commercial and industrial freedom.

Keywords of the alphabetical index:

Authorisation, refusal, grant / Licence, to practise a trade, conditions / Licence, lack, penalty.

Headnotes:

Freedom of trade and industry is a guarantee against interference with the freedom to choose and practise an occupation where such interference does not comply with the conditions under which that freedom may be infringed, namely the existence of a sufficiently clear legal basis and a sufficient public interest, proportionality and compliance with the hard core provisions.

It is not easy to infer a legal basis from the Constitution for the strategy of requiring commercial service providers, by means of constraints, to have certain vocational qualifications and demonstrate these by means of examinations and practice, except in cases where there is a danger (police protection of property). If this question remains unresolved, it is up to Parliament to specify its approach to the matter by means of legislation.

The legal basis for restricting freedom to choose an occupation must clearly specify the self-employed activities where such restrictions exist. In the case of serious interference that has repercussions on the freedom to choose an occupation, it is necessary to lay down strict requirements as regards legal bases. Specifying that the occupations subject to authorisation are those for which special vocational knowledge is required does not constitute a sufficiently clear legal basis, since not all the occupations involving an activity subject to authorisation are sufficiently well defined.

Given the principle of proportionality, it is not possible to require presentation of a certificate of competence for the performance of every single occupational task (partial performance of work) involved in an occupation in respect of which there is provision for apprenticeship when the performance of that work is connected with another activity that requires authorisation or must be declared.

Summary:

I. In the course of criminal proceedings for an offence against the Law on Craft, Commercial and Industrial Occupations, against a business that engaged in flower-arranging and made bouquets without a licence, the proceedings were interrupted and the issue of the constitutionality of Section 5.a of the Law on Craft, Commercial and Industrial Occupations and Rule 4 of the relevant rules was submitted to the State Council. Under Section 5.a of the Law on Craft, Commercial and Industrial Occupations, it is compulsory to obtain authorisation for activities requiring special vocational knowledge.

II. The State Council considered it shocking that people lawfully practising as florists, an occupation for which authorisation is not needed, be required to prove that they had knowledge corresponding to that acquired through several years' apprenticeship to a florist, on penalty of being prohibited from preparing bouquets. This is an activity that does not entail dangers beyond the risks inherent in daily life, and lack of the knowledge in question does not seriously undermine the objective of encouraging and maintaining a high standard of vocational training. This objective cannot therefore take precedence over the private interest represented by the florist's business.

The State Council therefore repealed, on grounds of unconstitutionality, Section 5.a of the Law on Craft, commercial and industrial occupations and Rule 4 of the rules on craft, commercial and industrial occupations because it undermined freedom of trade and industry.

Languages:

German.

Lithuania
Constitutional Court

Important decisions

Identification: LTU-2005-3-006

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 19.09.2005 / **e)** 19/04 / **f)** On the procedure for control of information not to be divulged to the public and dissemination of limited public information stored in computer networks used by the public / **g)** *Valstybės Žinios* (Official Gazette), 113-4131, 22.09.2005 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.13 **General Principles** − Legality.
3.18 **General Principles** − General interest.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.13.3 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Access to courts.
5.3.21 **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:

Media, Internet, service provider / Internet, service provider, liability / Information, restriction.

Headnotes:

The freedom to express convictions, and to obtain and impart information, may only be restricted by law if it is necessary to protect the constitutional values set out in Article 25.3 of the Constitution, namely human health, honour and dignity, private life and morals and constitutional order. The constitutional concept of freedom of information does not, as suggested, embrace the freedom to perpetrate the criminal actions specified in Article 25.4 of the Constitution, that is to say, to promote the type of beliefs which stir up national, racial, religious or social hatred, violence and discrimination, as a result of which people are slandered or where society or its individual members are otherwise misinformed. Neither does the concept of constitutional freedom of information embrace war propaganda. This is prohibited by Article 135.2 of the Constitution.

The Constitution imposes a duty on the legislator to regulate the seeking, obtaining and dissemination of information in such a way as to safeguard the basic human right of freedom of information (including, by implication, freedom of electronic media) whilst at the same time protecting and defending constitutional rights.

Article 25.3 of the Constitution requires the legislator, when enacting the law, to define the content of information the dissemination of which is either prohibited or limited, the ways in which dissemination of certain information is prohibited, and other conditions for dissemination of corresponding information if this in any way limits freedom of information. The legislator must also set out in the law sanctions for disregarding such prohibitions and limitations, as well as sanctions for disseminating prohibited information. The law should also identify entities with powers to supervise the observance of the prohibitions and limitations and to disseminate certain information, as well as entities which can apply sanctions for disregarding the prohibitions and limitations. Efficient judicial protection of freedom of information is needed.

The Constitution does not rule out certain measures linked with obtaining and dissemination of information, including the supervision and control of legally-imposed prohibitions and limitations on dissemination of information, something which can also be done by sub- statutory legal acts such as government resolutions. In regulating these activities through resolutions, the Government cannot enact any legislation which is not based upon the Constitution and laws, or which is in conflict with them.

Summary:

I. The Vilnius City Court of the Second District decided to suspend the investigation of an administrative case and petitioned the Constitutional Court to examine Chapters VI, VII and VIII of the Procedure for Control of Information not to be Divulged to the Public and Dissemination of Limited Public Information Stored in Public Use Computer Networks (hereinafter also referred to as “the Procedure”) as confirmed by Government Resolution no. 290 of 5 March 2003. The Constitutional Court was asked whether the Procedure was at variance

with Article 25.3 of the Constitution and Article 53.1 of the Law on the Provision of Information to the Public.

Regulations within Items 12, 14.2 and 16.3 of the Procedure provide that once the Police Department under the Ministry of the Interior has established a breach of the Procedure and after it has informed the information hosting service provider and the network service provider about this, they must disable access to any information stored on the server which is not to be divulged to the public, if it is technically possible to disable the access. Information hosting service providers and network service providers are deemed to know about the information on the server which is not for public dissemination once they are informed about it by the Police Department under the Ministry of the Interior.

The petitioner argued that in the case in point, the decision as to whether the activity of a public information producer or provider must be suspended or discontinued is to be taken under the terms of Item 14.2 of the Procedure and not by a court. At the same time, under Article 53.1 of the Law on the Provision of Information to the Public the activities of a producer and disseminator of public information may be suspended or terminated by a court if the producer and disseminator of public information violate the provisions of this law. The petitioner pointed out that this meant that the disputed norms of the Procedure were in conflict with Article 53.1 of the Law on the Provision of Information to the Public as well as with Article 25.3 of the Constitution under which freedom to express convictions, as well as to obtain and impart information can only be restricted by law.

II. The Constitutional Court stated that the Constitution obliges the legislator to enact legislation which would enable public authority (through its institutions and officials) to act swiftly to prevent the type of behaviour by which, under cover of freedom of information, people can encroach upon the values guaranteed under the Constitution. At the same time, the Constitutional Court emphasised that the Constitution does not rule out certain measures linked with obtaining and dissemination of information, including the supervision and control of legally-imposed prohibitions and limitations on dissemination of information, something which can also be done by sub-statutory legal acts such as government resolutions. The Government, whilst regulating such activities by means of its resolutions, cannot enact any legislation which is not based on the Constitution and law, or any such legal regulation which competes with that established by laws.

The Constitutional Court indicated that:

1. the disputed provisions of the Procedure deal with different matters from those envisaged by Article 53.1 of the Law on the Provision of Information to the Public, which allow for the temporary suspension of termination of the activities of a producer and disseminator of public information;
2. the provision “The Police Department under the Ministry of the Interior must inform the information hosting service provider or the network service provider about the established violation” contained in Item 16 of the Procedure is based upon on the Law on Police Activities. The disputed provision of Item 16 does not establish any limitations on dissemination of information;
3. the disputed provision of Item 14 of the Procedure imposes an obligation on information hosting service providers and network service providers which stems directly from the Constitution, *inter alia* from Article 25.3 and 25.4 of the Constitution;
4. the legal regulation established in Item 12 of the Procedure cannot be interpreted in such a way that the information hosting service provider and network service provider can be held liable solely on the grounds of Item 12 of the Procedure. The provider of information hosting services is liable under the laws establishing liability for storing and dissemination of information which cannot legally be divulged to the public.

The Constitutional Court examined the following provisions within the procedure:

- Item 12 “The information hosting service provider shall be liable for information that he is storing at the request of the founder (manager) of an internet web page and/or the recipient of the service only in the following cases:

  provided he renders the service while possessing factual knowledge of the violations of this Procedure, which are perpetrated by making use of the services rendered by him or his server computer;

  provided he, having learned about the information not to be divulged to the public which is stored in his server computer does not remove it immediately or does not disable access to it, while taking regard of the provisions of Item 14 of the Procedure. ”

- Item 14.2 “Information hosting service providers and network service providers must disable access to the information which is in the server computer in the following cases:

  Provided the information hosting service provider or the network service provider learns about the information not to be divulged to the public which is in the server computer and provided it is technically possible to disable such access.”

- Item 16.3 “The Police Department under the Ministry of the Interior must inform the information hosting service provider or the network service provider about the established violation”.

It held that the provisions were not in conflict with the Constitution and with Article 53.1 of the Law on the Provision of Information to the Public. However, the Court also stressed that the law in this area was very general in nature and that it did not take sufficient account of the internet as a means of disseminating information.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2005-3-007

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 29.09.2005 / **e)** 15/02 / **f)** On the Law on Pharmaceutical Activities / **g)** *Valstybės Žinios* (Official Gazette), 117-4239, 01.10.2005 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.9 **General Principles** − Rule of law.
3.16 **General Principles** − Proportionality.
3.18 **General Principles** − General interest.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.21 **Fundamental Rights** − Civil and political rights − Freedom of expression.
5.3.24 **Fundamental Rights** − Civil and political rights − Right to information.
5.4.19 **Fundamental Rights** − Economic, social and cultural rights − Right to health.

Keywords of the alphabetical index:

Advertising, restriction / Medicine, information, public / Competition, protection.

Headnotes:

The constitutional concept of freedom of information is particularly broad and embraces freedom to seek, obtain and impart a wide variety of information. The concept of freedom of information as set out in the Constitution also includes freedom of advertising, specifically the freedom to advertise goods and services.

The advertising of medicines (whether or not this activity is charged for) is always aimed at encouraging usage of various medicines. In some circumstances, this could cause harm to somebody’s health. Health is of course a value entrenched in, and protected and defended by the Constitution. Misleading information about medicines can also be harmful (in both promotional and non-promotional content). In some cases this can amount to misinformation, the dissemination of which is not covered by the constitutional concept of freedom of advertising.

The Constitution places a duty on the legislator to enact the type of legislation which could prevent the dissemination of information about medicines (of a promotional and a non-promotional nature) which might be harmful to health or which might be misleading. Within this legislation, the legislator must also establish efficient ways of control of advertising of medicines.

Summary:

A group of members of the *Seimas* (the Parliament of Lithuania) petitioned the Constitutional Court to assess whether Article 8 of the Law on Amending Articles 1, 4, 5, 10, 11, 15, 17, 19 and 20 of the Law on Pharmaceutical Activities and Supplemented by Articles 10^1 and 17^1 was in conflict with Articles 25 and 46 of the Constitution.

The petitioner argued that the amendment of Article 17 of the Law on Pharmaceutical Activities gave rise to a prohibition, within Paragraph 4, on the promulgation of information via radio and television about prescription medicines and on the advertising of these medicines. The amendment also resulted in a prohibition of the advertising of prescription

medicines via electronic information media. The petitioner went on to assert that under Article 25.4 of the Constitution, information about medicines can only be held back where this is necessary to protect human health. An outright prohibition on the promulgation of information about prescription medicines is in conflict with Article 25.1 of the Constitution. It was also suggested that a prohibition on advertising prescription medicines creates conditions which distort competition in the market, since other medicines can be advertised and information can be disseminated about them. The petitioner accordingly suggested that the prohibition of the advertising described above was in conflict with the Constitution.

The Constitutional Court emphasised that the prohibition on the advertising of prescription medicines via radio and television and through electronic information media should be assessed as being in place to protect human health, a value established in and defended and protected by the Constitution, and thus it is necessary in a democratic society. The Constitutional Court stated that this limitation on the freedom of advertising, which was established in the Law on Pharmaceutical Activities, was no more extensive than necessary in order to protect human health and so it was not disproportionate to the constitutionally important objective sought. The Constitutional Court concluded that the prohibition on advertising of medicines described above was not at variance with Article 25.3 of the Constitution.

However, the Constitutional Court took a different approach to the assessment of the constitutional compliance of the prohibition on presenting information on prescription medicines via radio and television, as consolidated in Article 17.4 of the Law on Pharmaceutical Activities. The Court concluded that Article 17.4 was at variance both with Article 25.3 of the Constitution and the constitutional principle of the rule of law, insofar as it prohibited the giving of non-promotional information on medicines via radio and television, the giving of which would not give rise to any harm to public health.

With regard to the question of competition, the Constitutional Court stressed that the mere fact that Article 17.4 was in conflict with Article 25.3 of the Constitution and the constitutional principle of the rule of law to the extent outlined above, was not a sufficient basis for recognising that it was also in conflict with the provision “the law shall protect freedom of fair competition” within Article 46.4 of the Constitution. On the one hand, the law prohibits the advertising of prescriptive medicines and so there cannot be any competition as regards their advertising. On the other hand, the established limitations on the giving of information about prescriptive medicines via radio and television, even to the extent that they are in conflict with Article 25.3 of the Constitution and the constitutional principle of the rule of law, neither discriminate nor grant privileges to any economic entities operating in the radio and television market, and so they neither impede nor distort competition in this market.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2005-3-008

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 03.11.2005 / **e)** 02/03-03/03-04/03-05/03-39/03-05/04-16/04-02/05-04/05 / **f)** On the Law on Tobacco Control / **g)** *Valstybės Žinios* (Official Gazette), 131-4743, 05.11.2005 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.9 **General Principles** − Rule of law.
4.7.1.1 **Institutions** − Judicial bodies − Jurisdiction − Exclusive jurisdiction.
5.3.13.1.4 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Scope − Litigious administrative proceedings.

Keywords of the alphabetical index:

Justice, administration / Fine, monetary, proportionality / Fine, minimum, mitigation, exclusion.

Headnotes:

The constitutional principle of justice requires distinction between established penalties for breaking the law (including administrative penalties and pecuniary fines), so that the nature of the breach of the law, mitigating circumstances and different levels of responsibility can be taken into account. As a result, a milder punishment might be imposed than the minimum one prescribed.

The legislator is not empowered under the Constitution to establish any such legal regulations according to which a court, when imposing a pecuniary fine, would not be able to tailor the size of the fine to the circumstances of the perpetrator of the crime, for instance by taking into account the nature and gravity of the crime and its scale, by having regard to the criteria of justice and reasonableness and by assessing whether a particularly large fine might be disproportionate to the crime and thus unfair and whereby courts would not be able to impose a smaller fine than that provided for in the law or to deviate from the strictly-defined sums provided for in the law. This would place a fetter upon the courts' powers to administer justice, which are consolidated in Article 109.1 of the Constitution, and could give rise to conditions which could jeopardise the constitutional right of a person to a fair trial.

Summary:

I. The Vilnius Regional Administrative Court and the Supreme Administrative Court of Lithuania both presented the Constitutional Court with nine different petitions requesting adjudication as to the compliance with the Constitution of certain provisions of the Law on Tobacco Control which established large pecuniary fines (ranging from 5 000 to 50 000 litas) for breach of this Law. Courts investigating administrative cases with a bearing on the relevant articles of this Law had raised doubts as to its compliance with the Constitution. Doubts had also arisen as to whether the sanctions – monetary fines for violations of the Law on Tobacco Control – consolidated in these provisions (referred to as "economic sanctions") were or had been in conflict with the Constitution precisely in the aspect and to the extent that the courts were unable to impose a smaller fine than that set out in the Law, even if there were extenuating circumstances and it was clear that the fine was disproportionately large.

II. The Constitutional Court emphasised that its assessment of the compliance of the disputed provisions of the Law on Tobacco Control with the Constitution was strictly limited to the aspects of the case raised by the petitioners themselves.

The Constitutional Court began by noting that, in Lithuania, under Article 109.1 of the Constitution, justice shall be administered solely by courts, that under Paragraph 2 the judge and the courts shall be independent in the administering of justice, and that under Paragraph 3, judges shall have regard only to the law while considering cases. The Court went on to assert that the penalties established within the legal system must be such that a court is able to administer justice when imposing the penalties. It is essential for the legislator, when adopting a particularly large fine for breaking a law, to make provision for the courts to take account of all mitigating circumstances, including those which are not *expressis verbis* specified in the law, and in such circumstances to impose a smaller fine on the perpetrator of the crime than that set out in the legislation, especially where a large fine would be disproportionate.

The Constitutional Court turned its attention to certain sanctions established in the legislation which are tantamount to criminal punishments by their severity, whether they are attributable to criminal, administrative, disciplinary or other legal liability and irrespective of the way they are described in the law. In such instances, the legislation must provide for procedural guarantees (stemming *inter alia* from Article 31 of the Constitution) to those persons who are held legally liable under corresponding laws. The provisions of Article 31 of the Constitution cannot be construed as being designed only for persons who are held criminally liable. Neither is it permitted to disregard this imperative in cases where the legislation has imposed certain sanctions which may be referred to as "economic sanctions" and which may fall into the category of administrative legal liability, but which, in terms of their severity, are tantamount to criminal punishments. In such cases, procedural guarantees stemming from the Constitution can be established for persons held liable in administrative matters within the legislation setting out these sanctions and other laws pertaining to the administrative liability of citizens and economic entities. The guarantees can also be established in jurisprudence relating to administrative cases and in laws that regulate the activity of courts.

The Constitutional Court held that the provisions of the Law on Tobacco Control were in conflict with Article 109.1 of the Constitution and the constitutional principles of justice and a state under the rule of law, insofar as they restricted the courts' powers to impose a smaller fine upon the perpetrator of a crime than that set out in the legislation, in circumstances where there were mitigating factors and the fine was out of proportion to the crime committed.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2005-3-009

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 10.11.2005 / **e)** 01/04 / **f)** On the Code of Administrative Violations / **g)** *Valstybės Žinios* (Official Gazette), 134-4819, 12.11.2005 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.9 **General Principles** − Rule of law.
5.2 **Fundamental Rights** − Equality.
5.3.13 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial.
5.3.14 **Fundamental Rights** − Civil and political rights − *Ne bis in idem*.

Keywords of the alphabetical index:

Punishment, mitigation, possibility, requirement.

Headnotes:

The constitutional principle *ne bis in idem* does not rule out the possibility that more than one sanction of the same type (that is, defined by norms from the same branch of law) can be applied with respect to the same breach of law.

Under this principle, somebody who has been held liable and has had a sanction imposed on them for an administrative breach of law cannot be held criminally liable for the said deed.

Ne bis in idem does not preclude the possibility of legislation being passed which would result in a stricter sanction being imposed upon somebody who has already been punished for a breach of the law and who commits the same breach again, than upon somebody who commits the same kind of breach for the first time. This type of legislation should not be regarded as giving rise to a situation where somebody could be punished twice for the same deed.

The sanctions set out in law for breaking administrative law have to be just. It is not permissible to create sanctions which would obviously be disproportionate in size in relation to the breach in point and the purpose behind the punishment or penalty. The punishment or penalty imposed by the court must also be just. The Constitution allows courts, when imposing a sanction for a violation of law, to take account of all the mitigating circumstances, including those which are not *expressis verbis* established in law and to impose sanctions upon lawbreakers which are more lenient than those stipulated in the legislation.

Summary:

I. The District Court of Panevėžys City petitioned the Constitutional Court to assess whether Article 163² (and on a separate basis its Paragraph 6) of the Code of Administrative Violations of Law (hereinafter referred to as the CAVL) were in conflict with Articles 29.1 and 31.5 of the Constitution and the constitutional principle of the rule of law.

The petitioner summed up the position as follows. Under Article 163.6² of the CAVL, if somebody has already incurred an administrative penalty in respect of violations set out in Paragraphs 2, 3, 4, 5 or 6 of the article and they then carry out certain other actions set out in Paragraphs 1, 2, 3 and 4, they will be fined between twenty thousand and fifty thousand Litas, and the goods in question will be confiscated. The petitioner pointed out that the fine indicated in Article 163.6² of the CAVL was equal in size to the type of penalty a court might impose for medium or serious crime, and suggested that this fine could be at variance with Article 29.1 of the Constitution and the constitutional principle of the rule of law. The petitioner also claimed that the penalty indicated in Article 163.6² of the CAVL is imposed on somebody who has already been fined for the violations indicated in Paragraphs 2, 3, 4 or 5 of the article, with the result that the person is punished a second time for the same offence. In the opinion of the petitioner, Article 163² and separately Article 163.6² of the CAVL are in conflict with Article 31.5 of the Constitution.

II.1. The Constitutional Court noted that in the provisions under dispute, another administrative violation of law of the type specified in Article 163.2², 163.3 and 163.4 of the CAVL will previously have been committed by somebody and they will already have been punished for this. The Court ruled that the provisions in point were not in conflict with Article 31.5 of the Constitution.

2. The Constitutional Court noted that the constitutional principle of the rule of law would be violated if:

a. legal liability was established in the law for the type of deed that is not dangerous to society and therefore not to be prohibited;
b. a strict sanction (legal liability) was established in the law for a deed which is contrary to law, under which the punishment or penalty imposed on the perpetrator would clearly be disproportionate in size to the breach of law and therefore unjust;

c. those held liable were unable to enjoy their constitutional rights (including the right to due legal process) or were not able to avail themselves of certain rights which, under the law, are enjoyed by other persons in an analogous situation. In the latter case, the constitutional principle of equal rights of persons, as set out in Article 29.1 of the Constitution would also be violated.

a. The Constitutional Court explained that the provisions cover the storage, transportation, usage or realisation of excised goods in violation of the established procedure, as well as trading in such goods without labels or any other specific markings, or with old sample labels, regardless of the value of the illegally stored, transported, used or realised goods. Such activity is to be regarded as detrimental to the economic system of the state and its financial order and it is lawful to seek to stop it, *inter alia* by establishing administrative legal liability for this kind of activity. The provisions under dispute established administrative legal liability.

b. The Constitutional Court stated that the fine established in the disputed provisions was to be considered as a significant one for the perpetrators of the outlawed activity. It went on to say that there was no legal argument to prevent the legislator from establishing fines of the size indicated for the type of anti-social activity targeted in the provisions.

c. The disputed provisions did not govern procedural matters and other guarantees available to those held liable for certain administrative violations of the law. Therefore, it could not be said that the provisions were in conflict in this regard with the constitutional principles of equality of persons and a state under the rule of law.

The Constitutional Court held that the disputed provisions were not in conflict with Article 29.1 of the Constitution and the constitutional principle of a state under the rule of law.

Languages:

Lithuanian, English (translation by the Court).

Identification: LTU-2005-3-010

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 12.12.2005 / **e)** 20/02 / **f)** On the Law on the Reorganization of the Joint-stock Companies *"Būtingės nafta"*, *"Mažeikių nafta"* and *"Naftotiekis"* / **g)** *Valstybės Žinios* (Official Gazette), 146-5332, 15.12.2005 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.9 **General Principles** − Rule of law.
5.3.39.3 **Fundamental Rights** − Civil and political rights − Right to property − Other limitations.

Keywords of the alphabetical index:

Compensation, property / Exception, general regulation / Company, share, obligatory official offer / Company, shareholder, small, property rights.

Headnotes:

The concept of "obligatory official offer" is entrenched within Lithuanian law as a means of protecting shareholders' ownership rights. Certain other legislation states that an obligatory official offer is not to be submitted, even if a shareholder, whether alone or with others, acquires such a number of shares of a joint stock company that he can control the activity of the company. Further legislation is needed which would ensure that the rights of minority shareholders (especially their ownership rights) are protected. Without legal regulation of the type which could ensure compensation for losses, the provisions of Article 23 of the Constitution that guarantee the legal protection of the ownership rights would be disregarded and circumstances could arise where the rights of minority shareholders could be breached.

Summary:

I. The Mažeikiai District Local Court petitioned the Constitutional Court to examine the compliance of Article 3.8 of the Law on the Reorganisation of Joint Stock Companies *"Būtingės nafta"*, *"Mažeikių nafta"* and *"Naftotiekis"* (hereinafter also referred to as "the Law") and Article 4.2 on the non-application of Article 19 of the Law on Securities Exchange with the Preamble to the Constitution and with its Articles 1, 23, 29 and 46. In accordance with the above provisions of the Law, after not having submitted the obligatory offer to buy up the rest of the shares, a general meeting of the shareholders of the joint stock company *"Mažeikių nafta"* was convened on 19 June 2002.

The petitioner argued that the legal regulation established in Articles 3.8 and 4.2 of the Law is designed for the furtherance of private interests of individual persons. General norms which apply to all other persons and which are established in other legislation (notably the Law on the Securities Market), are not applied. These exceptions to the general legal order are at odds with the objective of an open, just and harmonious civil society and state under the rule of law as set out in the Preamble to the Constitution, they contravene the provisions of Article 1 of the Constitution, under which Lithuania is a democratic republic, and they are in conflict with the principle of equality of all persons before the law as consolidated in Article 29.1 of the Constitution. Moreover, according to Article 4.2 of the Law, the minority shareholders of the joint-stock company *"Mažeikių nafta"* were deprived of the right to sell their shares to the majority shareholders who act in cooperation, which the legislator sought to protect by the obligatory offer to buy up the rest of securities of the accountable issuer in Article 19 of the Law on Securities Exchange. That is what every person legitimately and reasonably expects, when he acquires shares from public trading. Thus, the articles in the Law were at variance with Article 23 of the Constitution, which establishes the principles of inviolability of property and just compensation for seizure of property for the needs of society. In the opinion of the petitioner, the legal regulation under dispute also violated Article 46.1, 46.3 and 46.4 of the Constitution.

II. The Constitutional Court noted that there are instances within the legislation where certain provisions protecting individual property rights are not applicable. Where they are not applied, this can jeopardise individual property rights. The legislator has a duty to ensure that the protection of individual property rights can be guaranteed by other means.

In its decision as to whether Article 4.2 of the Law is in conflict with the Constitution to the extent that it establishes that the provisions of Article 19 of the Law on Securities Market are not applicable when concluding and implementing the agreements specified in this paragraph, the Constitutional Court noted that after the exception to the general legal order was established and consolidated in the Law on Securities Market, no compensating legislation was passed to allow for the protection by other means of the rights of minority shareholders (particularly their property rights). According to the Constitutional Court, this alone is sufficient grounds to state that, to the extent that it establishes that the provisions of Article 19 of the Law on Securities Market are not applicable when concluding and implementing the agreements specified in this paragraph and that there are no other provisions which would offer protection of ownership rights of minority shareholders, Article 4.2 of the Law is in conflict with the provision of Article 23.2 of the Constitution that ownership rights are protected by laws and with the constitutional principle of a state under the rule of law.

Having held that Article 4.2 of the Law was in this respect in conflict with Article 23.2 of the Constitution and the constitutional principle of the rule of law, the Constitutional Court did not examine the issue of whether this paragraph (to the extent indicated) was in conflict with Articles 1, 29 and 46 of the Constitution.

The Constitutional Court also emphasised that the legislator's duty, whilst paying heed to the rights of minority shareholders as well as the constitutionally defended public interest of all society, was to enact the type of legislation which would ensure that in the situation highlighted by the shareholders in the joint stock company *"Mažeikių nafta"* and others like it, if minority shareholders experience loss within the reasonable time period set out in the law and they experience them precisely because of the non-submission of the obligatory official offer under Article 4.2 of the Law, such losses will be estimated and compensated.

The Constitutional Court also decided to dismiss that part of the case on Article 3.8 of the Law on the Reorganisation of Joint Stock Companies *"Būtingės nafta"*, *"Mažeikių nafta"* and *"Naftotiekis"*, according to which, "after the obligatory official offer to buy up the rest of the shares was not submitted, a general meeting of the shareholders of the joint-stock company *"Mažeikių nafta"* was convened on 19 June 2002 in the aspect of its compliance with the Constitution of the Republic of Lithuania. To that extent, the petition would be returned to the petitioner.

Supplementary information:

- See Decisions 29/98, 16/99, 3/2000 of 18.10.2000, *Bulletin* 2000/3 [LTU-2000-3-010];
- See Decisions 39/01-21/02 of 17.03.2003, *Bulletin* 2003/2 [LTU-2003-2-004].

Languages:

Lithuanian, English (translation by the Court).

Moldova
Constitutional Court

Important decisions

Identification: MDA-2005-3-005

a) Moldova / **b)** Constitutional Court / **c)** / **d)** 06.10.2005 / **e)** 18 / **f)** Review of the constitutionality of certain provisions of Appendix no. 1 to Government Decree no. 956 of 28 December 1994 on compulsory civil liability insurance for owners of cars and electric urban vehicles / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.4 **General Principles** − Separation of powers.
3.13 **General Principles** − Legality.
4.6.3.2 **Institutions** − Executive bodies − Application of laws − Delegated rule-making powers.

Keywords of the alphabetical index:

Insurance, obligation / Liability, civil / Car, insurance, obligatory.

Headnotes:

The universal right to life, health protection and private property and the equality of all citizens before the law are the highest values of a democratic society and are guaranteed by the Constitution.

Article 55 of the Constitution provides that everyone shall exercise his or her rights and constitutional freedoms in good faith, without violating the rights and freedoms of others.

Article 46.1 of the Constitution, read in conjunction with Article 55, guarantees the right to own private property. Implicit in it is the possibility of exercising the right to own, use and dispose of property, and the obligation to refrain from violating the rights of others.

Summary:

On 15 June 1993, in the course of passing legislation on compulsory civil liability insurance for car owners, parliament passed the Insurance Act (no. 1508-XII), covering the relationship in respect of civil liability insurance between insurance companies and natural persons and other legal entities, and State regulation of insurance activities.

The applicant challenged the provisions in paragraphs 28 and 30 of Appendix no. 1 to Government Decree no. 956 of 28 December 1994 on compulsory civil liability insurance for owners of cars and electric urban vehicles, which set out the conditions for compensation by insurance companies for bodily injury or the death of third parties as a result of road accidents.

During the hearing, the applicant extended the scope of the application to the full text of Appendix no. 1, on the basis that its provisions set general standards and applied to a number of people. Regulation of such relations by government decree therefore violated Article 6 of the Constitution, which concerns the separation of powers.

Given that insurance is inherently an inalienable aspect of the fundamental human right to life, health protection and private property, the government made civil liability insurance compulsory for car owners.

The Act in question is designed to protect the individual and financial interests of natural persons and legal entities through the accumulation of capital made up of insurance premiums. In exchange, the insurer is responsible for paying the insured person the sum insured or compensation in the event of an accident.

Civil liability insurance against damage to third parties caused by road accidents is one example of compulsory insurance. Given that such insurance is compulsory, parliament, in Section 62 of Act no. 1508-XII, required the government to draft and table, within three months, a Bill on compulsory civil liability insurance against damage to third parties caused by road accidents.

It is clear from the content of the Act that parliament's intention was that compulsory civil liability insurance for car owners should be regulated by law.

The application of the provisions of Appendix no. 1, which cover the state of affairs after the occurrence of the contingency which has been insured against, is incompatible with Article 6 of the Constitution and contravenes Article 66.c of the Constitution, which provides that Parliament is responsible for ensuring uniformity in the national legislation. In addition, under Article 102.2 of the Constitution, the purpose of government decrees is to ensure the process of enactment of legislation.

The Constitutional Court had previously held that government decrees should be issued after laws were passed by parliament. The government, as the supreme executive body, in the exercise of its constitutional powers and those deriving from the Government Act, arranges for legislation to be brought into force by issuing a decree elaborating on the law in question and ensuring its correct application.

Government decrees may not contain primary legal rules.

The Court's view was that the provisions in paragraphs 28 and 30 of Appendix no. 1, which apply limits to the amount of compensation, introduce binding primary legal rules, which is contrary to what the law intended.

The Court concluded that the government exceeded the powers assigned to it by Article 102.2 of the Constitution and interfered in the activities of parliament, thereby violating the provisions of Article 6 of the Constitution concerning the separation and co-operation of powers.

In its constitutional review of paragraphs 28 and 30 of Appendix no. 1 to Government Decree no. 956, the Court held that the applicant's request that the constitutional review be extended to the entire text of Appendix no. 1 was in fact unconstitutional.

Paragraphs 28 and 30 of Appendix no. 1 are linked to other provisions setting out the conditions for compulsory civil liability insurance for car owners. Appendix no. 1 lays down the basic principles of compulsory civil liability insurance for owners of cars and electric urban vehicles against damage to the lives, health and property of third parties caused by road accidents. The application of these principles depends on the constitutionality of the provisions in paragraphs 28 and 30.

Exercising its jurisdiction to decide questions of constitutional law, the Constitutional Court held that Appendix no. 1 to Government Decree no. 956 of 28 December 1994 on compulsory civil liability insurance for owners of cars and electric urban vehicles was unconstitutional.

Languages:

Romanian, Russian.

Identification: MDA-2005-3-006

a) Moldova / **b)** Constitutional Court / **c)** / **d)** 22.11.2005 / **e)** 21 / **f)** Review of the constitutionality of the provisions of Sections 9.3 and 11 of Law no. 289-XV of 22 July 2004 on compensation for temporary unfitness for work and other social security benefits / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

5.2.1.3 **Fundamental Rights** − Equality − Scope of application − Social security.
5.4.14 **Fundamental Rights** − Economic, social and cultural rights − Right to social security.

Keywords of the alphabetical index:

Social security, allowance, duration / Unfitness for work, temporary / Social security, maximum length.

Headnotes:

Entitlement to social security benefits is restricted to the right to social protection and entails the payment of compensation, allowances, pensions and other benefits to persons insured against the risks stemming from loss of the capacity to work.

Summary:

Law no. 489-XIV defines an insured person as a natural person fit for work, ordinarily resident in the Republic of Moldova, and obliged to pay social security contributions in order to be entitled to statutory measures to prevent, restrict or rule out social risks.

Article 58 of the Constitution provides that all citizens are under an obligation to contribute, by way of taxes and financial impositions, to public expenditure.

A member of parliament asked the Court to review the constitutionality of the provisions of Section 9.3 and the expression "without exceeding the time limit for the payment of compensation provided for herein" in Section 11 of Law no. 289-XV of 22 July 2004 on compensation for temporary unfitness for work and other social security benefits.

The applicant contended that the above statutory provisions were contrary to Articles 1, 16.2, 47 and 54.1 of the Constitution and to Articles 7 and 25 of the Universal Declaration of Human Rights. He also

argued that the time limit for the payment of compensation for temporary unfitness for work should be the same for all employees, regardless of the duration of their employment contract.

Although Institutional Act no. 289-XV provided for equal conditions of entitlement to compensation for temporary unfitness for work for insured persons, it laid down different time limits for the payment of compensation for different categories of workers, restricting the time limit for the unemployed.

The Court noted that the provision of the law whereby insured persons with a fixed-term individual employment contract, including seasonal employees, and unemployed persons, were entitled to a maximum of thirty days compensation for temporary unfitness for work over the course of the year, was based on the special nature of this type of contract. Under Article 54.2 of the Labour Code, individual fixed-term employment contracts are signed for a maximum period of five years and, under Article 55, they are intended for certain work of a temporary nature.

The provision mentioned is similar to those applying to remuneration and taxation and in no way undermines the principle of the equality of rights of citizens, given that the right to social security is linked to the obligation to contribute, by means of social security contributions, to the public social security system either for an indefinite period or for a fixed period, which may not exceed five years, in accordance with the provisions referred to the Court for review.

The Constitutional Court held that the provisions of Section 9.3 and the expression “without exceeding the time limit for the payment of compensation provided for herein” in Section 11 on the Law on compensation for temporary unfitness for work and other social security benefits were constitutional.

Two judges expressed dissenting opinions, on the grounds that the Court had not conducted a detailed study of the provisions of Articles 16, 47 and 131 of the Constitution concerning the equal rights of citizens, the right to social protection and assistance and the obligation for citizens to contribute to the State social security budget.

Moreover, the Court did not take account of the fact that, after Law no. 289-XV was passed, a certain category of employees with permanent employment contracts were obliged to sign fixed-term employment contracts, following the reorganisation of the central and local authorities, institutions, organisations and public services, which reduced their entitlement to social protection in the event of illness.

Languages:

Romanian, Russian.

Identification: MDA-2005-3-007

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 22.12.2005 / **e)** 24 / **f)** Review of the constitutionality of Section 73.6 of the Bankruptcy Act (no. 632-XV) of 14 November 2001, as amended by Act no. 573-XV of 26 December 2003 / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

3.16 **General Principles** − Proportionality.
3.18 **General Principles** − General interest.
3.25 **General Principles** − Market economy.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.4.6 **Fundamental Rights** − Economic, social and cultural rights − Commercial and industrial freedom.

Keywords of the alphabetical index:

Competition, economic, protection / Bankruptcy, receiver, maximum number of companies / Creditor, rights / Company, reorganisation.

Headnotes:

Under Article 126 of the Constitution, the State must ensure freedom of trade and entrepreneurial activity, the protection of fair competition and the establishment of a framework conducive to the enhancement of all factors of production.

The introduction of certain statutory restrictions must be proportionate to the situation that gave rise to them and may not undermine the rights and freedoms concerned (Article 54 of the Constitution).

Summary:

The Bankruptcy Act establishes a legal framework for the reorganisation of bankrupt companies to remedy their financial and economic situation.

The applicant sought the review on the grounds of unconstitutionality of the provisions of Section 73.6 of the Bankruptcy Act (no. 632-XV), which provide that somebody may be appointed administrative receiver in only one bankrupt company. In exceptional circumstances, the Court, with the consent of the body representing the creditors, may appoint the same person as receiver in a maximum of two bankrupt companies.

The applicant argued that the above provisions were at variance with Article 126.2.b of the Constitution.

On examining the application submitted on grounds of unconstitutionality, the Court pointed out that the State was entitled to introduce, by law, certain restrictions on various forms of activity.

The provisions of Section 73.6 of the Bankruptcy Act are binding on the courts and introduce restrictions affecting official administrative receivers, in that they oblige the courts, at the proposal of a creditor or debtor, to appoint a receiver to a single company and, exceptionally and with the creditors' consent, to two companies.

The Court concluded that the restriction introduced by Section 73.6 of the Bankruptcy Act was in keeping with the provisions of Article 54.2 and 54.4 of the Constitution.

These provisions have the effect of enhancing all the factors of production, they enable administrative receivers to carry out their work effectively, they help to increase the number of specialists, and they guarantee the protection of fair competition, as they apply to all official administrative receivers.

The Court held that the introduction of this restriction was in keeping with Article 126.2.c of the Constitution, which sets out the State's obligation to protect the national interests involved in economic, financial and currency exchange activities.

Languages:

Romanian, Russian.

Norway
Supreme Court

Important decisions

Identification: NOR-2005-3-004

a) Norway / **b)** Supreme Court / **c)** / **d)** 28.10.2005 / **e)** 2005/412 / **f)** / **g)** *Norsk retstidende* (Official Gazette), 2005,1365 / **h)** CODICES (Norwegian, English).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** − Jurisdiction − The subject of review − Failure to act or to pass legislation.
2.2.1.2 **Sources of Constitutional Law** − Hierarchy − Hierarchy as between national and non-national sources − Treaties and legislative acts.
2.2.1.6.4 **Sources of Constitutional Law** − Hierarchy − Hierarchy as between national and non-national sources − Community law and domestic law − Secondary Community legislation and domestic non-constitutional instruments.
5.3.17 **Fundamental Rights** − Civil and political rights − Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

European Economic Area, directive, transposition, failure, state liability / Car, insurance, harmonisation.

Headnotes:

It is inherent in the Agreement on the European Economic Area (EEA) and the EEA Act that the State is liable in damages for the deficient transposition into Norwegian law of a Directive provided that three conditions are met. The directive in question must be intended to confer rights on individuals, the rights conferred must be clearly identifiable from the provisions of the directive, and the breach on the part of the State must be "sufficiently serious".

Summary:

The decision deals with the question of State liability for the wrongful transposition into Norwegian law of the EU Motor Vehicle Insurance Directives in connection with Norway's accession to the EEA Agreement.

The previous plenary judgment of the Supreme Court in *Rt*-2000-1811 [NOR-2000-3-003] concerned a civil action by *Veronika Finanger v. the insurance company Storebrand Skadeforsikring AS*. The plaintiff claimed compensation for loss suffered as a result of a car accident which left her 100 % occupationally disabled. Storebrand rejected the claim on the grounds that there was causation between the driver's intoxication and the injury she had suffered, and that she had known that the driver was intoxicated. Pursuant to Section 7.3.b of the Motor Vehicle Liability Act, as that provision was in force at the time, the insurance company was only liable to pay compensation in these circumstances if there were "special grounds". The insurance company denied that there were special grounds. Finanger argued that as the provision was incompatible with the EU Motor Vehicle Insurance Directives, it should be set aside.

The Supreme Court found that Section 7.3.b was incompatible with the Directives. In the majority view, however, the provision was still applicable because the EU Directives must be transposed into Norwegian law in order to have application there. Finanger's claim for compensation against the insurance company was therefore dismissed.

Finanger then issued civil proceedings against the State, claiming that the State was liable in damages and was obliged to pay the compensation to which she would have been entitled had Section 7.3.b been amended.

The Supreme Court sitting in plenary found that it was inherent in the EEA Agreement and the EEA Act that the State is liable in damages for the deficient transposition into Norwegian law of a Directive provided that three conditions are satisfied: The directive in question must be intended to confer rights on individuals, the rights conferred must be clearly identifiable from the provisions of the directive, and the breach on the part of the State must be "sufficiently serious". The Supreme Court held, with dissenting votes (9-4), that the State was liable towards Finanger. The dissenting opinions related to the question of whether the third condition was fulfilled.

Cross-references:

- Decision 2000-1811 *Rt* of 16.11.2000, *Bulletin* 2000/3 [NOR-2000-3-003].

Languages:

Norwegian, English (translated by the Court).

Poland
Constitutional Tribunal

Statistical data
1 September 2005 – 31 December 2005

Number of decisions taken:
- Final judgments: 35
- Cases discontinued: 30 (20 fully, 10 partially – When the Tribunal is delivering a final judgment it may at the same time partially discontinue the case in a given scope. Partial discontinuation may also occur in a form of a separate procedural decision).

Decisions by procedure:
- Abstract review *ex post facto*: 10 judgments, 17 cases discontinued (15 fully, 2 partially)
- Preliminary review (Initiated, on the basis of Article 122.3 of the Constitution, by the President of the Republic of Poland): 3 judgments, 0 cases discontinued
- Questions of law referred by a court: 8 judgments, 3 cases discontinued (2 fully, 1 partially)
- Constitutional complaints: 14 judgments, 11 cases discontinued (4 fully, 7 partially)

Important decisions

Identification: POL-2005-3-008

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 13.09.2005 / **e)** K 38/04 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2005, no. 186, item 1567; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005/A, no. 8, item 82 / **h)** CODICES (English, Polish).

Keywords of the systematic thesaurus:

3.9 **General Principles** − Rule of law.
3.12 **General Principles** − Clarity and precision of legal provisions.
3.16 **General Principles** − Proportionality.
3.25 **General Principles** − Market economy.
4.3.1 **Institutions** − Languages − Official language(s).
4.14 **Institutions** − Activities and duties assigned to the State by the Constitution.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.2 **Fundamental Rights** − Equality.
5.4.7 **Fundamental Rights** − Economic, social and cultural rights − Consumer protection.
5.4.8 **Fundamental Rights** − Economic, social and cultural rights − Freedom of contract.

Keywords of the alphabetical index:

Economic action, freedom / Consumer, protection, European model / Employment, worker, protection / Contract, language, official, obligatory use.

Headnotes:

I. The scope of the term: “official language”, used in Article 27 of the Constitution (official language status of the Polish language), does not encompass the language used between entities in non-public factual relations or in private-legal relations, whenever such relations do not concern the exercise of public functions by these entities. Accordingly, that provision does not restrict the freedom of entities subject to Polish civil law to create declarations of will in languages other than Polish. Nevertheless, the obligation to use the Polish language may be extended to spheres falling outside the scope of Article 27 of the Constitution. That may be justified especially as regards transactions involving consumers and transactions within labour relations, by virtue of the principle protecting the safety of legal transactions (i.e. the principle of good faith and fair dealing in contractual relationships) and postulates concerning protection of the weaker contractual party.

The requirement to respect the autonomy of will within private legal relationships has a constitutional basis in the principle of freedom of the person (Article 31.1 of the Constitution) and in the principles of social market economy and freedom of economic activity (Articles 20 and 22 of the Constitution).

One of the elements of the freedom of contract is the possibility for parties to choose the language in which their contract is concluded in.

Restrictions on the freedom of contract may be justified not only by virtue of proportionality (Article 31.3 of the Constitution) but also, within the sphere of economic relations, by the very notion of a social market economy, requiring a fair balancing of the positions of participants in economic transactions. Such restrictions do not seek to limit the contractual parties’ autonomy of will but, conversely, seek to

restore contractual balance where it is weakened because of the *de facto* inequality of the contractual parties' positions. Solutions of this kind are typical within regulation of legal transactions involving consumers. Within the sphere of employment relationships, restrictions on the parties' autonomy of will are so strong that it is justifiable to question the operation of the freedom of contract in this area.

Article 76 of the Constitution (consumer protection) does not directly create individuals' rights. Nonetheless, it obliges public authorities to undertake actions to protect the life, health, privacy and safety of consumers and to protect them against dishonest market practices.

Whilst Article 76 of the Constitution does not directly refer to employees, the axiology contained therein has broader relevance and should be understood as including persons who, whilst not directly mentioned in this provision, are exposed to similar threats because they are the weaker party in a contractual relationship. This especially concerns employees.

The protection mentioned in Article 76 may not be separated from the European model of consumer protection which is based on broadening the knowledge and scope of accessible information, so as to enable consumers to fulfil their perceived needs autonomously and in accordance with their own interests. The principles of transparency and genuine public access to clear, comprehensive and comprehensible commercial information are therefore assumptions of modern consumer protection.

The language of communication in consumer transactions and employment relationships should be comprehensible to consumers and employees and should constitute an effective tool for conveying information concerning the rights and obligations of the parties to those relationships.

Where the legislator formulates legal solutions in a manner which is imprecise, ambiguous and leads to significant uncertainties, or where the legislator uses undefined terms, this infringes the requirements of correct legislation, stemming from the constitutional principle of the rule of law (Article 2 of the Constitution).

Summary:

I. According to the Polish Language Act 1999, documents, including contracts, involving consumers or labour law shall be drafted in Polish whenever, at the time of their conclusion, the consumer or employee resides in Poland and the contract is intended to be performed in Poland. Article 8.2 of the Act allows contracts to be drafted in a foreign language, in addition to a Polish version (which represents the basis for interpreting the contract), "unless the parties agree otherwise". Article 8.3 of the Act permits contracts to be drafted in a foreign language (without the need for a Polish version to exist) "upon the request of the person performing the work or the consumer", on the condition that, *inter alia*, such a person is a citizen of an EU Member State other than Poland. A labour contract may also be drafted in a foreign language "upon the request of the person performing the work, such person not being a Polish citizen" provided that the employer "possesses citizenship of an EU Member State or has its seat in any such country".

A group of Deputies of the *Sejm* (i.e. the first chamber of the Polish Parliament) alleged that the aforementioned provisions infringed the requirements of the rule of law (Article 2 of the Constitution), as well as the official language status of the Polish language (Article 27 of the Constitution) and principles of equality (Article 32 of the Constitution) and consumer protection (Article 76 of the Constitution).

II. The Tribunal ruled that:

- the challenged provisions conform to Articles 27 and 83 of the Constitution, but do not conform to Articles 2 and 76 of the Constitution;
- Article 8.2 of the 1999 Act conforms to the Constitution but Article 8.3 of the 1999 Act does not conform to Article 32 of the Constitution.

Article 8.2 of the Act infringes Article 76 of the Constitution by permitting the use of a language which is incomprehensible to consumers and employees. This provision does not infringe Article 32 of the Constitution (equality). The mere possibility to conclude contracts in a foreign language and to treat the foreign language version as the basis for interpretation, are not discriminatory.

Article 8.3 of the Act permits contracts to be drafted in languages other than Polish only insofar as they relate to subjects who are citizens of EU Member States. Accordingly, consumers who are not citizens of an EU Member State but who reside in Poland, where the contract is to be performed, may not draft a contract in a language other than Polish (at least insofar as the version constituting the basis for interpretation is concerned). The only instance where it is possible for an employee, who is not a citizen of another EU Member State, to demand that a contract or other document be drafted in a foreign language is where their employer is a citizen of an EU Member State or has its seat in such a country. Such a legal

solution infringes the requirement to protect the weaker contractual party.

The challenged provisions infringe the principle of correct legislation. They cause serious and irremediable interpretational difficulties, both as concerns determination of their scope of application and as concerns the meaning of particular terms therein.

Cross-references:

- Resolution W 7/96 of 14.05.1997, O*rzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1997, no. 2, item 27; *Bulletin* 1997/2 [POL-1997-2-011];
- Judgment P 11/98 of 12.01.2000, O*rzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 1, item 3; *Bulletin* 2000/1 [POL-2000-1-005];
- Judgment P 13/02 of 03.12.2002, O*rzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002/A, no. 7, item 90; *Bulletin* 2003/1 [POL-2003-1-008];
- Judgment U 3/02 of 17.12.2002, O*rzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002/A, no. 7, item 95; *Bulletin* 2003/1 [POL-2003-1-011];
- Judgment SK 24/02 of 29.04.2003, O*rzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003/A, no. 4, item 33; *Bulletin* 2003/2 [POL-2003-2-021];
- Judgment K 33/03 of 21.04.2004, O*rzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004/A, no. 4, item 31; *Bulletin* 2004/2 [POL-2004-2-013];
- Judgment K 42/02 of 20.04.2005, O*rzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005/A, no. 4, item 38;
- Judgment K 4/04 of 20.06.2005, O*rzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005/A, no. 6, item 64;
- Judgment of the Court of Justice of the European Communities, 120/78 of 02.02.1972, *European Court Reports* 1979, I-649;
- Judgment of the Court of Justice of the European Communities, C-85/94 of 12.10.1995, *European Court Reports* 1995, I-2955.

Languages:

Polish, English (summary).

Identification: POL-2005-3-009

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 25.10.2005 / **e)** K 37/05 / **f)** / **g)** *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005/A, no. 9, item 106 / **h)** CODICES (English, Polish).

Keywords of the systematic thesaurus:

1.2.1.1 **Constitutional Justice** − Types of claim − Claim by a public body − Head of State.
1.2.1.2 **Constitutional Justice** − Types of claim − Claim by a public body − Legislative bodies.
1.3.2.1 **Constitutional Justice** − Jurisdiction − Type of review − Preliminary review.
1.4.9.1 **Constitutional Justice** − Procedure − Parties − *Locus standi*.
3.15 **General Principles** − Publication of laws.
4.4.1.4 **Institutions** − Head of State − Powers − Promulgation of laws.
4.5.3.3.1 **Institutions** − Legislative bodies − Composition − Term of office of the legislative body − Duration.
4.5.3.4 **Institutions** − Legislative bodies − Composition − Term of office of members.

Keywords of the alphabetical index:

Parliament, member, activity / Law, binding force.

Headnotes:

The publication of a statute is a pre-condition for its entry into force (Article 88.1 of the Constitution). Accordingly, a normative act does not represent a source of universally binding law within the meaning of Article 87.1 of the Constitution until it has been properly promulgated.

The right of a group of Senators (members of the Senate, i.e. the second chamber of Polish Parliament), to submit applications to the Constitutional Tribunal regarding the constitutionality of statutes (Article 191.1.1 of the Constitution) does not encompass statutes prior to their publication. The only entity entitled to initiate proceedings before the Tribunal regarding the conformity of an unpublished statute is the President of the Republic who may, prior to signing a statute, submit an appropriate application on the basis of Article 122.3 of the Constitution, i.e. within the preliminary review procedure.

Summary:

On 5 September 2005, members of the Senate submitted to the Constitutional Tribunal an application challenging a provision of the Act which was published in the Journal of Laws on 12 September 2005. Subsequently, the first sitting of the newly-elected *Sejm* was convened for 19 October 2005. The procedural decision summarised herein refers to two problems: firstly, challenging a statute before publication thereof; and, secondly, a trend in Tribunal jurisprudence, according to which the discontinuation of parliamentary activity, as a result of the beginning of new terms of office of the *Sejm* (the first chamber of Polish Parliament) and Senate (see above), also affect proceedings initiated before the Tribunal by Deputies or Senators.

The Tribunal discontinued the proceedings, pursuant to Article 39.1.1 of the Constitutional Tribunal Act, given that it would be inadmissible to pronounce judgment.

The challenged Act, adopted by parliament on 29 July 2005 and signed by the President on 23 August 2005, was not published prior to submission of the present application but rather in the Journal of Laws no. 175 of 12 September 2005. Accordingly, the application submitted by the group of Senators on 5 September 2005 was premature.

On the basis of the decision of the President of the Republic of Poland dated 28 September 2005, the President convened the first sitting of the newly-elected *Sejm* for 19 October 2005. This signifies that the previous Senate's term of office expired on 18 October 2005 (Article 98.1 of the Constitution), on which date the Senators' mandates expired and, accordingly, the initiators – as members of the previous Senate – lost their *locus standi* as regards proceedings before the Constitutional Tribunal.

Languages:

Polish, English (summary).

Identification: POL-2005-3-010

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 26.10.2005 / **e)** K 31/04 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2005, no. 222, item 1914; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005/A, no. 9, item 103 / **h)** CODICES (English, Polish).

Keywords of the systematic thesaurus:

3.16 **General Principles** − Proportionality.
3.17 **General Principles** − Weighing of interests.
3.18 **General Principles** − General interest.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.2.2 **Fundamental Rights** − Equality − Criteria of distinction.
5.3.13.3 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Access to courts.
5.3.25.1 **Fundamental Rights** − Civil and political rights − Right to administrative transparency − Right of access to administrative documents.
5.3.32 **Fundamental Rights** − Civil and political rights − Right to private life.

Keywords of the alphabetical index:

Data, collection / Data, public, access / Secret service, data, access / Secret service, data, collection, aggrieved person.

Headnotes:

It stems from the right to a fair trial (Article 45.1 of the Constitution) that documents constituting the basis for court findings must be entirely accessible, both by the complainant and by the court.

The constitutional right of access to official documents and data collections refers exclusively to documents and collections relating to the person concerned (Article 51.3 of the Constitution), i.e. those documents the subject of which is the person concerned.

Summary:

I. The Institute for National Remembrance *(Instytut Pamięci Narodowej)* functions on the basis of the Institute for National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation Act 1998 (hereinafter: "the 1998 Act"). The Institute's tasks include storing and researching documents of the Communist State security agencies, created and compiled between 22 July 1944 and 31 December 1989.

The right of access to the aforementioned documents is not general. The operative law prior to the entry into force of the present Tribunal judgment identified several categories of persons permitted to access information concerning the content of those documents:

1. The first category were "aggrieved persons" who were defined as being persons on whom the Communist State security agencies collected information on the basis of intentionally-collected data, including data acquired secretly. Persons who subsequently became civil servants, employees or co-operatives within such security agencies were, however, excluded from this category. "Aggrieved persons" have a series of rights, in particular, the right to:

a. information concerning documents related to them (Article 30.1 of the 1998 Act);
b. information concerning the existence of such documents in the Institute's archives and the means for gaining access thereto (Article 31.1) and the right to obtain copies of such documents (Article 31.2);
c. information on personal details of functionaries, employees and co-operatives of State security agencies who were responsible for collecting and evaluating data concerning them or who supervised such co-operatives (Article 32.1);
d. include their own supplements, corrections, updates, clarifications and supplementary documents or copies thereof in the collection of documents related to them, although no alterations shall be made to data already contained within the documents stored by the Institute (Article 33.1).

2. The second category of entitled persons are civil servants, employees and co-operatives of the Communist state security agencies. They have the right to be informed about documents related to them, following prior submission of a statement to the Institute regarding their service, work or co-operation with such agencies (Article 35.2).

3. A further category consists of persons who – under certain circumstances – were permitted to access documents for the purpose of carrying out scientific research (Article 36.5).

4. Furthermore, it is possible to identify another category of persons which, whilst not mentioned in the Act, is crucial from the perspective of the present decision, i.e. persons who question whether they are aggrieved persons but, for various reasons, do not obtain confirmation of this status and may not therefore be provided with information on documents concerning them, nor gain access to such documents.

Other provisions challenged in the present case are: Article 39 (which permits the separation of a secret collection of documents which is inaccessible) and Article 43 of the 1998 Act (according to which proceedings regarding matters regulated in the 1998 Act shall be conducted pursuant to provisions of the Administrative Procedure Code, with the exclusion of the right to challenge matters specified in Article 39 of the Act before the Administrative Court).

The proceedings in the present case were initiated by the Ombudsman who alleged that the aforementioned provisions were incompatible with Article 31.3 (proportionality), Article 32 (equality and non-discrimination), Articles 45.1 and 77.2 (right to court and prohibition on barring recourse to the courts in order to vindicate infringed rights and freedoms), Article 47 (private life), Article 51.3 and 51.4 of the Constitution (rights of individuals referring to official documents and data collections concerning them).

II. The Tribunal ruled that:

1. Articles 30.1, 31.1 and 31.2 (of the 1998 Act), insofar as they deprive the concerned persons, other than aggrieved persons, of the right to be provided with information on documents held and available, which are related to them, as well as the manner of gaining access thereto;
2. Article 33.1, insofar as it deprives the concerned persons, other than aggrieved persons, of the right to include their own supplements, corrections, updates, clarifications and supplementary documents or copies thereof in the collection of documents related to them;
3. Article 35.2

do not conform to Articles 47, 51.3 and 51.4 of the Constitution.

Furthermore, the Tribunal found that Articles 36, 39 and 43 of the 1998 Act do not infringe the constitutional provisions indicated by the applicant.

The existence per se of a separate, particular status of aggrieved persons neither infringes the principle of equality, nor amounts to discrimination.

A certificate issued by the Institute, stating that a particular person is not an "aggrieved person", is not equivalent to an official finding that such a person was a civil servant, employee or co-operative within the security agencies. In particular, the sole reason for denying the aggrieved person status may be the non-existence, within the Institute archives, of documents relating to the person concerned, which should be reflected in an appropriate document

issued to such a person. Where other reasons for a refusal exist, the Institute must adopt a position on the merits of the case in a form capable of being challenged before an administrative court.

The requirement to submit to the Institute a declaration regarding the fact of co-operation by a person, who was neither a civil servant nor an employee of State security agencies, but concomitantly, does not possess the status of an aggrieved person in order to be provided with information on documents relating to them, constitutes an impermissible limitation on the individual's right to access official documents and data collections concerning them.

Given the dual status of the documents and data within the archives, which are simultaneously information on individuals and documents of a historical nature, their destruction must be ruled out.

The constitutional right to demand correction or deletion of incorrect or incomplete information, or information acquired by means contrary to statute, being a reference to, and extension of, the right to private life, may not be limited to the aggrieved persons. No state interest may justify the retention of incorrect or incomplete information, or information acquired by means contrary to statute, within official documents and data collections.

The construction of point 1 of this ruling does not eliminate the provisions indicated therein from the legal order but – without curtailing rights previously acquired by aggrieved persons – creates the conditions necessary for direct application of Article 51.3 of the Constitution to other entitled persons. Enjoyment of this right does not require any special procedures: until appropriate legal regulations are adopted, access to information may be realised in a form analogous to that applicable to persons recognised as aggrieved persons.

The reserved access to certain documents constitutes a serious limitation on the right specified in Article 51.3 of the Constitution. Nevertheless, since indicating the expiry date of such reservation is required, no infringement of this right's essence occurs. The limitation is justified by reasons of the common good and security of all citizens and is significant for the functioning of a democratic state.

Cross-references:

- Judgment K 39/97 of 10.11.1998, O*rzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 6, item 99; *Bulletin* 1998/3 [POL-1998-3-018];
- Judgment K 21/99 of 10.05.2000, O*rzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 4, item 109; *Bulletin* 2000/2 [POL-2000-2-013];
- Procedural decision SK 10/99 of 04.12.2000, O*rzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 8, item 300; *Special Bulletin* Inter-Court Relations [POL-2000-C-002];
- Judgment K 32/04 of 12.12.2005, O*rzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005/A, no. 11, item 132.

Languages:

Polish, English (summary).

Identification: POL-2005-3-011

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 09.11.2005 / **e)** Kp 2/05 / **f)** / **g)** *Monitor Polski* (Official Gazette), 2005, no. 69, item 962; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005/A, no. 10, item 114 / **h)** CODICES (English, Polish).

Keywords of the systematic thesaurus:

3.4 **General Principles** − Separation of powers.
4.5.5 **Institutions** − Legislative bodies − Finances.
4.5.8 **Institutions** − Legislative bodies − Relations with judicial bodies.
4.6.2 **Institutions** − Executive bodies − Powers.
4.6.6 **Institutions** − Executive bodies − Relations with judicial bodies.
4.10.1 **Institutions** − Public finances − Principles.
4.10.2 **Institutions** − Public finances − Budget.
4.10.6 **Institutions** − Public finances − Auditing bodies.
5.3.13.3 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Access to courts.
5.3.13.14 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Independence.

Keywords of the alphabetical index:

Judicial power, independence / Judicial power, financial independence.

Headnotes:

The independence of courts and tribunals vis-à-vis other branches of power (Article 173 of the Constitution) is not intended to serve the judicial power *per se* (i.e. the organs exercising such power) but, rather, to ensure an individual's constitutional right to court (Article 45.1 of the Constitution).

The administration of justice, as exercised by courts, and the Constitutional Tribunal's judicial competences fall within the state's basic functions and, as such, should be financed by public funds. Organs of the judicial power and their accompanying organisational structures are entirely maintained by the state budget and are obliged to transfer to the budget all revenues obtained from their activity (e.g. court fees).

The legislative power has a democratic mandate to decide upon the destination of public funds originating from the imposition of public levies on citizens. Concomitantly, the Council of Ministers, as an executive organ, occupies a strong position within the constitutional system as regards financial policy. This position is specified by Article 221 of the Constitution (the Council of Ministers' exclusive right to initiate legislative proceedings regarding the Budget Act), Article 220.1 of the Constitution (prohibiting the *Sejm*, i.e. the first chamber of Polish Parliament, from increasing the budget deficit above that envisaged in the draft Budget Act), and Article 219.4 of the Constitution, read in conjunction with Article 146.4.6 of the Constitution (the Council of Ministers' exclusive competence to pursue the State's financial policy and to manage the implementation of the budget). Accordingly, it is permissible for the Council of Ministers to undertake actions to survey the uniformity of public funds management within all public finance sector units, including judicial units. The regulation of financial control and internal audit within the courts and Constitutional Tribunal must, however, take account of the specific nature of these units, given the independence of the judicial power vis-à-vis the executive.

Matters concerning the division of tasks between the executive and judicial powers in the course of budget implementation must be regulated by statute (Article 219.2 of the Constitution). Such statutes must, firstly, correspond to the requirements of sufficient specificity so as to categorically guarantee the judicial power that the Council of Ministers will not interfere authoritatively in areas concerning important prerogatives of the judicial power. Secondly, these statutes must deal with conflicts of competence, including potential conflicts, and introduce appropriate instruments to prevent such conflicts and contribute to the resolution thereof. Thirdly, each of the instruments through which the executive influences the judicial power should be precisely regulated; in particular, it must be indicated who possesses the right to exert such influence, which matters are subject to such influence and what are the effects of such influence. Fourthly, statutes regulating such matters must be characterised by particularly diligent fulfilment of requirements concerning the legislative procedure.

Insofar as concerns the "separateness" of the judicial power's position in relation to the drafting and implementation of the Budget Act, and supervision of such implementation, the Constitution endows the legislative power with considerable discretion. The limits of such discretion are: on the one hand – the need to ensure uniformity of the public finances system, as required by the constitutional provisions, and the inviolability of the Council of Ministers' obligations and competences as the sole organ established to pursue the state's financial policy; and, on the other hand – the prohibition on making the position of judicial organisational units equal to that of units subordinate to the executive power.

Summary:

I. Within public sector organisational units – including the courts and the Office of the Constitutional Tribunal – there is an internal audit (i.e. an independent review of management and supervision systems within any given unit, especially as regards financial control procedures) which is performed by an internal auditor, employed by a given unit.

The Public Finance Act 2005 (hereinafter: "the 2005 Act") contains elements causing the President of the Republic of Poland to question their conformity with the principles of the separation of powers (Article 10.1 of the Constitution) and independence of the judicial power (Article 173 of the Constitution), the latter of which is exercised by courts and tribunals (Article 10.2 of the Constitution). The essence of the challenged provisions, insofar as they concern organisational units connected with the functioning of the judicial power, consists in directly linking the internal auditor's activities with the Main Inspector of Internal Audit, subordinate to the Minister of Finance.

II. The Tribunal ruled that:

1. Articles 53.5, 53.6, 56.3, 62.1-62.3, 63.3 and 63.4 of the 2005 Act (strengthening the institutional link between internal auditors within judicial organisational units and the Minister of Finance, via the Main Inspector of Internal Audit) conform to Articles 10.1 and 173 of the Constitution;

2. Articles 65.1, 66 and 67 of the 2005 Act (competences of the Ministry of Finance's employees, headed by the Main Inspector of Internal Audit, related to the financial control), insofar as they concern the Supreme Court, common courts, administrative courts and the Constitutional Tribunal, do not conform to Articles 10.1 and 173 of the Constitution.

The Council of Ministers' "supervisory", informational and evaluative functions vis-à-vis judicial units are not autonomous in nature but are auxiliary to its primary function of managing and implementing the state budget. The Constitution entrusts supervision, understood as an autonomous function, to the Supreme Chamber of Control (Article 204.1.1 of the Constitution). The Public Finance Act may only regulate those Council of Ministers' functions connected with management and implementation of the budget which do not duplicate functions of the Supreme Chamber of Control and which, simultaneously, are crucial for the performance of the government's constitutional activities.

The competences vested, by provisions indicated in point 2 of the ruling, in subordinates of the Main Inspector of Internal Audit may be differently interpreted and applied. These provisions create a potential threat to the constitutional independence of the judicial power. In particular, such independence argues against the ability of the executive power's representatives to review documents directly connected with exercising the administration of justice (e.g. concerning the preconditions for exemption from court costs or costs connected with the institution of a court-appointed counsel). Furthermore, if the Ministry of Finance's employees were to enter judicial organisational units to view documents and other materials, with no substantive nor time limits and in the absence of any sufficiently justified supervisory need, this would threaten the public image of the administration of justice, since it could cause citizens to make false assumptions about the government's institutional, authoritative influence on the manner in which justice is administered.

Supplementary information:

The judicial power enjoys a *sui generis* autonomy concerning budget planning. When presenting the Council of Ministers with the draft Budget Act (before the latter reaches the *Sejm*), the Minister of Finance incorporates into this draft an unaltered plan of the revenues and expenditures of judicial organisational units (Article 121.2 of the 2005 Act). Furthermore, the Council of Ministers itself is unauthorised to correct the plan contained within the draft budget presented to the *Sejm*, but it does provide the *Sejm* with an opinion on this matter (Article 122.2 of the 2005 Act).

Cross-references:

- Judgment K 1/98 of 27.01.1999, O*rzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005/A, no. 10, item 114.

Languages:

Polish, English (summary).

Portugal
Constitutional Court

Statistical data
1 September 2005 – 31 December 2005

Total: 289 judgments, of which:

- Prior review: 1 judgment
- Abstract *ex post facto* review: 3 judgments
- Referendum: 1 judgment
- Appeals: 173 judgments
- Complaints: 40 judgments
- Electoral disputes: 64 judgments
- Political parties and coalitions: 2 judgments
- Political parties' accounts: 1 judgment
- Incompatible activities by holders of political office: 3 judgments

Important decisions

Identification: POR-2005-3-009

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 02.11.2005 / **e)** 599/05 / **f)** / **g)** *Diário da República* (Official Gazette), 242 (Series II), 20.12.2005, 17668-17672 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.16 **General Principles** − Proportionality.
5.2.2.4 **Fundamental Rights** − Equality − Criteria of distinction − Citizenship or nationality.
5.3.8 **Fundamental Rights** − Civil and political rights − Right to citizenship or nationality.

Keywords of the alphabetical index:

Foreigner, nationality / Citizenship, acquisition, conditions / Citizenship, law / Citizenship, refusal / Naturalisation / Citizenship, link, real and effective / Citizenship, specific bond of integration.

Headnotes:

The rule laid down in the Nationality Act whereby the government grants naturalisation to foreign citizens who satisfy the condition of being effectively and fully integrated into the national community – which presupposes an ability to be self-sufficient and to support oneself – does not infringe any principle or rule of constitutional value.

Like the previous two Constitutions, the current one does not define Portuguese citizenship. It merely states that "all persons are Portuguese citizens who are considered as such by law or under an international convention" (Article 4 of the Constitution) and makes reference to international conventions and ordinary law on this matter. However, the principles of universality and equality of the right to acquire Portuguese citizenship require that, if the other conditions are satisfied, ordinary legislation should not accord different treatment to foreign citizens who have applied for Portuguese nationality by naturalisation, who have the same ability to be self-sufficient and are in a position to support themselves. National legislation may, however, separate those who are in a position not to be a financial burden on the national community from those who are not in order to justify a difference of treatment.

The court decision holding that a citizen wishing to be naturalised as a Portuguese national did not satisfy the condition of being able to support himself, given that he "was unemployed and his means of subsistence were unknown", applied legislation which is not in breach of the Constitution.

Summary:

An Angolan citizen filed an application with the Constitutional Court following the rejection of his application for Portuguese nationality by naturalisation. In these proceedings, it had been held on the one hand that the applicant did not satisfy the condition laid down in the Nationality Act, not because he did not have a stable income exceeding the national minimum wage, but, specifically, because he had been unemployed for several months and his means of subsistence were unknown. Secondly, it was held that the naturalisation of the individual concerned was not a right and that the state's power to grant it was discretionary.

Because the drafters of the Constitution referred the definition of the rules governing the right to Portuguese citizenship to international law and ordinary legislation, it is in this area that the subordination of the right of Portuguese citizenship to the principles and safeguards which, constitutionally, constitute fundamental rights, must be assessed. In the same way, due account must be taken of the principle derived from international law of a real and effective link between the person

concerned, the Portuguese state and the national community.

The act constituting the acquisition of Portuguese nationality by naturalisation is a decision by the public authorities (in this case, the government). When an application is made for naturalisation, the government may or may not grant Portuguese nationality. Although the government has a discretionary power in this matter, under ordinary law that power is subject to a series of conditions being met, these being regarded as real legal prerequisites for the exercise of the (discretionary) governmental power to decide on the granting of nationality. In view of the nature of the nationality bond, these prerequisites are necessarily indicative of the type, nature and intensity of the actual relationship existing between the individual, the Portuguese state and the national community with which he or she wishes to become integrated. Since the right in question is recognised as a fundamental right, the conditions laid down in ordinary legislation must comply with the principles of appropriateness and proportionality in order to preserve the essence of that right. By its very nature, this right expresses a specific bond of integration into the Portuguese community. The other aim is not to integrate persons who are merely a financial burden on the other members of the community.

In conclusion, the Constitutional Court did not deem the rule laid down in the Nationality Act to be unconstitutional to the extent that it is understood as requiring foreigners wishing to acquire Portuguese citizenship to be capable of supporting themselves. For this purpose, in the first instance, the setting of this condition for acquiring Portuguese nationality is neither inappropriate nor disproportionate if one considers that it should not be a social or political obstacle to the integration of a foreign citizen into the Portuguese community and his or her acceptance by that community. Given that nationality is the bond by which sociological, cultural, economic, legal, political and other values constituting the heritage of the national community are expressed, it is understandable that this national community should be unwilling to make economic, financial and social sacrifices to support those who are unable not to be a burden to that community.

Languages:

Portuguese.

Identification: POR-2005-3-010

a) Portugal / **b)** Constitutional Court / **c)** Plenary / **d)** 09.11.2005 / **e)** 614/05 / **f)** / **g)** *Diário da República* (Official Gazette), 249 (Series II), 29.12.2005, 18116-18118 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

1.3.4 **Constitutional Justice** − Jurisdiction − Types of litigation.
3.16 **General Principles** − Proportionality.
3.19 **General Principles** − Margin of appreciation.
3.20 **General Principles** − Reasonableness.
3.22 **General Principles** − Prohibition of arbitrariness.
5.2.2.12 **Fundamental Rights** − Equality − Criteria of distinction − Civil status.
5.3.33.2 **Fundamental Rights** − Civil and political rights − Right to family life − Succession.

Keywords of the alphabetical index:

Cohabitation, partner, survivor, inheritance right / Constitutional Court, case-law, differences / Survivor's pension, conditions / Family, constitutional protection.

Headnotes:

There are major differences, which legislation may regard as significant, between the situation of two married people, who have voluntarily chosen to modify their legal status, and the situation of two people of different sex who may have been living together for over two years "in conditions similar to those of married couples", but have, however, chosen to maintain a *de facto* situation, without assuming and acquiring on a legal basis the rights and obligations arising from marriage.

A significant example of differing legal treatment between the above situations is the conditions recognition of the right to a survivor's pension in the case of persons living together in a *de facto* union.

Summary:

During a concrete review of constitutionality, the second chamber of the Constitutional Court, in Judgment no. 159/05, declared constitutional the rule relating to survivor's pension scheme where entitlement to a survivor's pension in the case of persons living together in a *de facto* union is dependent on whether the surviving partner is entitled to receive maintenance from the estate. An application was made to the plenary assembly of the Constitutional Court, in support of Article 79-D of the

Constitutional Court Act, because, in delivering that judgment, the second chamber went against the third chamber, which, in Judgment no. 88/04 delivered on 10 February 2004, declared the same rule of the survivor's pension scheme unconstitutional (according to the rule in question, the award of a survivor's pension, in the event of the death of a social security recipient, to the person who had been cohabiting with him or her depends, in particular, not only on having lived together with the deceased for over two years in conditions similar to those of married couples, but also on being unable to receive "maintenance" from certain members of the deceased's family).

According to the Court, the opinion expressed in Judgment no. 159/05 (which, moreover, followed the guidelines laid down previously in Judgment no. 195/03) must be maintained and reiterated. On the one hand, from the point of view of the principle of equality, the difference in treatment cannot be regarded as unreasonable or arbitrary. On the other, with regard to a possible violation of the principle of proportionality, in comparing a legislative solution and the principle of proportionality it is important not only to take account of the seriousness or scale of the disadvantages caused to the individuals concerned, but also to know whether the broad outline of a legal regime is acceptable (i.e. whether it meets a constitutionally acceptable criterion), in the light of the aim pursued and the alternatives available, while constantly bearing in mind the wide discretion that must be given to the legislature to evaluate costs and benefits and choose alternatives in the light of the legislative policy goals laid down in the constitutional framework.

As may be seen from a comparison between the legislative solutions applied to the inheritance rights of a surviving spouse and the surviving partner in a *de facto* union, the treatment accorded to the surviving spouse is precisely one of the points of the legal regime where the legislature has chosen to treat marriage more favourably. This difference between the positions of a surviving spouse and the surviving partner in a *de facto* union, who may in fact be in competition after the death of the beneficiary, is in line with the continued encouragement given to the marriage-based family, which, from the point of view of the Constitution, is not open to criticism (the Constitution even places special emphasis on it).

Supplementary information:

This judgment gave rise to differences of opinion between the members of the plenary assembly of the Court, because two judges relinquished their jurisdiction to hear the case and four judges declared the rule in question unconstitutional.

With regard to the Constitutional Court's case-law on cohabitation, see Judgments 203/04 of 9 April 2003, published in *Bulletin* 2003/1 [POR-2003-1-004] and 88/04 of 10 February 2004, published in *Bulletin* 2004/1 [POR-2004-1-005] and the additional information on them.

Languages:

Portuguese.

Identification: POR-2005-3-011

a) Portugal / **b)** Constitutional Court / **c)** Second Chamber / **d)** 15.11.2005 / **e)** 631/05 / **f)** / **g)** *Diário da República* (Official Gazette), 13 (Series II), 18.01.2006, 835-841 / **h)** CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.16 **General Principles** − Proportionality.
3.17 **General Principles** − Weighing of interests.
3.18 **General Principles** − General interest.
5.3.13.20 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Adversarial principle.
5.3.32 **Fundamental Rights** − Civil and political rights − Right to private life.
5.3.33.1 **Fundamental Rights** − Civil and political rights − Right to family life − Descent.
5.3.43 **Fundamental Rights** − Civil and political rights − Right to self fulfilment.
5.3.44 **Fundamental Rights** − Civil and political rights − Rights of the child.

Keywords of the alphabetical index:

Parentage, identity, personal, right to know / Paternity, biological father / Paternity, establishment by the court / Paternity, right to establish, child.

Headnotes:

The right to personal identity includes, in addition to the personal identification aspect, the right to know one's origins or personal history. This aspect of personality presupposes, on the one hand, the existence of legal means to prove the biological ties and, on the other, legal recognition of those ties. The

enshrinement in the Constitution of a fundamental right to knowledge and recognition of maternity and paternity, as an aspect of the right to personal identity (Article 26.1 of the Constitution), must therefore not be called into question.

Since the right to knowledge and recognition of maternity and paternity constitutes a fundamental human right, and consequently a right of the child, it must therefore form part of the protection which a child may expect from the state and society. As a right which society and the state must uphold, its enjoyment is in the general interest of the political community, i.e in the public interest. Moreover, knowledge of maternity and paternity is an essential component of the child's fundamental right to the free development of his or her personality.

Since the fundamental right to recognition of children's maternity and paternity is in the public interest, it is clear that a legal action to secure that recognition by judicial means may be brought by the public prosecutor's department, independently of the assertion of any power of representation with regard to the exercise of minors' rights.

When the fundamental right to respect for private life is weighed against the child's fundamental right to the protection of the state in securing recognition of his or her paternity, on the basis of the principle of proportionality, one cannot accept the prevalence of the latter right, because, in a way, that would mean recognising the existence of a right not to be the subject of an investigation and not to be judicially compelled, in an action brought by the state, to recognise paternity.

Summary:

The constitutionality issue concerns, on the one hand, the rules of the Civil Code interpreted as allowing the intervention of the public prosecutor's department as representative of the minor who is the originator of the action to establish paternity, which may conflict with the right to respect for private and family life of the person who is the subject of the investigation. Secondly, it concerns the rules laid down by the legislative instrument on the Organisation of the Protection of Minors, interpreted as allowing a "secret" investigation to be legitimately carried out as a preliminary administrative step of the action (under civil procedure) to establish paternity, the initiative for which lies with the public prosecutor's department. This informal investigation is not subject to the adversarial principle, and, here again, the public prosecutor's department, unlike the person who is the subject of the investigation, holds a privileged institutional position.

However, according to the Constitutional Court, the judicial decision as to viability which is given on completion of the informal investigation into paternity does not infringe the legitimate rights and interests of the presumed parent because it simply allows the public prosecutor's department to initiate an action to establish paternity.

In other words, the informal investigation procedure does not take the form of a civil action brought against the person who is the subject of the investigation to secure recognition of paternity. In this action, no claim is made against the presumed father, in a way which might oblige him to recognise his child, and neither are any facts put forward against him upon which such an application might be based. This being so, it would be unreasonable to require the intervention of the person under investigation as a party to these proceedings, in identical conditions to those of the action to establish paternity, which is subject to civil procedure and consequently to the principle of procedural equality and the right to adversarial proceedings. The informal investigation procedure is simply a means whereby the state fulfils, independently of the right to initiate a judicial action, the duty of protecting the child with regard to knowledge and recognition of his or her maternity or paternity or with regard to any challenges to it.

In conclusion, the rules giving the public prosecutor's department, as representative of the state, the power or duty to investigate paternity, when it has been established that it is possible to conduct an informal investigation, do not infringe any principle or rule of constitutional value. In such an action, the public prosecutor's department exercises the usual powers which procedural law confer on a party.

Supplementary information:

The constitutional case-law relating to the judicial decision ruling on the viability of an action as not infringing the legitimate rights and interests of the presumed parent is derived from Judgment no. 616/98 of 21 October 1998. For actions to establish paternity, see Judgment no. 456/03 of 14 October 2003, published in *Bulletin* 2004/1 [POR-2004-1-003] and the additional information thereon.

Languages:

Portuguese.

Romania
Constitutional Court

Statistical data
1 January 2005 – 31 December 2005

I. Constitutional review

- Files registered in 2005: 1059
- Cases heard up to 31 December 2005: 701, broken down as follows:
  - admissible: 7
  - partially admissible: 5
  - rejected: 689

Important decisions

Identification: ROM-2005-3-003

a) Romania / **b)** Constitutional Court / **c)** / **d)** 14.11.2005 / **e)** 601/2005 / **f)** Decision on the constitutionality of the provisions of Articles 4.5, 12.1, 30.1.2, 31, 32.1, 38.1, 121.1 and 170.2 of the Senate Rules of Procedure, approved by Judgment no. 28 of 24 October 2005 / **g)** *Monitorul Oficial al României* (Official Gazette), 1207/18.11.2005 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

4.5.3.4.2 **Institutions** − Legislative bodies − Composition − Term of office of members − Duration.
4.5.4.1 **Institutions** − Legislative bodies − Organisation − Rules of procedure.
4.5.4.2 **Institutions** − Legislative bodies − Organisation − President/Speaker.
5.3.13.6 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Right to a hearing.

Keywords of the alphabetical index:

Parliament, chamber, President, dismissal / Procedure, right of defence / Parliament, group, rights / Senate, election / Parliament, bureau, political configuration, principle.

Headnotes:

1. Regulations governing the cases and circumstances in which the President of the Senate may be dismissed cannot contravene the constitutional principle set out in Article 64.5 of the political configuration forming the basis of the membership of the Senate Standing Bureau, nor the fundamental right to defence.

2. The Rules of Procedure of both Chambers of Parliament must not regulate the rights and obligations of certain individuals outside the chambers, as this would violate the principle of parliamentary autonomy under Article 64.1 of the Constitution.

Summary:

Fifty three senators requested a review by the Constitutional Court of the constitutionality of certain provisions in the Senate Rules of Procedure.

In Decision no. 601 of 14 November 2005, the Constitutional Court found that Article 30.1 of the Rules of Procedure was in breach of Articles 24 and 64.5 of the Constitution. Not only did it breach the right to defence but it also failed to comply with the political configuration principle. It allowed the President of the Senate, elected at the proposal of a parliamentary group and subsequently dismissed as a result of a legal sanction, to be replaced and a new President from a different parliamentary group, to be elected. This principle underlies the composition of the Senate Standing Bureau. Following Article 64.5, the political configuration of each Chamber reflected the composition of the Chambers in accordance with the results of the elections, in proportion to the number of seats held by each parliamentary group. The President of the Senate and the President of the Chamber of Deputies were also appointed in line with the political configuration resulting from the electorate's decision.

The vote granted to the President of a Chamber was a political one and could be annulled if the group that had proposed the President requested dismissal or a sanction on the grounds that he or she had committed certain acts incurring legal liability. The President could only be replaced by a person from the same parliamentary group, and this would comply with the political configuration principle. Dismissal before expiry of the term of office affected only the person dismissed and not the right of the parliamentary group that had nominated him or her to propose another senator to fill the vacant post.

To provide for the possibility of electing a new president from another parliamentary group would mean that the sanction applied to the President of the Senate (dismissal from post) would be extended to the parliamentary group that had proposed his or her election. The Constitution of Romania did not allow for the application of such a collective sanction.

Article 30.1 of the Senate Rules of Procedure made no provision for an investigation into the deeds alleged to have been perpetrated by the member of the Standing Bureau whose dismissal had been proposed. It did not afford the person affected any chance to defend themselves against the allegations. Neither did it define what was meant by repeated failure to comply with the Senate Rules of Procedure or the Rules of Procedure relating to joint sessions. This made it impossible for the member of the Standing Bureau in question to defend himself or herself and gave scope for abusive application of the provision.

Article 30.2 of the Rules of Procedure was in breach of Article 64.5 of the Constitution as it did not comply with the political configuration principle and allowed for the dismissal of the President of the Senate by withdrawal of political support, at the request of one or more parliamentary groups other than the one that had initially proposed him or her. Article 30.2 made dismissal subject to the will of the majority, namely the majority of senators authorised to propose dismissal. As such criteria violated the political configuration of parliament, this was in breach of the letter and spirit of the Constitution and could result in instability in parliamentary activity.

Article 32.1 of the Rules of Procedure was in breach of Article 64.5 of the Constitution, as it made no reference to Article 23.3 which provided that the political affiliation of the members of the Standing Bureau – including the President of the Senate – must reflect the political configuration which resulted from the elections. This configuration was the key principle underlying the composition of the Standing Bureau, both at the beginning of the life of the parliament and following dismissal of the President of the Senate prior to the expiry of his or her term of office.

Article 170.2 of the Rules of Procedure was in breach of Article 64.5 of the Constitution as it established obligations for individuals other than those related to the organisation and functioning of this Chamber of Parliament.

The Rules of Procedure of the Chambers could not regulate obligations for other individuals since, in the hierarchy of regulatory legal acts, the Rules of Procedure applied solely to the sphere of activity of the Chamber that had adopted them.

Supplementary information:

The provisions of the Rules of Procedure found to be unconstitutional by Decision no. 601/2005, are as follows:

- Article 30.1.2: “Dismissal of the President of the Senate may be proposed at the request of at least one third of the total number of Senators, in at least one of the following cases:

a. violation of the provisions of the Constitution;
b. serious or repeated violation of the provisions of the Senate Rules of Procedure or the Rules of Procedure of the joint sessions.

Dismissal of the President of the Senate may also be proposed by half the total number of Senators plus a further one”;

- Article 32.1: “The proposal for dismissal shall be approved by secret ballot by the majority of the Senators. The post of President shall become vacant and elections shall be organised straightaway, in accordance with the provisions of Article 24”;

- Article 170.2: “The relevant public authorities shall be required to inform the Senate, in writing and within thirty days, of the resolution being adopted”.

Cross-references:

In Decision no. 602 of 14.11.2005 (*Monitorul Oficial al României* 1207/18.11.2005), the Constitutional Court found that Article $25^1$1.2 and 25^2.2 of the Rules of Procedure of the Chamber of Deputies, covering identical regulations to those in the Senate Rules of Procedure, were unconstitutional for the same reasons cited in Decision no. 601/2005.

Languages:

Romanian.

Russia
Constitutional Court

Statistical data
1 January 2005 – 31 December 2005

Total number of decisions: 14

Type of decision:
- Rulings: 14
- Opinions: 0

Categories of cases:
- Interpretation of the Constitution: 0
- Conformity with the Constitution of acts of state institutions: 14
- Conformity with the Constitution of international treaties: 0
- Conflicts of jurisdiction: 0
- Observance of a prescribed procedure for charging the President with high treason or other grave offence: 0

Types of claim:
- Claims by state institution: 6
- Individual complaints: 11
- Referral by a court: 4
  (Some proceedings were joined with others and heard as one set of proceedings)

Important decisions

Identification: RUS-2005-3-001

a) Russia / **b)** Constitutional Court / **c)** / **d)** 01.02.2005 / **e)** 1 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 08.02.2005 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

3.3 **General Principles** − Democracy.
3.6.3 **General Principles** − Structure of the State − Federal State.
3.8.1 **General Principles** − Territorial principles − Indivisibility of the territory.
4.5.10.1 **Institutions** − Legislative bodies − Political parties − Creation.
4.5.10.3 **Institutions** − Legislative bodies − Political parties − Role.
5.1.3.3 **Fundamental Rights** − General questions − Limits and restrictions − Subsequent review of limitation.
5.3.27 **Fundamental Rights** − Civil and political rights − Freedom of association.
5.3.29.1 **Fundamental Rights** − Civil and political rights − Right to participate in public affairs − Right to participate in political activity.

Keywords of the alphabetical index:

Political party, regional, registration / Political party, membership, minimum.

Headnotes:

The right of association for citizens comprises, *inter alia*, the right to form political parties. However, this right is not absolute and may be limited in such cases as are prescribed by law and necessary in a democratic society to serve the interests of national security and public policy, to protect health and morals, and to safeguard the rights and freedoms of others.

Summary:

I. The applicants, members of the Baltic Republican Party, considered that the Federal Political Parties Act infringed the citizens' constitutional right of association because the impugned provisions subjected political parties to additional requirements.

The above Federal Act of 11 July 2001 stipulates in particular that a political party must have regional branches in more than half the Subjects of the Russian Federation and a membership of not less than ten thousand. Each regional branch must have at least one hundred members.

The applicants found the above requirements disproportionate because under the Act the right to participate in elections and referendums and to put forward candidates was only guaranteed to public associations holding political party status. A public association failing to meet the requirements laid down by the Act would forfeit the possibility of participating in the management of state affairs through its representatives.

II. The Court noted firstly that the right of citizens to form political parties was not directly regulated by the Constitution but formed an integral part of the individual right to freedom of association, so that political parties' freedom to operate as public associations was guaranteed.

The right of citizens to form political parties was also secured by those provisions of the Constitution guaranteeing equality in human and civic rights and freedoms irrespective of affiliation to public associations. Compulsion to join or to remain in any association was forbidden.

At the same time, the Constitution prohibits the creation and activity of associations which have the aims of changing by force the fundamental elements of constitutional governance, placing the integrity of the Russian Federation in jeopardy and undermining the security of the state, forming armed units and which engage in incitement to social, racial, ethnic and religious strife. There is scope within the Constitution for limiting the right of association by Federal Law to the extent required to protect morality, health, rights and lawful interests of other persons and to ensure the defence of the country and the security of the state.

The Constitution, in setting out the requirements for a multi-party system as well as the right of association and the freedom of action of associations, does not define the territorial level, whether this be national, inter-regional, regional or local, at which political parties are to be formed. Nor does it contain a direct prohibition against the formation of regional parties. Consequently, the impugned Act's introduction of a restriction that confines to a federal level the possibility of forming and operating political parties is lawful only in so far as necessary to protect values with constitutional status.

In the present circumstances where Russian society has not yet gained a full grounding in democratic life and where serious challenges are raised by separatist, nationalist and terrorist forces, the result of creating regional political parties could be the destabilising the state itself and the unity of the system of state power which are fundamental to Russia's federal structure.

Moreover, a proliferation of regional and local political parties could jeopardise Russia's developing democracy and thus impair constitutional safeguards for rights and freedoms.

The Court held that the limitation in question was of a temporary character and should be removed immediately the circumstances prompting it had ceased to apply.

The Court ruled that in determining the minimum membership of political parties the legislator should be guided by the expediency of a party's having substantial support in society and by the principle of a genuine multi-party system. In order to fulfil its essential purpose, namely the formation and expression of the people's political will, the minimum membership of the party must therefore be fairly large but not so large as to prejudice the citizens' right to band together in political parties. The Court stressed that the quantitative criteria would be at odds with the Constitution if their application precluded the creation of several parties so as to have a single active party.

Accordingly, the Court ruled that the impugned provisions were not contrary to the Constitution and did not unduly limit the right of citizens to band together in political parties.

Languages:

Russian.

Identification: RUS-2005-3-002

a) Russia / **b)** Constitutional Court / **c)** / **d)** 11.05.2005 / **e)** 5 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 20.05.2005 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

3.10 **General Principles** − Certainty of the law.
5.3.13.16 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Prohibition of *reformatio in peius*.
5.3.13.19 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Equality of arms.
5.3.15 **Fundamental Rights** − Civil and political rights − Rights of victims of crime.

Keywords of the alphabetical index:

Ne bis in idem, conditions / Miscarriage of justice, rectification / Fact, new, submission to court / Judgment, review / *Reformatio in peius*, prohibition, constitutionality.

Headnotes:

The right not to be prosecuted and convicted twice for the same offence does not mean a case cannot be tried again if evidence is adduced of new facts and charges or if a substantive violation of due process

was committed during the earlier proceedings. A miscarriage of justice must be rectified at the instigation of the prosecution as well as that of the defence.

Summary:

The Kurgan Regional Court, the Commissioner for Human Rights and several citizens sought a Constitutional Court decision on the constitutionality of Article 405 of the Code of Criminal Procedure concerning the inadmissibility of *reformatio in peius* when a judicial ruling undergoes supervisory review.

The Court observed that the impugned provision effectively ruled out the supervisory review of a criminal conviction as being tantamount to the application of criminal law to a more serious offence on the ground of insufficient severity of the penalty or other grounds, which could worsen the convicted person's position and result in the reversal of a judgment of acquittal.

The applicants argued that the impugned provision, in excluding reformatio in peius when judicial rulings undergo supervisory review, violates the universal right to a defence before a court, the constitutional principles of equality before the law and the courts, and the conduct of judicial proceedings on the basis of adversarial submissions and the parties' equality in law, secured by the Constitution.

It follows from the Constitution and corresponding Articles 7, 8 and 10 of the Universal Declaration of Human Rights and from Article 14 of the International Covenant on Civil and Political Rights, Article 6 ECHR and Articles 3 and 4.2 Protocol 7 ECHR which are an integral part of Russia's legal system under Article 15.4 of the Constitution, that justice in its most basic form can only be recognised as such if it meets the demands of equality and guarantees effective reinstatement of rights. Thus a judicial ruling must be reviewed if a new fact or charge or a substantive violation irrefutably shows that a miscarriage of justice has occurred, since a ruling of this kind does not fulfil the requirements of justice.

However, under the current criminal procedure system, rectification of a miscarriage of justice is not possible when a judicial ruling undergoes supervisory review, nor is it possible to reopen criminal proceedings in the light of new facts and charges if this puts the convicted person in a worse position.

There is a constitutional right to a ruling that one has been the victim of a miscarriage of justice, and the Constitution also foresees the possibility of rectifying miscarriages of justice even after a case has been tried by a court the judgment of which is deemed final in the context of normal judicial procedure. A supervisory criminal procedure must ensure the rectification of miscarriages of justice through the reversal of enforceable judgments in order to guarantee effective protection of rights and freedoms.

Under Article 50.1 of the Constitution, no-one may be sentenced twice for the same offence. There are international treaty stipulations corresponding to this constitutional provision in Article 14.7 of the International Covenant on Civil and Political Rights and of Article 4.1 Protocol 7 ECHR. According to these stipulations, it is not possible for the legal status of a person on whom final judgment has been passed to be altered arbitrarily and, as a rule, *reformatio in peius* for a convicted (or acquitted) person is inadmissible when enforceable judgments are reviewed. At the same time, Article 4.2 Protocol 7 ECHR provides that the right not to be tried and not to be convicted twice does not prevent the reopening of the case if there is evidence relating to new or newly discovered facts or new charges, or if there has been a fundamental defect in the previous proceedings affecting the outcome of the case.

It nevertheless follows from the impugned provision that when a judgment is reviewed a miscarriage of justice cannot be rectified at the instigation of the prosecution if this causes an aggravation of the convicted person's position. This provision does not presume, in particular, that an application by a victim or by a prosecutor concerning the review of an enforceable judgment would be brought on grounds tending to worsen a convicted (or acquitted) person's situation, whereas an application by a convicted (or acquitted) person to have a judgment reviewed on grounds tending to better his position is mandatory for a case to be tried and resolved on the merits. This results in the defence being given precedence over the prosecution, which infringes the constitutional principle of adversarial proceedings and of the parties' equality in law, as guaranteed by the Constitution.

Thus Article 405 of the Code of Criminal Procedure, which does not permit *reformatio in peius* when a judgment undergoes supervisory review at the request of a victim of miscarriage of justice or a prosecutor and which by not allowing the substantive defects of the earlier judgment to be eliminated, results in flawed proceedings, is not in keeping with the Constitution of the Russian Federation.

Languages:

Russian.

Identification: RUS-2005-3-003

a) Russia / **b)** Constitutional Court / **c)** / **d)** 31.05.2005 / **e)** 6 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 07.06.2005 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

3.5 **General Principles** − Social State.
3.9 **General Principles** − Rule of law.
3.16 **General Principles** − Proportionality.
3.21 **General Principles** − Equality.
4.6.3.2 **Institutions** − Executive bodies − Application of laws − Delegated rule−making powers.
5.3.39.3 **Fundamental Rights** − Civil and political rights − Right to property − Other limitations.

Keywords of the alphabetical index:

Liability, third party / Insurance, obligation / Motor vehicle, insurance, obligation.

Headnotes:

Insurance against the risk of third party liability is a guarantee of redress of damage sustained by victims. The obligation to insure against the risk of third party liability does not violate the principles of equality and justice or disproportionately limit citizens' constitutional rights.

Summary:

I. The applicants (the legislative assemblies of a number of Subjects of the Federation, a group of members of the State Duma and one private citizen) claimed that the Federal Act "on compulsory motor vehicle liability insurance" as a whole, and specific provisions thereof, were contrary to the Constitution because a general obligation to insure against a risk of third party liability restricted the right to own, enjoy and dispose of one's property and the right freely to use one's property for business activity and for other economic activities not prohibited by law, and infringed the constitutional principle forbidding the passage of laws that abolish or restrict human and civil rights and freedoms.

An applicant further considered that the payment of the compulsory insurance premium, which has all the characteristics of taxation, did not take minimum livelihood into account and thus constituted a disproportionate financial burden for most citizens owning means of transport.

II. The Court noted that the intended effect of the right of property was to guarantee owners a certain degree of freedom in the economic sphere. At the same time, in the context of the legal regulation of terms of ownership, the Constitution allowed this right to be limited by the legislator with due regard to fundamental constitutional values.

A constitutional requirement concerning the need to correlate a person's right of ownership with the rights and freedoms of others meant that an owner was entitled to do as he wished with his property provided this was in accordance with the law and other legislation and that the rights and legitimate interests of third parties were respected. The right of ownership therefore presupposed an owner's ability not only to exercise his powers to possess, enjoy and dispose of his property, but also to fulfil the duty of upkeep of his property. In accordance with the Civil Code, legal persons and private citizens whose activity posed a high degree of danger to individuals, particularly a danger linked with the use of means of transport, must redress any damage caused by the use of their property. But the fact that the Civil Code imposed a large degree of liability upon vehicle owners was not in itself a guarantee that damage to victims would be redressed. In a state governed by social law, it was the vehicle owners' insurance against the risk of third party liability, founded on the principle of apportionment of blame, which sought to guarantee such redress.

In placing vehicle owners under the obligation to insure against the risk of third party liability for the benefit of persons who might incur damage, the legislator performed one of the functions of a state governed by social law. The stipulation of this obligation in law could not be regarded as infringing the requirements of equality and justice, or as disproportionately limiting citizens' constitutional rights.

There was nothing unconstitutional in the provisions of the impugned law conferring on the government powers to set the limits of the insurance rates. Moreover, the constitutional principles of rule of law, equality and justice oblige the legislator to enact clear and unambiguous legislation, which is in accordance with the legal system already in force. The Constitutional Court held that these requirements also applied to the legal provisions whereby the legislator delegates powers to the government. But in the case in point, since the legislator had not established the criteria for determining the conditions of compulsory insurance and had left them to the discretion of the

government, their scope and substance were open to arbitrary interpretation, so that there was a limitation of the citizens' rights and freedoms by an act of the government.

In the light of the foregoing, the Court ruled that the provisions of Sections 3.3 and 3.4, 4.1 and 4.2 and 32.3 of the impugned Act were not contrary to the Constitution. Neither did Section 8.2.1 of the Act contravene the Constitution.

Section 5 of the Act, in so far as it permitted the government's arbitrary determination of the terms of the compulsory third party liability insurance contract, was not in keeping with the Constitution.

Languages:

Russian.

Identification: RUS-2005-3-004

a) Russia / **b)** Constitutional Court / **c)** / **d)** 14.07.2005 / **e)** 9 / **f)** / **g)** *Rossiyskaya Gazeta* (Official Gazette), 22.07.2005 / **h)** CODICES (Russian).

Keywords of the systematic thesaurus:

4.10.7.1 **Institutions** − Public finances − Taxation − Principles.
5.2.1.1 **Fundamental Rights** − Equality − Scope of application − Public burdens.
5.3.42 **Fundamental Rights** − Civil and political rights − Rights in respect of taxation.

Keywords of the alphabetical index:

Statute of limitation, period / Taxpayer, differentiation / Statute of limitation, period, expiry / Statute of limitation, prosecution, suspension / Tax, audit.

Headnotes:

The three-year limitation period for prosecution of a tax offence cannot be interrupted; the limitation period for legal action to recover a tax penalty is independent, not being subsumed by the limitation period applicable to the prosecution of a tax offence.

Summary:

A citizen petitioned the Court, and the Federal Court of Arbitration in Moscow asked it to review the constitutionality of Article 113 of the Taxation Code.

Under this provision, a person cannot be prosecuted for a tax offence once three years have elapsed since the date on which it was committed or since the day after the end of a taxation period during which the offence was committed.

In enacting legislation pertaining to the constitutional duty to pay taxes, the Federal legislator determines tax audit formalities and procedures and also defines tax offences and the sanctions for committing them; this includes the grounds and conditions of prosecution, particularly the limitation period. These measures are intended to secure the right of the State to receive from the taxpayer a sum fully corresponding to the tax payable.

Accordingly, under the Taxation Code, only the three calendar years of the taxpayer's activity directly preceding the year in which a tax audit is performed are subject to audit.

The three-year limitation period laid down by the Taxation Code is universal and of the same length for all tax offences.

Where a taxpayer has refused to pay the amount of a tax penalty without being compelled to do so by a court ruling, or has missed the payment deadline, the tax authority may bring court proceedings not later than six months after the date when the tax offence is recorded and a corresponding order to recover the amount in question is drawn up.

Thus the limitation of legal action to collect a tax penalty is independent. It is not subsumed by the limitation period for prosecution for unpaid tax and it is not to be presumed that the entire process of such prosecution must be completed within a time not exceeding the limitation period prescribed by Article 113. The deadline for recovering the tax penalty begins to run from the expiry of the limitation period for the bringing of tax proceedings, as this recovery is linked with the approval of the act of tax audit and not with the judicial ruling on the enforcement of the tax penalty.

It follows from Article 113 of the Taxation Code that the three-year limitation period may not be interrupted.

The impugned provisions of Article 113 of the Taxation Code cannot be construed in such a way that the limitation period which they prescribe is to be applied in the same way to taxpayers who fulfil their duties regarding the performance of tax audit as to those who obstruct it. Thus the provisions of Article 113, under their current interpretation in constitutional law, do not rule out the possibility that a court, where a taxpayer obstructs the performance of a tax audit, may hold admissible the causes of a tax authority's overrunning the time limit for legal action and to recover from the taxpayer the tax penalties for the offences brought to light.

Having considered the above arguments, the Court found that the provisions of Article 113 of the Taxation Code were not contrary to the Constitution.

Languages:

Russian.

Slovakia
Constitutional Court

Statistical data
1 September 2005 – 31 December 2005

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 4
- Decisions on the merits by the panels of the Court: 168
- Number of other decisions by the plenum: 6
- Number of other decisions by the panels: 242

Slovenia
Constitutional Court

Statistical data
1 September 2005 − 31 December 2005

The Constitutional Court held 52 sessions (14 plenary and 38 in chambers: 12 in the civil chamber, 12 in the penal chamber, 14 in the administrative chamber) during this period. There were 358 unresolved cases in the field of the protection of constitutionality and legality (denoted U- in the Constitutional Court Register) and 1 196 unresolved cases in the field of human rights protection (denoted Up- in the Constitutional Court Register) from the previous year at the start of the period (1 September 2005). The Constitutional Court accepted 103 new U- and 458 new Up cases in the period covered by this report.

In the same period, the Constitutional Court decided:

- 232 cases (U-) in the field of the protection of constitutionality and legality, in which the Plenary Court made:
  - 149 decisions and
  - 83 rulings;

- 32 cases (U-) cases joined to the above-mentioned for joint treatment and adjudication.

Accordingly the total number of U- cases resolved was 264.

In the same period, the Constitutional Court resolved 442 (Up-) cases in the field of the protection of human rights and fundamental freedoms (26 decisions issued by the Plenary Court, 416 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, the decisions and rulings are published and submitted to users:

- in an official annual collection (Slovenian full text versions, including dissenting and concurring opinions, and English abstracts);

- in the Slovenian Legal Practice Journal (Slovenian abstracts, with the full-text version of the dissenting and 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, at http://www.us-rs.si;

- since 2000 in the JUS-INFO legal information system on the Internet, full text in Slovenian, available through http://www.ius-software.si; and

- in the CODICES database of the Venice Commission.

Important decisions

Identification: SLO-2005-3-003

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 22.09.2005 / **e)** U-I-65/05 / **f)** / **g)** *Uradni list RS* (Official Gazette RS), 92/05 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

1.3.5.15 **Constitutional Justice** − Jurisdiction − The subject of review − Failure to act or to pass legislation.
1.6.9 **Constitutional Justice** − Effects − Consequences for other cases.
5.3.13.2 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Effective remedy.
5.3.13.13 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Trial/decision within reasonable time.
5.3.17 **Fundamental Rights** − Civil and political rights − Right to compensation for damage caused by the State.

Keywords of the alphabetical index:

Trial, excessive length, remedy after termination of procedure.

Headnotes:

The right to trial without undue delay is the core element of the right to judicial protection. The right can be viewed as one of the essential conditions for the effective exercise of all other human rights. If judicial protection is too late, the affected person is in the same position as if there is no judicial protection. The legal maxim is “justice delayed is justice denied”.

Article 15.4 of the Constitution, which affords judicial protection of human rights and remedies if they are breached, must be interpreted in the light of recent case law from the European Court of Human Rights, according to which effective judicial protection of the right to trial within a reasonable time is ensured only if an appropriate remedy is available for a party whose right had been violated in proceedings which had already finished. The criteria of the European Court of Human Rights, assessing whether the hearing has taken an inordinate length of time, must also be taken into consideration.

Summary:

The petitioner challenged Articles 62.1, 62.2 and 34 of the Administrative Dispute Act (hereinafter described as “*ZUS*”).

The Constitutional Court reviewed whether affected persons were ensured effective judicial protection of the right to trial without undue delay under Article 23.1 of the Constitution if the proceedings in which this right had been violated were terminated. It decided that *ZUS* was not consistent with the Constitution.

The Constitutional Court had dealt previously with cases regarding legislation governing the situation where the proceedings in which the right to trial without delay had allegedly been violated but those proceedings had come to an end. The affected person was able to file an action for the payment of compensation on the basis of Article 26 of the Constitution. This means that it is decided upon by the court in civil proceedings according to the general rule of torts as regulated by the Code of Obligations.

The Constitutional Court established that no specific statutory provisions exist to enable an affected person to claim the right to just satisfaction in the sense of the European Court of Human Rights. It emphasised that just satisfaction due to a violation of the right to trial within a reasonable time in the sense of the European Court of Human Rights does not entail compensation in the classic meaning according to the criteria of civil liability for property or non-property damage, which also applies to compensation under Article 26 of the Constitution. Here, one is dealing with satisfaction due to the omission of the state to ensure a system or organisation of proceedings which would enable an individual to obtain the decision of the court within a reasonable time. In view of Article 157.2 of the Constitution, *ZUS* does in broad terms govern the judicial protection of the right to trial without undue delay. However, it does not contain the specific provisions mentioned above, which would enable an affected party to gain satisfaction even if the proceedings in question had already concluded. This is why it is inconsistent with Article 15.4 of the Constitution, in conjunction with Article 23.1 of the Constitution.

As the matter concerns the case in which the legislator had failed to regulate an issue which it was obliged to regulate, it was impossible to repeal the legislation in question. Instead, the Constitutional Court reached a declaratory decision. The legislator was ordered to comprehensively regulate the protection of the right to trial without undue delay in *ZUS* or another statute, within one year from the publication of the decision in the Official Gazette of the Republic of Slovenia. The Court expressed the view that the legislator must try not to place an additional burden on the courts. In other words, the new legal remedy for the protection of the right to trial within a reasonable time must not cause additional delays to judicial proceedings.

In the case in point, the Court only considered whether the legislation in force contained effective judicial protection of the right to trial without undue delay when the original proceedings have already finished. It warned that the case law of the European

Court of Human Rights suggests that the issue of effectiveness of judicial protection of the right to trial without undue delay can also be raised in proceedings which are still pending.

As the remedying of the inconsistency with the Constitution requires more complex legislative regulation, it was not possible to decide, in this particular case, the way in which the decision should be implemented, pursuant to Article 40.2 of the Constitutional Court Act. Accordingly, until the appropriate remedies have been built into the law, anybody whose right may have been breached in proceedings which have already been terminated can only claim compensation under Article 26 of the Constitution.

The Constitutional Court decided unanimously that the Administrative Disputes Act was inconsistent with the Constitution. One judge gave a concurring opinion.

Cross-references:

Legal norms referred to:

- Articles 15, 23 and 26 of the Constitution;
- Articles 6 and 13 ECHR;
- Article 48 of the Constitutional Court Act.

Languages:

Slovenian, English (translation by the Court).

South Africa
Constitutional Court

Important decisions

Identification: RSA-2005-3-009

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 30.09.2005 / **e)** CCT 59/04 / **f)** Minister of Health and Another v. New Clicks SA (Pty) Ltd and Others / **g)** / **h)** 2006 (1) *Butterworths Constitutional Law Reports* 1 (CC); 2006 (2) *South African Law Reports* 311 (CC); CODICES (English).

Keywords of the systematic thesaurus:

3.9 **General Principles** − Rule of law.
3.13 **General Principles** − Legality.
3.20 **General Principles** − Reasonableness.
3.25 **General Principles** − Market economy.
4.6.3.2 **Institutions** − Executive bodies − Application of laws − Delegated rule-making powers.
5.3.13.1.5 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Scope − Non-litigious administrative proceedings.
5.3.25 **Fundamental Rights** − Civil and political rights − Right to administrative transparency.

Keywords of the alphabetical index:

Administration, information of the public / Administrative act, judicial review / Legislation, delegated / Company, margin, profit / Price, control, competence / Price, maximum, determination / Pricing policy, fundamental principles / Procedure, administrative, fairness.

Headnotes:

Where an Act of Parliament intends to give effect to a right in the Constitution, it is not permissible to circumvent that Act. A dispensing fee for pharmacies not allowing them to generate sufficient profit to remain viable as businesses and likely to drive them out of business is not “appropriate”.

Summary:

Appeal against decision of the Supreme Court of Appeal (SCA) striking down regulations promulgated by the Minister of Health (first applicant) on the advice of the medicines pricing committee in terms of the Medicines and Related Substances Act 101 of 1965 (the Act).

The Court was asked to assess the constitutionality of the regulations. The first question the Court had to decide was on what basis the constitutionality of the regulations should be assessed. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) was promulgated to give effect to the right to administrative justice contained in section 33 of the Constitution. PAJA however, only applies instances specified by the legislation itself. A question arose as to whether PAJA, on its own terms, applies to regulations made by a Member of Cabinet.

The question was answered in the affirmative by five judges. Five judges answered the question in the negative, assessing the constitutionality of the regulations on the basis of the constitutional principle of legality and the rule of law. One judge held that PAJA applied to part of the regulations only.

Section 22G of the Medicines and Related Substances Act contemplates the creation of a medicines pricing committee. The section authorises the Minister of Health, on the advice of the pricing committee, to make regulations:

a. on the introduction of a transparent pricing system for medicines, which shall include a single exit price (SEP). The SEP is the only price at which manufacturers shall sell medicines to persons other than the state;
b. on an "appropriate" dispensing fee to be added to the wholesale price of medicines by retail outlets;
c. on an "appropriate" fee to be charged by wholesalers and distributors.

Chaskalson CJ, in deciding if the Promotion of Administrative Justice Act (PAJA) applied to regulation-making, held that it would have been inconsistent with the Constitution to exclude from the ambit of PAJA the most important function of the implementation of legislation. He held that PAJA applies to the making of regulations by a Cabinet minister.

Ngcobo J held that PAJA applies to this case without deciding whether PAJA applies generally to regulation-making. He held that where an Act of Parliament intends to give effect to a right in the Constitution, as PAJA does, it is not permissible to circumvent that Act.

Langa DCJ and Van der Westhuizen J concurred in the judgment of Ngcobo J, while O'Regan J found that much of Ngcobo J's reasoning in holding that PAJA applied only to part of the regulations applies also to regulation-making in general.

Moseneke J found it unnecessary to decide if PAJA applied to proceedings. He held that whether the specific administrative justice protections offered by PAJA were relied on or the general principles of legality and the doctrine of the rule of law would have no significant effect on the outcome of the case. The doctrine of the rule of law, flowing from section 1 of the Constitution, requires that all action taken by the government or members of government, including members of Cabinet when they make regulations, to be taken in accordance with law. Whether the procedures followed by the pricing committee and the Minister in this case were assessed against this doctrine or the principles of administrative justice set out in section 33 of the Constitution and PAJA, Moseneke J held, would lead to the same conclusion. For this reason, Moseneke J held that this case is not an appropriate one in which to decide whether PAJA applies generally to ministerial regulation-making. Madala J, Mokgoro J, Skweyiya J and Yacoob J concurred in the judgment of Moseneke J.

Sachs J held that PAJA applied only to the question of the dispensing fee.

As to the substance of the regulations, the Court held unanimously that the dispensing fee set by the regulations was invalid in respect of rural and courier pharmacies. Thin margins are generated by these types of pharmacies, and the dispensing fee set would not allow them to generate sufficient profit to remain viable as businesses. A dispensing fee likely to drive them out of business is not "appropriate". The Court was divided on the validity of the dispensing fee as applied to urban pharmacies. The majority, per Chaskalson CJ found that retail pharmacies would not remain viable operating on the dispensing fee set by the regulations, and that the fee was therefore not "appropriate".

Moseneke J, for the minority, disagreed, finding the fee "appropriate" on the whole.

The Court was unanimous in holding that the SCA's decision to overturn the regulations in their entirety should be set aside. The members of the Court differed in their approach to the challenges to individual regulations. The Court found that the regulations relating to the SEP passed muster, but

indicated where certain words or phrases had to be read into or severed from individual regulations.

Languages:

English.

Identification: RSA-2005-3-010

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 07.10.2005 / **e)** CCT 45/04 / **f)** Sibiya and Others v. Director of Public Prosecutions (Johannesburg High Court) and Others / **g**) http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT45-04A / **h)** 2006 (2) *Butterworths Constitutional Law Reports* 293 (CC); CODICES (English).

Keywords of the systematic thesaurus:

1.4.7.1 **Constitutional Justice** − Procedure − Documents lodged by the parties − Time-limits.
1.6.6 **Constitutional Justice** − Effects − Execution.
3.10 **General Principles** − Certainty of the law.
3.18 **General Principles** − General interest.
5.1.1.4.3 **Fundamental Rights** − General questions − Entitlement to rights − Natural persons − Prisoners.
5.3.2 **Fundamental Rights** − Civil and political rights − Right to life.

Keywords of the alphabetical index:

Constitutional Court, decision, binding effect / Constitutional Court, decision, disregard / Order, final, Constitutional Court's power to vary / Time limit, extension.

Headnotes:

Where the court makes an order requiring a report to be filed with it before a certain date, it can grant an extension of time to allow the parties to comply with the terms of the order on good cause shown.

Summary:

The Constitutional Court declared the death penalty unconstitutional in the case of *State v. Makwanyane and Another* in June 1995. On 25 May 2005 the Constitutional Court gave judgment in the Sibiya matter upholding the constitutional validity of the legislation enacted to govern the process of substituting the sentences of those who had been sentenced to death before the Makwanyane judgment.

The Sibiya case raised concerns that the death sentences of 62 people of about 400 who were on death row at the time of the Makwanyane judgment had still not had their sentences set aside in terms of the applicable legislation. The Court ordered the respondents to the case to provide detailed information about the process by which death sentences had been substituted and explain fully why the death sentences of certain people had not yet been substituted. The information was to be furnished to the Court by 15 August 2005.

The Minister of Justice and Constitutional Development and the President, both respondents in the case, filed an application before 15 August seeking an extension of time to enable them to comply with the order. In granting the application for an extension, Yacoob J, for a unanimous Court, held that an extension was in the interest of justice. The explanation given for the failure to provide the information was on the whole satisfactory and the government had demonstrated its clear intention to comply with the order, and had already done much of the necessary work in this respect. In addition, the Court concluded that those people who had not yet had their death sentences replaced would not experience any prejudice as a result of any delay occasioned by the extension.

Cross-references:

- *Brummer v. Gorfil Brothers Investments (Pty) Ltd and Others,* 2000 (2) *South African Law Reports* 837 (CC), 2000 (5) *Butterworths Constitutional Law Reports* 465 (CC);
- *Khosa and Others v. Minister of Social Development and Others*;
- *Mahlaule and Others v. Minister of Social Development and Others,* 2004 (6) *South African Law Reports* 505 (CC), 2004 (6) *Butterworths Constitutional Law Reports* 569 (CC), *Bulletin* 2004/1 [RSA-2004-1-002];
- *Minister of Justice v. Ntuli,* 1997 (3) *South African Law Reports* 772 (CC), 1997 (6) *Butterworths Constitutional Law Reports* 677 (CC), *Bulletin* 1997/2 [RSA-1997-2-006];
- *National Police Service Union and Others v. Minister of Safety & Security and Others,* 2000 (4) *South African Law Reports* 1110 (CC); 2001 (8) *Butterworths Constitutional Law Reports* 775 (CC);

- *State v. Makwanyane and Another,* 1995 (3) *South African Law Reports* 391 (CC), 1995 (6) *Butterworths Constitutional Law Reports* 665 (CC), *Bulletin* 1995/3 [RSA-1995-3-002];
- *Sibiya and Others v. DPP: Johannesburg High Court and Others,* 2005 (8) *Butterworths Constitutional Law Reports* 812 (CC) , *Bulletin* 2005/1 [RSA-2005-1-004].

Languages:

English.

Identification: RSA-2005-3-011

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 07.10.2005 / **e)** CCT 55/04 / **f)** Phillips and Others v. National Director of Public Prosecutions / **g)** http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT20-02 / **h)** 2006 (1) *South African Law Reports* 505 (CC); 2006 (2) *Butterworths Constitutional Law Reports* 274 (CC); CODICES (English).

Keywords of the systematic thesaurus:

1.1.1.1 **Constitutional Justice** − Constitutional jurisdiction − Statute and organisation − Sources.
1.3.1 **Constitutional Justice** − Jurisdiction − Scope of review.
1.4.4 **Constitutional Justice** − Procedure − Exhaustion of remedies.
4.7.1 **Institutions** − Judicial bodies − Jurisdiction.
4.7.7 **Institutions** − Judicial bodies − Supreme court.
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:

Appeal, decision of Supreme Court / Appeal, leave to appeal / Asset, freezing, order, limitation to vary / Constitution, interpretation, jurisdiction / Crime prevention, permissible means.

Headnotes:

Any issue as to the nature and ambit of the powers of the superior courts necessarily raises a constitutional issue.

A restraint order in terms of Section 26 of the Prevention of Organised Crime Act 121 of 1998 can only be varied or rescinded on the grounds specified in Section 26.10 of that Act.

Where a matter is neither expressly pleaded nor argued as a constitutional matter in the lower courts, it is not generally in the interests of justice for an application for leave to appeal to be granted, although there may be exceptional circumstances which would warrant this.

It appears that the inherent power of the courts to protect and regulate their own process in the interests of justice arises only in an extraordinary procedural situation where there is a legislative lacuna in the process of the courts.

Summary:

I. The applicant had been charged with various criminal activities relating to the operation of a brothel. The respondent had applied for a restraint order against the applicant's assets pending the outcome of criminal proceedings. The applicant appealed to the Constitutional Court against the decision of the lower court, claiming that a restraint order made in terms of Section 26 of the Prevention of Organised Crime Act 121 of 1998 can only be varied on the grounds provided for in that section. The applicant argued that the Court has an inherent power in terms of Section 173 of the Constitution to vary an order made in terms of Section 26 on grounds other than those in Section 26.10.

II. Skweyiya J, writing for the Court, stated that an issue relating to the nature and ambit of the powers of a superior court necessarily raises a constitutional issue. He held further that the grounds in Section 26.10 constitutes a closed list and that a high court is not empowered to rescind or vary a restraint order on grounds other than those specified in the Act.

The Court also found it impermissible that there was no previous challenge to the constitutionality of Section 26.10. The case was neither expressly pleaded nor argued as a constitutional matter before the Supreme Court of Appeal. Thus, the respondent had no opportunity to deal with the allegations now raised by the applicant. Accuracy in pleadings where parties place reliance on the Constitution in asserting

their rights is of utmost importance. According to Skweyiya J this does not mean that circumstances can never exist where the interests of justice allows for a constitutional matter to be raised for the first time on appeal before this Court. However, such circumstances would be rare and exceptional.

The inherent power of the courts to protect and regulate their own process in the interests of justice arises only to meet an extraordinary procedural situation where there is a legislative lacuna in the process of the courts. An Act of Parliament cannot simply be ignored and reliance placed on a provision of the Constitution, nor is it permissible to side-step an Act of Parliament by resorting to the common law.

The application for leave to appeal was accordingly dismissed.

Cross-references:

- *Prince v. President, Cape Law Society, and Others,* 2001 (2) SA 388 (CC), 2001 (2) BCLR 133 (CC);
- *Bannatyne v. Bannatyne* (Commission for Gender Equality, as *Amicus Curiae*), 2003 (2) SA 363 (CC), 2003 (2) BCLR 111 (CC);
- *Shaik v. Minister of Justice and Constitutional Development and Others,* 2004 (3) SA 599 (CC), 2004 (4) BCLR 333 (CC);
- *S v. Pennington and Another,* 1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC);
- *Parbhoo and Others v. Getz NO and Another,* 1997 (4) SA 1095 (CC), 1997 (10) BCLR 1337 (CC).

Languages:

English.

Identification: RSA-2005-3-012

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 07.11.2005 / **e)** CCT 47/2004 / **f)** Omar v. Government, RSA and Others / **g)** http://www.constitutional court.org.za/uhtbin/hyperion-image/J-CCT47-04 / **h)** 2006 (2) *Butterworths Constitutional Law Reports* 253 (CC); 2006 (2) *South African Law Reports* 289 (CC); CODICES (English).

Keywords of the systematic thesaurus:

2.2.1.2 **Sources of Constitutional Law** − Hierarchy − Hierarchy as between national and non-national sources − Treaties and legislative acts.
3.9 **General Principles** − Rule of law.
3.10 **General Principles** − Certainty of the law.
3.12 **General Principles** − Clarity and precision of legal provisions.
3.17 **General Principles** − Weighing of interests.
3.20 **General Principles** − Reasonableness.
4.11.2 **Institutions** − Armed forces, police forces and secret services − Police forces.
5.3.5.1 **Fundamental Rights** − Civil and political rights − Individual liberty − Deprivation of liberty.
5.3.13.1 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Scope.
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:

Appeal, individual, right / Arrest, safeguards / Arrest, warrant, notification / Burden of proof, criminal proceedings / Burden of proof, reversal / Civil obligation, voluntary performance / Police, powers / State, duty to protect / Violence, domestic / Woman, special protection.

Headnotes:

A statute that allows a court to authorise a warrant of arrest when it issues a protection order, where that warrant remains suspended on condition that there is no breach of the terms of the protection order, is constitutional.

Summary:

I. The application arose out of an abusive relationship between the applicant and his wife, the third respondent in this matter. The abusive relationship resulted in several protection orders being issued against the applicant in terms of Section 8 of the Domestic Violence Act. The applicant applied in 2003 for direct access to the Constitutional Court, challenging the constitutional validity of Section 8. The application was denied on the basis that the exceptional circumstances to grant of direct access did not exist. The applicant went back to the High Court to challenge the constitutionality of the section, but was unsuccessful.

In his appeal to this Court, the applicant challenged the constitutionality of Section 8 on several grounds.

First, the section violated his right of access to courts by making it mandatory for a court issuing a protection order to authorise a warrant of arrest in the absence of and without the knowledge of a respondent. Second, that the section allows for arbitrary arrest in violation of Section 12.1 of the Constitution by providing for the arrest of a respondent who did not have knowledge of the proceedings and by allowing the police no discretion as to the credibility of the allegations made by the complainant. Third, that his right to a fair trial was violated because Section 8, read together with Section 5.3 of the Domestic Violence Act, created a reverse onus of proof and the possibility of criminal conviction on the mere balance of probabilities. The applicant asserted that the Act does not contain sufficient safeguards, as the procedure provided for in Section 8 was open to abuse by a malicious complainant. The applicant argued further that less restrictive measures to achieve the purpose of the Act were available to the legislature, including Section 40 of the Criminal Procedure Act 51 of 1977.

II. A unanimous Court acknowledged the high incidence of domestic violence in South African society and the severe psychological and social damage it causes to vulnerable groups, namely women and children. It was also acknowledged that South Africa has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights. Because of the complex private nature of domestic violence there was a need to legislatively combine both civil and criminal remedies to address it. However, proper regard must also be had for fundamental rights and fair trial procedures guaranteed in the Constitution.

The Court, considering the purpose and scheme of the Act, held that the interim protection order can be issued without the respondent having knowledge of the order. Notice to the respondent – the very source of the threat of violence – would defeat the object of the protection for the complainant and place her in more serious danger. This order must, however, still be served on the respondent to be of force and effect.

The respondent can come to court and give reasons why the interim order should not be made final. The standard of proof required to make the order final is a civil one of a balance of probabilities and thus the fair trial rights applying to accused persons in terms of Section 35 of the Constitution do not apply. At that stage the respondent is not an accused person and thus the procedure has nothing to do with reversing the onus of proof in criminal proceedings as it does not result in criminal conviction.

If the protection order is breached, a complainant may hand the order, together with an affidavit, to any member of the police. That police official does have a discretion, he or she is only obliged to arrest the respondent if it appears that there are reasonable grounds to suspect that a complainant may suffer imminent harm as a result of the alleged breach. Because the arrest follows on an alleged breach of a protection order in circumstances of imminent harm, the arrest of the respondent cannot be regarded as an arbitrary deprivation of freedom or as an arrest that lacks just cause.

The Court admitted that the mechanism provided for in Section 8 may be subject to misuse, manipulation or exploitation, but held that the mere potential to exploit a statute does not render it unconstitutional. The possibility of the Act being maliciously manipulated is by far outweighed by its potential to afford protection to victims of domestic violence.

The Court also considered, and rejected, the applicant's suggestion that Section 40 of the Criminal Procedure Act, which empowers peace officers to arrest a person without a warrant under a range of circumstances, provides for a less restrictive possibility to the mechanism in Section 8.

The Court concluded that Section 8 is constitutional and accordingly denied the applicant leave to appeal.

Cross-references:

- *S v. Baloyi* (Minister of Justice and Another Intervening) 2000 SA 425 (CC), 2000 (1) BCLR 86 (CC), *Bulletin* 1999/3 [RSA-1999-3-011];
- *Carmichele v. Minister of Safety and Security and Another* 2001 (4) SA 2001 (CC), 2001 (10) BCLR 995 (CC), *Bulletin* 2001/2 [RSA-2001-2-010];
- *Omar, Ex Parte* 2003 (10) BCLR 1087 (CC); *Phillips and Others v. National Director of Public Prosecutions* 2006 (2) BCLR 274 (CC).

Languages:

English.

Identification: RSA-2005-3-013

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 29.11.2005 / **e)** CCT 73/03 / **f)** Zondi v. Member of the Executive Council for Traditional and Local Government Affairs and Others / **g)** http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT73-03 / **h)** 2006 (3) *Butterworths Constitutional Law Reports* 423 (CC); CODICES (English).

Keywords of the systematic thesaurus:

1.4.6.1 **Constitutional Justice** − Procedure − Grounds − Time-limits.
1.5.4.5 **Constitutional Justice** − Decisions − Types − Suspension.
3.18 **General Principles** − General interest.
3.23 **General Principles** − Equity.
4.5.2.4 **Institutions** − Legislative bodies − Powers − Negative incompetence.

Keywords of the alphabetical index:

Order, final, Constitutional Court's power to vary / Constitutional practice, finality in litigation / Legislature, amendment, failure / Constitutional Court, decision, binding effect / Constitutional Court, decision, disregard / Time limit, suspension, extension / Time limit extension / Suspension of enforcement, conditions for grant.

Headnotes:

Where a Court finds legislation to be unconstitutional and strikes it down as invalid, but suspends the order of invalidity for a certain period in order to allow the relevant legislative bodies to remedy the defects, that Court retains the power, under the common law and the Constitution, to extend the period of suspension on application. The Court will only do so where it is just and equitable to do so.

Summary:

On 15 October 2004 in the matter of *Zondi v. MEC for Traditional and Local Government Affairs and Others*, the Constitutional Court declared invalid certain provisions of the Pound Ordinance, KwaZulu-Natal. The Ordinance created a mechanism for dealing with trespassing and straying animals, but certain sections of the Ordinance were struck down as unconstitutional as they infringed rights to equality and of access to court. In that judgment, the Court suspended the order of invalidity for a period of twelve months in order to allow the provincial legislature of KwaZulu-Natal to correct the constitutional defects in the Pound Ordinance. The period of invalidity was to expire on 15 October 2005.

On 23 September 2005 the MEC, the respondent to the original case, applied to the Court for an extension of the period of suspension. The process of remedying the defects in the legislation had been delayed and would not be ready to take effect before the end of the period of suspension.

The Court had to consider whether it has the power to extend the period of suspension. Writing for a unanimous Court, Justice Ngcobo held that the Court has the power to do so under the common law and the Constitution, as well as in terms of the original order. A period of suspension may be extended in these circumstances whenever it is just and equitable to do so.

The Court held further that a combination of factors had produced an unforeseeable delay. These factors included the appointment of a new MEC for Traditional and Local Government Affairs, and a restructuring of the Department of Traditional and Local Government Affairs. In addition, the draft Bill that had been in existence when the original court order was made, and which the Court had taken into account when suspending the order of invalidity for a period of twelve months, had to be rejected and re-drafted. An important consideration in the Court's reasoning was the fact that the public would suffer considerable prejudice if the period of suspension was not extended. There would be no mechanism for dealing effectively with trespassing and straying animals.

In these circumstances, and having held that the Court does have the power to extend the period of suspension ordered in the original order, the Court found that it was just and equitable for the period of suspension to be extended for a further twelve months.

Cross-references:

- *Zondi v. MEC for Traditional and Local Government Affairs and Others,* 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC);
- *Zondi v. Member of the Executive Council for Traditional and Local Government Affairs and Others,* 2004 (5) BCLR 547 (N);
- *Minister of Justice v. Ntuli* 1997 (3) SA 772 (CC);1997 (6) BCLR 677 (CC), *Bulletin* 1997/2 [RSA-1997-2-006];
- *S v. Steyn,* 2001 (1) SA 1146 (CC); 2001 (1) BCLR 52 (CC), *Bulletin* 2000/3 [RSA-2000-3-018];
- *Firestone South Africa (Pty) Ltd v. Genticuro A.G.,* 1977 (4) SA 298 (A).

Languages:

English.

Identification: RSA-2005-3-014

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 01.12.2005 / **e)** CCT 60/04; 10/05 / **f)** Minister of Home Affairs and Another v. Fourie and Another; Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs and Others / **g)** http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT60-04; http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT10-05 / **h)** 2006 (3) *Butterworths Constitutional Law Reports* 355 (CC); CODICES (English).

Keywords of the systematic thesaurus:

1.6.3 **Constitutional Justice** − Effects − Effect *erga omnes*.
3.4 **General Principles** − Separation of powers.
5.2.2.11 **Fundamental Rights** − Equality − Criteria of distinction − Sexual orientation.
5.3.1 **Fundamental Rights** − Civil and political rights − Right to dignity.
5.3.13.2 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Effective remedy.
5.3.34 **Fundamental Rights** − Civil and political rights − Right to marriage.

Keywords of the alphabetical index:

Law, suspension / Cohabitation, homosexual partners / Common Law, development / Constitutional right, violation, remedy / Homosexual, marriage / Marriage, equality / Sexual orientation, equality, right to marriage.

Headnotes:

Section 9.3 of the Constitution expressly prohibits unfair discrimination on the grounds of sexual orientation. The common law definition of marriage is inconsistent with the Constitution and invalid to the extent that it does not permit same-sex couples the same status, benefits and responsibilities it accords to heterosexual couples.

The omission from Section 30.1 of the Marriage Act 25 of 1961 of the words “or spouse” after the words “or husband” is therefore inconsistent with the Constitution. The Marriage Act is declared invalid to the extent of this inconsistency. The declaration of invalidity is suspended for one year to enable Parliament to pass rectifying legislation. Should it fail to do so, the words “or spouse” would automatically be read into the Marriage Act.

Summary:

Two women complained that the law unfairly and unconstitutionally excluded them from publicly celebrating their commitment to each other in marriage. The state claimed that if there is unfair discrimination, the fault does not lie with the law of marriage. Two *amici curiae* argued that to acknowledge same-sex marriages would undermine the institution of marriage and violate the religious feelings of the majority.

Writing for a unanimous Court, except in relation to the remedy, Sachs J held that it is inappropriate to entrench any particular form of family as the only socially and legally acceptable one. There was an imperative constitutional need to acknowledge the history of marginalisation and persecution of gays and lesbians in South Africa and abroad. The Constitution represents a radical rupture with the past and affirms the movement forward towards a society based on equality, tolerance and respect for all by all. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomforting.

Acknowledgment by the state of the rights of same-sex couples is not inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages. Granting access to same-sex couples would in no way attenuate the capacity of heterosexual couples to marry in the form they wished and according to tenets of their religion.

Excluding same-sex couples from the reach of the law, together with the utilisation of gender-specific language in the marriage vow, presupposes that only heterosexual couples are contemplated. The common law and Section 30.1 of the Marriage Act are accordingly inconsistent with the right to equality and dignity in the Constitution.

Dealing with the remedy to be provided, Sachs J held that, given the great public significance of the matter, the deep sensitivities involved and the importance of establishing a firm-anchored foundation for the achievement of equality in this area, it is appropriate that the legislature be given one year to remedy the defect. If Parliament fails to cure the defect within twelve months, the words “or spouse” will automatically be read into Section 30.1 of the Marriage Act.

In a separate judgment O'Regan J expressed her agreement with the findings, but dissented on the remedy. She stated that the Court should develop the common-law and at the same time read in words to Section 30 of the Act that would permit, with immediate effect, gays and lesbians to be married.

Cross-references:

- *Mashia Ebrahim v. Mahomed Essop,* 1905 TS 59;
- *National Coalition for Gay and Lesbian Equality v. Minister of Justice,* 1999 (1) SA 6 (CC), *Bulletin* 1998/3 [RSA-1998-3-009];
- *Fourie and Another v. Minister of Home Affairs and Another,* 2003 (5) SA 301 (CC), 2003 (10) BCLR 1092 (CC);
- *Mkontwana v. Nelson Mandela Metropolitan Municipality and Another*;
- *Bisset and Others v. Buffalo City Municipality and Others;*
- *Transfer Rights Action Campaign and Others v. MEC, Local Government and Housing, Gauteng, and Others, (KwaZulu-Natal Law Society and Msunduzi Municipality as amici curiae*) 2005 (1) SA 530 (CC), 2005 (2) BCLR 150 (CC);
- *Bhe and Others v. Magistrate, Khayelitsha, and Others, (Commision for Gender Equality as amici curiae*), *Bulletin* 2004/3 [RSA-2004-3-011];
- *Shibi v. Sithole and Others*; *South African Human Rights Commission and Another v. President of the Republic of South Africa and Another,* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC), *Bulletin* 2004/3 [RSA-2004-3-011].

Languages:

English.

Identification: RSA-2005-3-015

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 05.12.2005 / **e)** CCT 19/05 / **f)** Veldman v. The Director of Public Prosecutions (Witwatersrand Local Division) / **g)** www.constitutionalcourt.org.za/uhtein/hyperion-image/J-CCT19-05 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.6.2 **Constitutional Justice** − Effects − Determination of effects by the court.
3.9 **General Principles** − Rule of law.
3.10 **General Principles** − Certainty of the law.
5.3.13 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial.
5.3.16 **Fundamental Rights** − Civil and political rights − Principle of the application of the more lenient law.
5.3.38.1 **Fundamental Rights** − Civil and political rights − Non-retrospective effect of law − Criminal law.

Keywords of the alphabetical index:

Amendment, legislative, retroactive effect / Criminal law, retroactive / Criminal proceedings, sentencing / Discretionary power, limits / Fundamental right, criminal protection / Imprisonment, period, decrease / Procedural fairness, principle / Sentence, maximum, increase / Sentence, mandatory minimum / Criminal justice, holistic approach.

Headnotes:

A legislative provision increasing the maximum penal jurisdiction of the regional magistrates' court does not apply where it was enacted after the plea but before the sentence was imposed.

The right to a fair trial extends beyond the specific rights listed in Section 35.3 of the Constitution. The operation of the presumption against retrospectivity depends on whether the applicant's substantive rights would be adversely affected.

Summary:

The applicant was convicted of murder in the regional magistrates' court and sentenced to fifteen years' imprisonment. He applied for leave to appeal to the Constitutional Court, relying on his right to a fair trial. Specifically, he relied on Section 35.3.n of the Constitution, which provides that an accused person is entitled "to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing".

At the time that the applicant committed the offence, the maximum penal jurisdiction of the regional magistrates' court for murder was ten years. After the applicant pleaded but before he was sentenced, this was increased to fifteen years in terms of Section 92.1.a of the Magistrates' Courts Act 32 of 1944.

In addition, between the time of the plea and the sentence, Section 51 of the Criminal Law Amendment Act 105 of 1997 introduced a prescribed minimum sentence for murder. One of the key questions that had to be answered by the Court was which of those provisions was relied upon by the magistrate in imposing the sentence. The applicant argued that application of either provision would amount to the retrospective application of a law, which is a violation of his right to a fair trial.

The magistrate did not indicate the section in terms of which the sentence was imposed. There was, however, no mention of any of the requirements for a deviation from the minimum prescribed sentence in Section 51, or of the legislative change between the plea and sentencing. Mokgoro J therefore concluded that the magistrate acted in terms of Section 92.1.a, which is the more routine procedure.

Mokgoro J then considered whether Section 35.3.n applies to an increase in maximum penal jurisdiction. She adopted the respondent's argument that Section 92.1.a does not prescribe sentences, but rather delineates the boundaries within which courts may exercise their sentencing discretion. Section 35.3.n does not apply to the latter. The applicant could therefore not rely on that provision.

The right to a fair trial, however, extends beyond the list of discrete rights in Section 35. The open-ended notions of fairness and justice require a holistic approach to criminal justice.

The general presumption against retrospectivity of legislative provisions arises out of the principle of legality and the need for clarity and certainty of the law. The respondent argued that this presumption did not apply, since the challenged provision was procedural in nature. Mokgoro J held that the distinction between substance and procedure is often not clear-cut, and therefore cannot be used as a conclusive test of whether the presumption applies. What is important is the impact of the provision on existing rights and obligations and the possible prejudice that would be suffered.

The respondent argued that the applicant's substantive rights would not be adversely affected since a sentence of fifteen years could have been imposed in the High Court. Indeed, certain provisions of the Criminal Procedure Act allow referral of a case from the magistrates' court to the High Court for sentencing. Mokgoro J distinguished those instances from the case at hand, to which the referral provisions could not apply. She held, therefore, that the presumption operated and the court could only impose a sentence of a maximum of ten years. She also referred to the unfairness of the uncertainty created by the retrospective application of the new provisions.

In terms of a remedy, Mokgoro J held that while this type of case would ordinarily be remitted back to the magistrates' court, the circumstances of this case permitted the Constitutional Court to substitute the sentence of fifteen years with one of ten years.

O'Regan J wrote a separate concurring judgment. She found that Section 92.1.a must be interpreted in the light of Section 35.3. Included in this is a concept of procedural fairness. While there is no vested right to a particular minimum sentence, it is unfair to vary proceedings after the plea, particularly where this would create a substantive disadvantage for the accused. This is more so in criminal trials. The provision in force at the time of the plea should therefore apply.

Ngcobo J, in his separate concurring judgment, focused on the spirit, purport and objects of the Bill of Rights as set out in Section 39.2 of the Constitution, and held that this would be undermined by the retrospective application of Section 92.1.a. This is in accordance with the principle of constitutional supremacy.

Cross-references:

- *Cape Town Municipality v. F. Robb & Co. Ltd*., 1966 (4) SA 345 (C);
- *S v. Mhlungu and Others,* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC);
- *S v. Zuma and Others* 1995 (21) SA 642 (CC); 1995 (4) BCLR 401 (CC);
- *S v. Dzukuda and Others*; *S v. Tshilo,* 2000 (4) SA 1078 (CC); 2000 (11) BCLR 1252 (CC);
- *Sanderson v. Attorney-General, Eastern Cape,* 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC);
- *S v. Jaipal,* 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC);
- *Curtis v. Johannesburg Municipality,* 1906 TS 308;
- *Minister of Public Works v. Haffajee NO,* 1996 (3) SA 745 (A);
- *S v. Ndevu,* 1975 (3) SA 519 (O);
- *S v. Mnisi en Ander,* 1999 (1) SACR 189 (T);
- *R v. Sillas,* 1959 (4) SA 305 (A);
- *S v. Mbuyane*; *S v. Nkitle, 1999* (1) SACR 458 (T); 1999 (6) BCLR 699 (T);
- *S v. Arendse and Another,* 1999 (1) SACR 454 (C);
- *S v. John,* 2003 (2) SACR 499 (C);
- *Pharmaceutical Manufacturers Association of South Africa and Another: in re Ex Parte President of the Republic of South Africa and Others,* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC), *Bulletin* 2000/1 [RSA-2000-1-003].

Languages:

English.

Identification: RSA-2005-3-016

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 24.02.2006 / **e)** CCT 10/06 / **f)** African Christian Democratic Party v. The Electoral Commission and Others / **g)** http://www.constitutionalcourt.org.za /uhtbin/hyperion-image/J-CCT10-06 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.2.2.4 **Constitutional Justice** − Types of claim − Claim by a private body or individual − Political parties.
1.3.4.1 **Constitutional Justice** − Jurisdiction − Types of litigation − Litigation in respect of fundamental rights and freedoms.
1.3.4.5.4 **Constitutional Justice** − Jurisdiction − Types of litigation − Electoral disputes − Local elections.
4.9.1 **Institutions** − Elections and instruments of direct democracy − Electoral Commission.
4.9.7.3 **Institutions** − Elections and instruments of direct democracy − Preliminary procedures − Registration of parties and candidates.
5.2.1.4 **Fundamental Rights** − Equality − Scope of application − Elections.
5.3.41.1 **Fundamental Rights** − Civil and political rights − Electoral rights − Right to vote.
5.3.41.2 **Fundamental Rights** − Civil and political rights − Electoral rights − Right to stand for election.
5.3.41.3 **Fundamental Rights** − Civil and political rights − Electoral rights − Freedom of voting.

Keywords of the alphabetical index:

Electoral law, infringement / Election, preparatory procedure / Election, campaign, accounts, approval, rejection / Election, campaign, violation, intensity / Election, local, candidate / Election, list, correction / Election, reimbursement, deadline / Election, local / Limitation period, expiry / Political activity, right to participate / Urgent proceedings.

Headnotes:

Section 19 of the Constitution protects the right to vote and the right of political parties to stand for elections.

A party contesting a local government election needs to ensure that the Independent Electoral Commission (IEC) is furnished with a notice of intention to contest, a party list and a deposit. A party who has substantively complied with Sections 14.1.b and 17.1.b of the Municipal Electoral Act cannot be disqualified from contesting the election.

The interest of justice requires the protection of political rights in a democratic society, and elections should not unnecessarily be disrupted.

Summary:

The African Christian Democratic Party (ACDP), a political party that was contesting the local government elections, made an urgent application to the Constitutional Court, seeking leave to appeal the decision of the Electoral Court. The Electoral Court disqualified the ACDP from contesting the local elections in the Cape Town Metropolitan area ("Cape Metro").

The question raised was whether the applicant had complied with Sections 14 and 17 of the Municipal Electoral Act 27 of 2000 ("Municipal Electoral Act"), which required a party contesting an election to lodge with the Commission a deposit, a notice of intention to contest the election and a party list. By the closing date for complying with these requirements, the ACDP had lodged its notice of intention to contest, a party list, and candidate nomination forms for the wards in the Cape Metro. It had also submitted to the Independent Electoral Commission (IEC) a lump-sum deposit for the municipalities it was contesting but due to an oversight, had neglected to include the Cape Metro on the list of municipalities that accompanied the required fee. However, on the closing date, the IEC held a surplus of funds that had been deposited by the applicant in respect of municipalities it subsequently decided not to contest.

The IEC found that the ACDP was disqualified from participating in the Cape Metro elections because it failed to comply with the provisions of the Municipal Electoral Act. The Electoral Court upheld that decision.

Writing for the majority, O'Regan J held that the Court had jurisdiction to hear the matter and that the interests of justice demanded that the case be heard. She found that the Municipal Electoral Act contains no express provisions indicating that a decision of the

Electoral Court is final. Furthermore, this case raises a constitutional issue, since it relates to Section 19 of the Constitution, which entrenches citizens' rights to vote. The application was filed shortly before the elections, and the possible negative effects that an order of court might have on the preparations of the IEC is an important factor to be borne in mind. However, it was established that the ballot papers could be reprinted and distributed in time for the elections. In addition, a significant number of people's political rights would be substantially affected if the ACDP was not entitled to contest the Cape Metro.

It was held by O'Regan J that the provisions of the Municipal Electoral Act need to be construed and understood in the light of the overall purpose thereof and with due regard to the constitutional rights and values relevant to elections. It is clear that Section 14 of the Municipal Electoral Act requires that a party contesting a local government election needs to ensure that the IEC is furnished with a notice of intention to contest, a party list and a deposit. Section 17 requires the same with regard to contesting wards. The definitive question to be answered was whether or not the party had paid an adequate deposit. She concluded that the surplus held by the Electoral Commission constituted compliance with the obligation to pay a deposit for the Cape Metro within the meaning of the Municipal Electoral Act. Consequently, the application and prayer for relief were granted.

In a dissenting judgment, Skweyiya J held that there was non-compliance with the statutory provisions and that therefore the ACDP should not be enrolled to contest the Cape Metro local government elections.

Cross-references:

- *Liberal Party v. The Electoral Commission,* 2004 (8) BCLR 810 (CC);
- *August and Another v. Electoral Commission and Others,* 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC);
- *Maharaj and Others v. Rampersad,* 1964 (4) SA 638 (A);
- *Weenen Transitional Local Council v. Van Dyk,* 2002 (4) SA 653 (SCA).

Languages:

English.

Identification: RSA-2005-3-017

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 09.03.2006 / **e)** CCT 14/06 / **f)** Minister of Social Development and Others, *Ex Parte* / **g)** http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT14-06 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.4.3.3 **Constitutional Justice** − Procedure − Time-limits for instituting proceedings − Leave to appeal out of time.
1.5.4.7 **Constitutional Justice** − Decisions − Types − Interim measures.
1.6.5.2 **Constitutional Justice** − Effects − Temporal effect − Retrospective effect (*ex tunc*).
2.1.2.2 **Sources of Constitutional Law** − Categories − Unwritten rules − General principles of law.
3.4 **General Principles** − Separation of powers.
3.10 **General Principles** − Certainty of the law.
3.12 **General Principles** − Clarity and precision of legal provisions.
5.4.14 **Fundamental Rights** − Economic, social and cultural rights − Right to social security.

Keywords of the alphabetical index:

Constitutional Court, decision, binding effect / Government, failure to act / Interim measure / Legislature, amend, failure / Court, order, final, court's power to vary / Time limit, extension / Social security, grant, payment, possible interruption.

Headnotes:

In calculation of time or time periods as contained in a court order, the period of time is governed by the ordinary civilian method where any unit of time other than days is used.

Once the time period of a court order suspending a declaration of invalidity of national legislation has lapsed, the declaration of invalidity takes effect and the legislation is invalid. A court cannot retrospectively extend a suspension order that has lapsed and cannot revive legislation that has already been declared invalid.

Summary:

The Minister of Social Development, along with Members of the Executive Councils (MECs) from each of South Africa's nine provinces, filed an urgent application for direct access to the Constitutional Court on Saturday 4 March 2006. The applicants asked for an extension of a suspension period in

terms of an earlier order of the Court, declaring a presidential proclamation invalid but suspending the declaration of invalidity for eighteen months to enable the legislature to correct the defect. The Court heard argument on the matter on Monday 6 March 2006.

In the case of *Mashavha v. President of the RSA and Others*, this Court had confirmed the invalidity of Presidential Proclamation R7 of 1996. This Proclamation sought to assign the administration of the Social Assistance Act 59 of 1992 to provincial governments. The Court held that the power of national government to administer the Social Assistance Act could not be delegated to the provinces by way of proclamation. The Constitutional Court suspended the order of invalidity for eighteen months.

The applicants averred that the suspension period expired on 6 March 2006 and conceded that they had not been able to comply fully with the order during the period of suspension. They requested an additional suspension of 25 days to bring the remaining section of the Act into force and to fund the Social Security Agency. The applicants contended that a further suspension is the only legally available means to arrange for the payment of social grants to people who would otherwise experience severe distress during the 25-day period when the old law will no longer be operative and the new law has not yet come into operation.

The Constitutional Court was concerned about the plight of the people who depend upon social security grants and thus assumed in favour of the applicants that the matter should be heard on an urgent basis.

Van der Westhuizen J, writing for the Court, dismissed the application and found the applicants' explanations for not timeously complying with the order and for approaching the Court on the same day that the order expired, unconvincing. According to the civilian computation method a period of time expressed in months expires at the end of the day preceding the corresponding calendar day in the subsequent month. The Court, using this method, found that the period of suspension ended at midnight on 5 March 2006. Accordingly, on 6 March 2006, the suspension period had already lapsed.

Van der Westhuizen J held that once the suspension period had lapsed, it cannot be extended. To do so would offend the principle of separation of powers in terms of which law-making powers are reserved for the legislature, and the principle of constitutional supremacy which renders law that is inconsistent with the Constitution invalid. At the moment the suspension expired, the declaration of invalidity took effect. Having declared the presidential proclamation invalid, the Court reached the boundary of its power. The Court cannot "retrospectively extend" a suspension order that no longer exists, nor can it revive the invalid proclamation. To do so would intrude into the domain of the legislature.

The Court was not convinced that the order sought by the applicants was the only way of lawfully allowing for the payment of social grants. It concluded that it is crucial for the relevant organs of state to make every effort to explore all possibilities to meet its constitutional obligations and to prevent the interruption of the payment of pensions and other social grants.

In a separate concurring judgment, Ngcobo J stated that in considering an application to extend the period of suspension of an order of invalidity, the Court must balance all of the relevant factors, bearing in mind that it must make an order that is just and equitable. One of the relevant factors is the explanation given for the delay. In this case, he found that there was no explanation for the delay in complying with the court order, nor for the delay in initiating the present proceedings. He therefore concluded that the government failed to make out a case for the extension of the period of suspension of the order of invalidity.

Cross-references:

- *Mashavha v. President of the Republic of South Africa and Others,* 2004 (3) BCLR 292 (T);
- *Minister of Justice v. Ntuli,* 1997 (3) SA 772 (CC), 1997 (6) BCLR 677 (CC), *Bulletin* 1997/2 [RSA-1997-2-006];
- *S v. Ntuli,* 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC);
- *Firestone South Africa (Pty) Ltd v. Genticuro AG,* 1977 (4) SA 298 (A);
- *Zondi v. MEC for Traditional and Local Government Affairs and others,* 2006 (3) BCLR 423 (CC);
- *President of the Republic of South Africa v. United Democratic Movement, (African Christian Democratic Party and others intervening: Institute for Democracy in South Africa and another as Amici Curiae*, 2003 (1) SA 472 (CC), 2002 (11) BCLR 1164 (CC).

Languages:

English.

Sweden
Supreme Administrative Court

Important decisions

Identification: SWE-2005-3-002

a) Sweden / **b)** Supreme Administrative Court / **c)** Grand Chamber / **d)** 23.11.2004 / **e)** 7160-04 / **f)** / **g)** *Regeringsrättens Årsbok* / **h)** CODICES (Swedish).

Keywords of the systematic thesaurus:

2.1.1.3 **Sources of Constitutional Law** − Categories − Written rules − Community law.
2.1.1.4.3 **Sources of Constitutional Law** − Categories − Written rules − International instruments − Geneva Conventions of 1949.
5.3.13.3 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Access to courts.
5.3.13.7 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Right to participate in the administration of justice.

Keywords of the alphabetical index:

Document, official, access, public, inhibition by original source.

Headnotes:

The protection of individuals did not presuppose indirect effects on an individual's civil rights. Thus the European Convention on Human Rights was of no consequence in assessing the right to be a party to national court proceedings.

Summary:

In Sweden a request to obtain official documentation is one of the few remaining types of case where there is only one party to the proceedings. Chapter 2, Article 15 of the Freedom of Press Act and Chapter 15, Article 7 of the Secrecy Act state that only somebody who has had their request rejected can participate in such court proceedings. In a recent case, the company from which the documents in question originated requested that the Supreme Administrative Court should grant it status as party to the court proceedings. The company also referred to Article 6 ECHR and to European Community Law as well as to ordinary principles of administrative law.

The company argued that because information in the documentation consisted of the company's trade secrets and the results of its research, it was covered by the Convention's regulations on property protection. A decision about public access to this information would have a direct impact on the protection of the company's intellectual property rights and rights of ownership – and thereby civil rights – with the result that Article 6 ECHR would be applicable. The Supreme Administrative Court found that established practice from the European Court of Human Rights did not support the idea that the protection of individuals contained the kind of indirect effects on the individual's civil rights as the company pointed out. Giving access to these documents would not therefore have such an impact on the company that Article 6 ECHR would be applicable. Thus the Convention was of no consequence in assessing whether the company was entitled to be a party to the proceedings or not.

The European Community Law cited by the company consisted of Directive no. 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive no. 90/220/EEC – Commission Declaration. The company contended that Article 25.1 of the Directive established that the information in the documents was "protected private property" and that the Directive stated clearly that confidential information should not be divulged to a third party. Since the company was clearly affected by the legal consequences of the decision, it followed that they were entitled to participate in the court proceedings pursuant to ordinary principles of administrative law.

The Supreme Administrative Court replied that the Directive referred to had been incorporated in Swedish law. This had not resulted in the company obtaining any other or more extensive rights than those that followed from the Freedom of Press Act and the Secrecy Act or from ordinary principles of administrative law. A minority of two Judges had a dissenting opinion on this matter.

Languages:

Swedish.

Switzerland
Federal Court

Important decisions

Identification: SUI-2005-3-007

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 03.05.2005 / **e)** 1P.570/2004 / **f)** X. v. Public Prosecution Department and Cantonal Court for Basle region / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 131 I 272 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.17 **General Principles** − Weighing of interests.
5.3.13.17 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Rules of evidence.

Keywords of the alphabetical index:

Evidence, illegally obtained, admissibility / Video surveillance / Recording, video.

Headnotes:

Articles 29 and 32 of the Federal Constitution, Article 6 ECHR; ban on using evidence obtained illegally in criminal proceedings.

Constitutional ban on using evidence which, without in itself being prohibited, has been obtained illegally: the concept of a fair hearing deriving from Article 29.1 of the Federal Constitution and Article 6.1 ECHR (recital 3.2) is decisive.

Admissibility of weighing up interests to decide whether to use such evidence (confirmation of case law, recital 4). It is not necessary, under the Constitution, to extend the ban on the use of evidence provided for in Section 7.4 of the federal law on the surveillance of postal correspondence and telecommunications beyond the scope of that law in the event of unauthorised use of technical surveillance means, for example video surveillance (recital 4.4).

Summary:

I. The Cantonal Criminal Court for the Basle region convicted X. of arson in an underground garage which extended under several blocks of flats, sentencing him to 2¼ years' imprisonment. The court based its decision mainly on a video recording showing that X. had been present in the garage shortly before the fire started, and on other evidence of X.'s actions. Despite the fact that the police made the recording without permission, the court considered this evidence to be admissible. When X. appealed, the Cantonal Court upheld the judgment of the court of first instance.

Lodging a public law appeal, X. asked the Federal Court to overturn the sentence. Arguing that the evidence had been obtained illegally and could not therefore be used, he contended that his right to a fair hearing as guaranteed by Articles 29 and 32 of the Federal Constitution and Article 6.1 ECHR had been breached. The Federal Court dismissed the appeal.

II. The right to a fair hearing does not, in all circumstances, prohibit the use of evidence obtained illegally. It was indisputable in this case that the video recording had been made without permission and was therefore illegal. Installing surveillance equipment is not, however, in itself illegal. The video recording in the underground garage could have been authorised by a court as a means of obtaining evidence. In such situations, the case law weighs up the interests at stake. On the one hand, it is necessary to take into consideration the seriousness of the offence: the more serious the offence, the greater the need to use evidence obtained illegally, in the public interest. On the other hand, account must be taken of the extent to which individual rights are infringed: if the way in which the evidence has been obtained seriously violates fundamental rights, these may take precedence over the public interest in a criminal prosecution. Secret recordings may have a part to play as evidence, provided the accused acted of his or her own free will and not under constraint or pressure from the authorities.

The obligation to weigh up the interests at stake stems directly from the provisions of the Constitution and the Convention. It is therefore of little importance that the federal law on the surveillance of postal correspondence and telecommunications bans the use of evidence obtained without authorisation.

In this case, the cantonal judicial authorities complied with the requirements laid down in the Constitution and in the Convention. The video cameras were installed in the underground garage in the wake of other fires, as means of obtaining evidence. Their

installation should have been authorised by a court. The appellant was not caught in a police trap and was free to go into the garage. The way in which the interests at stake – the seriousness of a fire in an underground garage extending under several blocks of flats, on the one hand, and a video recording, on the other – were weighed up in a way that is not open to criticism.

Languages:

German.

Identification: SUI-2005-3-008

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 22.06.2005 / **e)** 1P.765/2004 / **f)** A. v. Public Prosecution Department and Thurgau Cantonal Court / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 131 I 350 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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:

Legal aid, free / Lawyer, defence officially assigned / Counsel, defence, officially assigned / Defence, necessary / Defence, genuine / Defence, effective.

Headnotes:

Officially assigned defence counsel and necessary defence. Articles 29.3, 31.2 and 32.2 of the Federal Constitution, Articles 6.1 and 6.3.c ECHR.

Concept of necessary defence (recital 2.1). Neither cantonal procedural law (recital 2) nor Article 29.3 of the Federal Constitution and Article 6.3.c ECHR (recital 3) make it compulsory to be defended throughout the period of detention or investigation. The right to a fair criminal trial (Articles 32.2 and 31.2 of the Constitution and Article 6.1 ECHR) may require the official assignment of defence counsel (recitals 4.1 and 4.2). This was not the case here (recitals 4.3 and 4.4).

Summary:

I. The Court of First Instance of the Canton of Thurgau gave A. a suspended 12-month prison sentence for drug trafficking during November and December 2001. He had been detained on remand on 19 December 2001 and was released on 15 February 2002. The criminal investigation took place mainly during the detention period and ended with a confession. A. was not represented by a lawyer at the time.

Appealing to the Thurgau Cantonal Court, A. argued that he had not had legal representation and inferred from this that the interrogations and his confession should not be used and should be removed from the case file. The Cantonal Court upheld the judgment of the court of first instance.

Lodging a public law appeal, A. asked the Federal Court to set aside the Cantonal Court judgment, contending in particular that there had been a violation of Articles 29, 31 and 32 of the Federal Constitution and Article 6 ECHR. The Federal Court dismissed the appeal.

II. The concept of necessary or compulsory defence in criminal proceedings means that, in the light of the factual and legal circumstances, the persons concerned must be compulsorily represented; they do not need to submit an application to this effect, and may not forfeit this right or defend themselves on their own. Necessary defence is thus different from the right to legal representation safeguarded by Article 29.3 of the Federal Constitution and Article 6.3.c ECHR.

Under Article 29.3 of the Federal Constitution, anyone who cannot afford legal representation is entitled, unless his or her case appears to have no chance of succeeding, to legal aid; he or she is also entitled to be represented free of charge by a defence counsel, in so far as this is necessary to safeguard his or her rights. This constitutional provision is designed to safeguard the principle of equality of arms and provide access to a court and to legal representation, regardless of the financial position of the person concerned. It does not, however, mean that the accused must compulsorily be defended, and leaves the accused free to choose whether to defend himself or herself on his or her own or to request assistance from a lawyer.

Similarly, Article 6.3.c ECHR gives the accused the right to be represented by a lawyer of his or her own choice, or, if he or she cannot afford to pay for legal representation, by an officially assigned lawyer. This provision applies not only to proceedings before the court but also to the investigation stage: a refusal to assign a defence counsel to the accused during the initial interrogations may constitute a breach of the

Convention. The Convention does not, however, provide that a defence counsel is necessary. It allows the accused to defend himself or herself or, if necessary, to request assistance from a defence counsel of his or her own choice or an officially assigned lawyer.

It follows that neither Article 29.3 of the Federal Constitution nor Article 6.3.c ECHR makes it necessary and obligatory to be defended in the sense referred to. The question remains as to whether the need to assign a defence counsel officially may be inferred in certain circumstances from other provisions of the Constitution or the Convention.

The case law of the Federal Court and the European Court of Human Rights provides that, in order to guarantee a fair hearing within the meaning of Article 6.1 ECHR, the court must inform individuals who are not represented of their procedural rights and draw their attention to their right to be represented at all times. The Convention is not designed to protect theoretical or illusory rights, but actual tangible rights. If a defence is not effectively guaranteed, the court is obliged to intervene. Similar obligations derive from Articles 31.2 and 32.2 of the Federal Constitution, which are designed to assure the accused of a genuine and effective defence.

It is from this angle that consideration must be given to whether, in the case in point, the appellant was sufficiently informed of his right to be defended or whether a defence counsel should have been assigned to him. Firstly, the case file reveals that the applicant was informed several times of his right to remain silent and his procedural rights. He was also informed of his right to choose a defence counsel or to request legal aid and ask to be represented by an officially assigned counsel. There is nothing to suggest that the appellant did not understand this information. It has to be concluded that he forfeited the assistance of a defence counsel of his own free will. Secondly, the case was not very complex, was of average importance and a suspended sentence had been envisaged right from the start of the investigation. The proceedings as a whole therefore met the requirements of a fair hearing even though a defence counsel was not officially assigned. It follows that the interrogations carried out during the investigation may be used in the court proceedings. The appeal is therefore unfounded.

Languages:

German.

Identification: SUI-2005-3-009

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 06.10.2005 / **e)** 1P.440/2005 / **f)** X. v. Public Prosecution Department and Indictments Chamber of the Canton of Sankt Gallen / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 131 I 455 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

1.4.9.1 **Constitutional Justice** − Procedure − Parties − *Locus standi*.
1.4.9.2 **Constitutional Justice** − Procedure − Parties − Interest.
5.3.3 **Fundamental Rights** − Civil and political rights − Prohibition of torture and inhuman and degrading treatment.
5.3.13.2 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Effective remedy.

Keywords of the alphabetical index:

Investigation, proper / Police, professional misconduct / Police, powers / Proceedings, criminal, institution, obligation.

Headnotes:

Articles 3 and 13 ECHR, Article 10.3 of the Federal Constitution; degrading treatment, investigation.

A person who puts forward a defendable case that they have been treated in a degrading manner by a police officer is entitled to a proper, detailed official investigation (recital 1.2.5). In this case, this right was not respected (recital 2).

Summary:

I. X., of Turkish extraction, lodged a complaint against police officers A. and B., on the following grounds. Around midnight on 11 February 2005, he was in a restaurant in Sankt Gallen and the restaurant owner called a taxi for him. His blood alcohol level was such that he was unable to give the taxi driver his address. He was suddenly confronted with two police officers, who asked for his papers and handcuffed him. He was apparently pushed against the car and fell down. One of the officers then allegedly pulled his hair and banged his face against the ground several times. X. suffered a broken nose and injuries to his lips, shoulder and leg. He then lost consciousness, was taken to hospital and woke up the next day in a cell at the police headquarters. When lodging his complaint,

he added that he was prepared to provide additional information and supply evidence.

The Prosecutor for the Canton of Sankt Gallen forwarded the complaint and an extract from the police log of 11 and 12 February 2005 to the Indictments Chamber, which is the body competent to institute proceedings against police officers. The Chamber provided the police force and the two officers with an opportunity to express their views on the complaint.

The police sent the Indictments Chamber a report by A. on the events in question, the comments of A. and B. and comments by two other officers who had dealt with X. during the night of 11 to 12 February 2005. The Indictments Chamber forwarded these documents to X.'s representative, who requested that criminal proceedings be instituted against A. and B. and demanded that a medical report, two photographs taken at the hospital and the hospital file be included in the case file.

The Indictments Chamber refused to bring criminal proceedings against A. and B., on the grounds that the two officers' conduct was legitimate in the performance of their duties. There was nothing to suggest that the two officers had used illegal or disproportionate methods. X.'s fractures and other injuries were apparently caused by his fall, which had been occasioned by his drunkenness and the fact that he was handcuffed.

Lodging a public law appeal, X. asked the Federal Court to set aside the Indictments Chamber's judgment, pleading a violation of Articles 3 and 13 ECHR. The Federal Court allowed the appeal and set aside the Indictments Chamber's decision.

II. The question first arises as to whether X. is entitled to appeal under Section 88 of the Federal Courts Act (OJ). According to established precedents, a complainant is not entitled to take action under Section 88 OJ against a decision not to prosecute or an acquittal, on the grounds that only the State is allowed to institute criminal proceedings: these are brought in the public interest and benefit the injured party only indirectly. The injured party is not therefore entitled to appeal under Section 88 OJ against a decision concerning the conduct of criminal proceedings. This rule is waived only when the injured party complains of a violation of formal rights secured to him or her by cantonal procedural law or deriving directly from the Federal Constitution or the Convention. This applies in the case of X., who argues that Articles 3 and 13 ECHR were violated. The appeal is therefore admissible on those grounds.

Under Article 3 ECHR, no one may be subjected to torture or to inhuman or degrading treatment or punishment. Article 10.3 of the Federal Constitution likewise prohibits torture and all other cruel, inhuman or degrading treatment or punishment. The European Court of Human Rights deduces from this, in its case law, that anyone who has a defendable claim to have been ill-treated by the police is entitled to a proper detailed official investigation that can lead to the punishment of those responsible. The right to an effective remedy under Article 13 ECHR likewise guarantees the complainant proper access to the investigation procedure.

X. did indeed suffer a broken nose and various other injuries. It has not been established whether these bodily injuries were caused by the conduct of the police officers or by the fact that X., who was drunk and handcuffed, fell down. X.'s accusations are defensible. If A., in pulling his hair, did indeed bang X.'s head against the ground, this would constitute inhuman and degrading treatment. It follows that X. may avail himself of the guarantees provided for in Articles 3 and 13 ECHR.

The Indictments Chamber based its decision on the following documents: X.'s complaint, the extract from the police log for 11 and 12 February 2005, A.'s report, the comments by A. and B., the comments by the other two officers, the medical report, two photographs and the record of X.'s interrogation on 12 February 2005. As for the cause of the injuries, there are only the contradictory statements by X. on the one hand and A. and B. on the other.

Given the facts of the case, it cannot be said that a proper detailed investigation was carried out. Witnesses could have been called, in particular the people who reacted to the noise in the middle of the night by arriving at the scene and the ambulance and hospital staff. Equally the hospital's medical records could have been examined and an expert medical appraisal could have been commissioned, to determine the cause of the injuries.

The appeal is founded on the above grounds. The cantonal authorities must therefore launch a criminal investigation and examine the facts and the accusations X. has brought against A. and B. The launch of such an investigation does not, however, mean that officers A. and B are guilty: they are innocent until proved guilty.

Languages:

German.

"The former Yugoslav Republic of Macedonia"
Constitutional Court

Important decisions

Identification: MKD-2005-3-009

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 21.12.2005 / **e)** U.br.102/2005 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 3/2006, 12.01.2006 / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

5.2.1.2.1 **Fundamental Rights** − Equality − Scope of application − Employment − In private law.
5.3.13.3 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Access to courts.
5.3.39.3 **Fundamental Rights** − Civil and political rights − Right to property − Other limitations.
5.4.5 **Fundamental Rights** − Economic, social and cultural rights − Freedom to work for remuneration.

Keywords of the alphabetical index:

Damage, compensation, limitation, statutory / Employment, remuneration, loss, compensation, limitation.

Headnotes:

It is stipulated in constitutional provisions and in international legislation that the right to remuneration, or salary, is an essential right for an employee who is employed on a contractual basis. This right is aimed at ensuring a decent living standard for his family.

If an employee is prevented from obtaining a salary through work because of unlawful acts on the part of his employer, the employee suffers damage, that is to say, his property status is prejudiced.

The contested legal provisions deviate from the general rules on compensation for damage and envisage a different level of compensation for damage for an employee whose employment has been terminated through the fault of his employer.

If the legislator is only involved in the determination of the amount of the compensation for damage in cases where the employee has had his employment terminated through a fault on the part of his employer, this means that the contracting partners – the employee and the employer – are in an unequal position.

Summary:

An individual petitioned the Court to bring proceedings to appraise the constitutionality of the following articles of the Labour Law:

That part of Article 102.2 which reads "as much as 70% of the remuneration lost" and that part of Article 102.5 which reads: "as high as a minimum of three and a maximum of twelve average monthly salaries of the employee paid over the past twelve months".

It is clear from the constitutional provisions relating to fundamental economic, social and cultural rights, and from the provisions in international legislation, that the right to remuneration, or salary, is an essential right for an employee employed on a contractual basis, and that this right is aimed at giving his family a decent standard of living.

An analysis of the Labour Law demonstrates that employment relations can be defined as a voluntary contractual relationship between the employer and the employee which the employee joins in an organised process, organised in advance by the employer, with a view to obtaining a salary and other types of remuneration. If the employee is prevented from doing remunerated work as a result of unlawful actions on the part of his employer, the employee suffers damage, that is to say, his property status is prejudiced.

The Law on Contractual and Other Obligations governs compensation for damage and loss of remuneration. This law states that if the injured party cannot be restored to the position he would have been in had the damage not taken place, or if the court decides that it is not necessary for the person responsible to do that, then the court will rule that the injured party be paid a corresponding sum of money as recompense for damage. The court shall grant the injured party recompense in monetary form if he requests it, unless the circumstances of the particular case justify their being restored to their former position.

The Court considered the above provisions of the Law on Contractual and Other Obligations as well as Article 159 of the Labour Law, under which, if an employee has been caused damage while working or in connection with work, the employer is obliged to compensate him for the damage. It ruled that the contested legal provisions deviate from the general rules on compensation for damage and envisage a different level of compensation for damage for an employee who has had his employment terminated because of a fault on the part of the employer.

In view of the above, the Constitutional Court held that, in cases of compensation for damage suffered by an employee due to unlawful termination of employment, it is not appropriate for the legislator to stipulate a percentage or a finite sum for the damage that the employee suffers. The Court is the correct forum to appraise, on a case-by-case basis, the circumstances giving rise to the termination of the employment, as well as the legality of the employer's decision and its compliance with the material provisions of the law and the collective agreements in force. It should also be for the Court to decide upon the damage the employee has suffered when his employment is terminated through no fault of his own.

The Court was of the view that the underlying aim of court proceedings is not only to secure the re-employment of the employee, but also to restore him or her to the position in which he or she would have been had his employment not been terminated, that is to say, on a par with his or her former co-workers, who were able to continue to work and draw salaries.

Under Article 6 ECHR, everyone is entitled to a fair and public hearing within a reasonable time before an independent and impartial tribunal established by law to consider and determine their civil rights and obligations. The Court ruled that the current method of regulating the issue of the right to compensation for damage excludes the general principle enshrined in Article 6 ECHR that citizens are entitled to realise their civil rights before a court.

The Court also took the view that if the legislator is only involved in the determination of the amount of the compensation for damage in cases where the employee has had his employment terminated through a fault on the part of his employer, this means that the contracting partners – the employee and the employer – are in an unequal position. This is in breach of Article 9 of the Constitution.

Languages:

Macedonian, English.

Identification: MKD-2005-3-010

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 21.12.2005 / **e)** U.br.161/2005 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 3/2006, 12.01.2006 / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

1.6.3 **Constitutional Justice** − Effects − Effect *erga omnes*.
3.9 **General Principles** − Rule of law.
3.10 **General Principles** − Certainty of the law.
5.4.2 **Fundamental Rights** − Economic, social and cultural rights − Right to education.

Keywords of the alphabetical index:

Education, secondary, final examination, legal basis / Law, reference to invalid provision.

Headnotes:

It runs against the principle of the rule of law to seek to establish the validity of a Rulebook which has undoubtedly ceased to be valid and which no longer forms part of the legal order of the state.

Summary:

A citizen petitioned the Court to bring proceedings to assess the constitutionality of Article 6 of the Law on Changing and Supplementing the Law on Secondary Education. Article 6 of this Law changes Article 115 of the Law on Secondary Education to read as follows: "Students who complete their gymnasium education, art education, and three and four year vocational education in the 2005/2006 school year shall take the final examination under the provisions of the Rulebook pertaining to the contents and organisation of the final examination in secondary education.

The Court found that the 1994 Rulebook was superseded within the legal order of the Republic of Macedonia by the Law on Secondary Education, immediately as this Law came into force. Moreover, the Rulebook has also ceased to be valid with regard to the manner of taking examinations and evaluating the students' results in the final examinations in secondary vocational education which was repealed by the

Constitutional Court by its Decision U.br.31/2005 of 15 June 2005, *Bulletin* 2005/2 [MKD-2005-2-005].

Article 6 of the Law on Changing and Supplementing the Law on Secondary Education established the validity of the Rulebook as regards the contents and organisation of the final examination in secondary education. As this Rulebook has undoubtedly ceased to be valid and no longer forms part of the legal order of the state, the Court held that Article 6 is not in accordance with the Constitution on the grounds of legal certainty as an element of the principle of the rule of law.

Languages:

Macedonian, English.

Identification: MKD-2005-3-011

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 21.12.2005 / **e)** U.br.139/2005 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 3/2006, 12.01.2006 / **h)** CODICES (Macedonian, English).

Keywords of the systematic thesaurus:

5.2.1.3 **Fundamental Rights** − Equality − Scope of application − Social security.
5.2.2.1 **Fundamental Rights** − Equality − Criteria of distinction − Gender.
5.2.3 **Fundamental Rights** − Equality − Affirmative action.
5.4.16 **Fundamental Rights** − Economic, social and cultural rights − Right to a pension.

Keywords of the alphabetical index:

Pension, old age, women, positive discrimination.

Headnotes:

The principle of equality of citizens before the Constitution and the law places an obligation on the legislator and all those subject to collective agreements to provide an equal legal position for all workers, both in law and under the terms of collective agreements.

Women and men must have equal opportunities and equal treatment in employment, promotion and in termination of contracts of employment.

The right of a female insured person to draw an old age pension earlier than a male insured person is justified by the principle of affirmative action, that is to say, the principle of positive discrimination for women.

Summary:

A citizen petitioned the Court to launch proceedings to assess the constitutionality of Article 104.1 of the Labour Law.

The Court found that Article 104.1 of the Labour Law entitles an employer to terminate the contract of employment of an employee once he fulfils the conditions for an old age pension. Analysis of the provisions quoted from the Constitution revealed that the constitutional principle of equality of citizens before the Constitution and the law places an obligation on the legislator and all subjects of collective agreements to provide an equal legal position for all workers, both in law and under the terms of collective agreements. On that basis, the Labour Law specifically governs termination of contracts of employment, including the right of employers to terminate contracts of employments of workers who meet the legal conditions to draw an old age pension.

The Court also found that those provisions in the Labour Law relating to termination of contracts of employment by workers and employers contained in the sub-title "Termination of contracts of employment on the grounds of the employee's age" within Article 104.1 stipulate that an employer is entitled to terminate an employee's job contract once he meets the legal conditions for an old age pension. Article 104.2 of the Law prescribes that an employer may extend an employee's job contract under Article 104.1 until a maximum age of sixty five, unless otherwise defined by law and general collective agreement.

The Court held that the legislator is obliged to place the citizens in an equal legal position on the grounds noted above, when regulating the pursuance of employers' and employees' rights, obligations and responsibilities and the commencement and termination of employment.

In the opinion of the Court, the contested legal provision does not provide for an equal legal position as between citizens. The contested provision of Article 104.1 of the Law stipulates that an employer has the right to terminate an employee's job contract once the employee fulfils the legal conditions for drawing an old age pension. Unequal treatment as between citizens on the grounds of sex can be construed, in circumstances where the conditions for the drawing of a pension (as defined by a special law) are different for men and women, as is the case under the law currently in force in the Republic of Macedonia. The legal provision in question imposes termination of the right to work upon women under different conditions from those applying to men. Their job contracts can be terminated at the age of sixty two – men's job contracts can be terminated at the age of sixty four.

The Court has found that the contested legal provision was at variance both with the principle of equality of citizens irrespective of their sex and with the principle of availability of each job to every person under equal conditions.

The Court also took into consideration Article 17 of the Law on Pension and Disability Insurance and the stance of the Court noted in its Decision U. no. 107/2004 of 29 September 2004. Here, the Court held that the right of a female insured person to draw an old age pension at an earlier age than a male insured person is justified under the principle of affirmative action, that is to say, the principle of positive discrimination of women, specifically in the sphere of pension and disability insurance. This may not be automatically applied to other spheres, in particular if that was to result in restriction of rights on grounds of sex. This specific case concerns the realisation of the right to work which differs from the realisation of the right to an old age pension.

In view of the above, the Court ruled that the contested provision of Article 104.1 of the Labour Law is at variance with the provision indicated in the Constitution. That article has been revoked.

Languages:

Macedonian, English.

Turkey
Constitutional Court

Important decisions

Identification: TUR-2005-3-008

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 23.06.2004 / **e)** E.2004/14, K.2004/84 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 25974, 22.10.2005 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

3.16 **General Principles** − Proportionality.
4.6.3.2 **Institutions** − Executive bodies − Application of laws − Delegated rule-making powers.
4.10.7.1 **Institutions** − Public finances − Taxation − Principles.

Keywords of the alphabetical index:

Taxation, principle of legality / Government, powers.

Headnotes:

When levying taxes on assets, the legislator is entitled to set criteria to reflect the real value of the assets. Calculation of tax on motorised vehicles according to the volume and capacity of the engine, the type of vehicle and number of seats and the vehicle's age is not at variance with the Constitution. It is possible for the legislator to delegate competence to the Council of Ministers over some issues, notably the flexibility to reduce tax on motorised vehicles by a percentage under certain conditions.

Summary:

Law 5035 amended some of the provisions of Law 197 on Motorised Vehicles. Before Law 5035 came into force, vehicle taxation was based on the age and weight of the motorised vehicles. Under the new law, the tax is levied with reference to age and size.

Several deputies applied to the Constitutional Court to assess the compliance with the Constitution of Articles 23, 24 and 50.d of Law 5035, which amended certain articles of the Law on Motorised Vehicles.

A. Amended Articles 5.1 and 6 of the Law 197

Everybody has to pay tax in accordance with their financial resources in order to meet public expenditure. This is set out in Article 73 of the Constitution. These are the principles of generality of taxes and paying taxes according to one's financial resources. The principle of generality requires anybody with financial resources to pay taxes. These taxes are universally levied by reference to expenditure, income or assets.

Taxation according to financial resources means that tax is levied according to taxpayers' economic and personal circumstances. The rationale behind this principle is that those with more resources pay proportionately more than those with fewer resources.

Tax on motorised vehicles is a tax imposed on assets, specifically motorised land, air or sea vehicles. In order to levy a tax on assets, it is necessary to determine their real value. The legal criteria used to determine the value must reflect the level of financial resources and the tax must be levied in a just and balanced way. There may be cases where it is very difficult or even impossible to determine the real value of assets and sometimes problems can arise in collecting the tax. The legislator must have the flexibility to determine criteria so that the value can be calculated as accurately as possible. Laws must be enacted within this field in accordance with constitutional principles.

Articles 5 and 6 of Law 197, as amended by Articles 23 and 24 of Law 5035, establish that the tax must be levied according to the type and age of the vehicle, the number of seats it has, and the engine capacity and power, and also that there is to be no differentiation as between taxpayers with the same vehicles. It was held that these amended articles were not unconstitutional.

The deputies' case was accordingly rejected.

B. Amended Article 5.2 of the Law 197

Under Article 5.2 of the Law, as amended, the Council of Ministers can reduce the tax on motorised vehicles by 4 % if the tax amounts set out in the article exceed the insurance value of vehicles by 6 %.

Article 73.3-4 of the Constitution provides that taxes, fees, duties and other such financial impositions are to be imposed, amended or revoked by law. It also enables the Council of Ministers to make exemptions from tax and to reduce the level of taxes, fees, duties and other such financial impositions within the minimum and maximum limits prescribed by law.

The basic elements of taxation such as evaluation, levying and collection, must be set out clearly within the legislation, to avoid arbitrary administration with an adverse impact on the social and economic lives of individuals. The executive power may in certain circumstances be given competence in fiscal matters, provided that the constitutional principles are observed and that the legal framework within which the executive power is to operate has been defined in the law.

The provision under dispute provides for certain conditions where the Council of Ministers may determine the tax which should be levied, within limits set out in the law. The principles of legality of administration and legal certainty were accordingly not breached and the provision was not unconstitutional. The deputies' case was rejected.

Languages:

Turkish.

Identification: TUR-2005-3-009

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 02.12.2004 / **e)** E.2001/216, K.2004/120 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 25973, 21.10.2005 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

5.3.13.19 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Equality of arms.
5.3.13.26 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Right to have adequate time and facilities for the preparation of the case.

Keywords of the alphabetical index:

Procedure, civil, fairness, principle / Court, civil, submission, deadline, equality for public and private parties.

Headnotes:

Under the principles of equality of arms and the right to a fair trial, the same terms must be available for the plaintiff as well as for the defendant, irrespective of whether the defendant or plaintiff is a public corporate body or a real or legal personality. Neither public corporate bodies, nor real or legal personalities may have advantages or disadvantages during civil proceedings.

Summary:

Avanos Peace Court asked the Constitutional Court to rule upon the conformity with the Constitution of Article 195.2 (as amended by Law 2494) and the second sentence of Article 432.1 (as amended by Law 3156) of the Law on Civil Procedure.

The Law on Civil Procedure provides that parties to civil cases must, in principle, file their submissions at the court within fifteen days. The same rule applies to appeals presented to the Appeal Court against decisions delivered by the lower courts. If, however, the Legal Adviser to the Ministry of Finance is a party to a civil case, the fifteen day limit becomes a thirty day one.

The principle of equality, as set out in Article 10 of the Constitution, requires that individuals with the same status should be bound by the same rules. It also prevents the creation of privileged individuals and communities. In civil cases, plaintiffs and defendants, whether they are real or legal persons or public corporate bodies, have the same status as parties to the case. The provision under dispute confers privilege upon public institutions and organisations enumerated in Law 4353 by comparison with real and legal persons.

The same conclusion may be reached when considering Article 36 of the Constitution. Article 36.1 of the Constitution, as amended in 2001 by Law no. 4709, provides for the universal right to a fair trial.

The principle of equality of arms is one of the generally accepted criteria of the right to fair trial at the international level. It means that parties to legal proceedings have equal status and are not to be granted advantages or disadvantages. In other words, there must be an equal balance between the parties.

The provisions being challenged allow public corporate bodies involved in civil proceedings thirty days to present their submissions to the court and thirty days to file appeals before the Appeal Court. If different deadlines are allowed for public corporate bodies and real persons, there cannot be an equal balance between the parties. The provisions are thus at odds with the right to a fair trial. It was held that they contravene Articles 10 and 36 of the Constitution and they have accordingly been repealed.

Article 53 of the Law of the Organisation and Trial Procedures of the Constitutional Court provides that if the Constitutional Court invalidates any laws, amendments to legislation, the Standing Orders of the Grand National Assembly of Turkey or specific articles and provisions thereof on grounds of unconstitutionality, the legislation in question will cease to have effect directly as soon as the annulment decision has been published in the Official Gazette. The Court also has discretion to decide upon a different date upon which the annulment decision should take effect. That date should be no more than one year from the date of publication of the decision in the Official Gazette.

The Court undertook an evaluation under Article 53 above, and decided that the annulment decision would take effect six months after the date of the publication of the decision in the Official Gazette.

Languages:

Turkish.

Identification: TUR-2005-3-010

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 29.12.2004 / **e)** E.2002/39, K.2004/125 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 25977, 25.10.2005 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

4.6.2 **Institutions** − Executive bodies − Powers.
4.6.3.2 **Institutions** − Executive bodies − Application of laws − Delegated rule-making powers.

Keywords of the alphabetical index:

Free zone, establishment, competence / Government, powers.

Headnotes:

The delegation of power to the Council of Ministers on the creation of free zones is not to be considered unconstitutional. It is not always possible to stipulate in advance exact details of the sites and borders of free zones. Accordingly, once the basic rules governing free zones have been established, the Council of Ministers may decide upon the creation and management of the zones. The executive power is in a better position to take action in response to changing social, technical and economic conditions. In order to attract foreign capital to Turkey, the Council of Ministers may decide upon the methods to be used in the creation of free zones.

Summary:

Article 2 of the Law on Free Zones (3218) allows the Council of Ministers to determine the sites and the boundaries of free zones in Turkey. The Council of Ministers can grant permission to public institutions and bodies and to domestic or foreign real or legal persons to establish and to manage free zones.

The General Assembly of Administrative Chambers of the Council of State contended that Article 2 of the Law on Free Zones contravenes Articles 2, 7, 73, 123 and 126 of the Constitution.

The principle of the rule of law as envisaged in Article 2 of the Constitution requires that the concepts of equity and justice must be taken into account when legislative power is used and that laws enacted by Parliament must be based on public interest. Those criteria necessitate conflicting interests to be reconciled in protecting legal rules. Competences and duties in the State must be governed by laws made within this framework.

In order for the Turkish free zones to be able to compete economically with other free zones, the rules governing them, their size and their boundaries, their creation and management (whether by domestic or foreign entities), must be determined with reference to changing technical and economic requirements. The Council of Ministers is to use the power given by the provision under dispute within the framework of Article 1 of Law no. 3218, whilst taking into account constitutional and other legal principles.

The legislator was trying, in the provision under dispute, to speed up the flow of foreign capital and technology into Turkey and to increase the amount of investment and production for export. These aims could only be achieved by means of flexible legal regulation capable of adapting to changing conditions. The provision was therefore not found to be at variance with Article 2 of the Constitution. Furthermore, it was not disputed that decrees issued by the Council of Ministers are subject to judicial review and judicial control, which is one of the requirements of a state governed by the rule of law.

Article 7 of the Constitution enables the legislator to make rules on any subject provided that it acts within constitutional limits. Developments within the economy and society may require that the executive power be given the scope to establish and repeal certain measures. The legislator would set out the basic rules and leave the technical and administrative details to the executive. Looking at Article 2 of Law no. 3218 from this standpoint, it is clear that the executive has the power to decide upon issues such as the way in which free zones are to be set up; the entities which will be chosen to establish them, and the selection process for these entities. Giving this kind of competence to the Council of Ministers is not to be deemed as the delegation of power to legislate. The disputed provision is therefore not contrary to Article 7 of the Constitution.

The Constitutional Court did not consider that Articles 73, 123 or 126 of the Constitution were relevant to the review of the provision under dispute.

As Article 2 of the Law 3218 was not contrary to the Constitution, the petition was rejected. Justice F. Saglam put forward a dissenting opinion.

Languages:

Turkish.

Ukraine
Constitutional Court

Important decisions

Identification: UKR-2005-3-004

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 07.09.2005 / **e)** 1-v/2005 / **f)** On providing opinion on the compliance of the draft Law "On Introducing Amendments to the Constitution of Ukraine" with the requirements of Articles 157 and 158 of the Constitution (case on introducing amendments to Articles 85, 118, 119, 133, 140, 141, 142, 143 of the Constitution) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 38/2005 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

1.3.2.1 **Constitutional Justice** − Jurisdiction − Type of review − Preliminary review.
1.3.5.3 **Constitutional Justice** − Jurisdiction − The subject of review − Constitution.
3.8.1 **General Principles** − Territorial principles − Indivisibility of the territory.
4.8.2 **Institutions** − Federalism, regionalism and local self-government − Regions and provinces.
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.
4.8.6.2 **Institutions** − Federalism, regionalism and local self-government − Institutional aspects − Executive.

Keywords of the alphabetical index:

Constitution, amendment, Constitutional Court, opinion / Local self-government, body, reform.

Headnotes:

The new wording of Article 118.1 of the Constitution, according to which local state administrations shall represent the executive power, is disputable. The term "represent", in contrast to the term "exercise", as used in the current wording of Article 118, fails to comply with the functional characteristic of local state administrations, as determined by Article 119 of the Constitution.

Article 95.1 of the Constitution, which deals with the budgetary system, preserves the notion of the territorial community, which conflicts with the definition of "community" given in the proposed wording of Article 133 of the Constitution.

Summary:

According to Article 85.1.1 of the Constitution, the authorities of the parliament *(Verkhovna Rada)* agreed to "introduce amendments to the Constitution within the limits and by the procedure envisaged by Chapter XIII of this Constitution". In particular, requirements for such amendments are laid down in Articles 157 and 158 of the Constitution.

Article 158.1 of the Constitution stipulates that a draft law on introducing amendments to the Constitution of Ukraine, considered by the parliament and not adopted, may be submitted to the parliament no sooner than one year from the day of adoption of the decision on this draft law. Article 158.2 of the Constitution provides that within the term of its authority, the parliament shall not amend the same provisions of the Constitution twice.

The parliament did not consider provisions of the draft Law on introducing amendments to Article 119 of the Constitution. Also, the draft Law was not the subject of voting for adoption with at least two-thirds of the constitutional composition of the parliament in the part of Articles 118, 133, 140, 141, 142 and 143 of the Constitution.

Provisions of Article 85.1.29 of the Constitution remained unchanged, as Law no. 2222-IV, 8 December 2004, "On Introducing Amendments to the Constitution of Ukraine" replicates the current version of the Constitution.

Amendments to Articles 85, 118, 119, 133, 140, 141, 142 and 143 of the Constitution, introduced by the draft Law, are neither aimed at abolishing the independence of Ukraine nor at violating its territorial integrity. The draft law therefore complies with the requirements of Article 157.1 of the Constitution.

The draft law deals with provisions of Article 85.1.29 of the Constitution, which establishes authorities of the parliament in the sphere of the administrative and territorial structure. The Constitutional Court has already considered the said proposals and recognised them as complying with Article 157 of the Constitution (opinion of the Constitutional Court n° 1-v/2003, 30 October 2003, *Bulletin* 2003/3 [UKR-2003-3-018]).

The proposed wording of Article 118 of the Constitution provides for the withdrawal of rayon state administrations from the system of executive bodies; procedure for cancellation of decisions of heads of local state administrations, if they conflict with the Constitution and laws, other legislative acts; replication of the current provisions of Articles 118.4, 118.5 of the Constitution (on appointment and responsibilities of heads of local state administrations). Provisions of current Articles 118.9, 118.10 of the Constitution shall adopt the new wording of Article 118.6 of the Constitution. The new wording of Article 118 of the Constitution does not cancel nor restrict human rights and citizen's freedoms.

Proposed amendments to Articles 119.4, 119.7, 133, 142.1, 142.2, 143.1 and 143.2 do not cancel or restrict human rights and citizen's freedoms.

Proposed amendments to Article 140 of the Constitution mainly deal with a new definition of a community as an administrative and territorial unit. The Constitutional Court already considered such provisions and recognised them as complying with requirements of Article 157.1 of the Constitution (Constitutional Court Opinion no. 1-v/2003, 30 October 2003, *Bulletin* 2003/3 [UKR-2003-3-018]).

The Constitutional Court considers that proposed Article 140.1 of the Constitution, providing that local self-governance shall be secured by the law, fails to comply with Article 7 of the Constitution, which stipulates that local self-governance is recognised and guaranteed in Ukraine. That is, the Constitution in force provides better guaranties than the proposed amendments.

Article 140.6 of the Constitution, in the new wording, stipulates that the grounds and the procedure of the delegation of authorities of governmental bodies to local self-government bodies shall be established by the law. This provision fails to comply with Article 143.3 of the Constitution, which provides for assignment, not delegation of certain powers of executive authorities to bodies of local self-government by the law and reads that the state shall finance execution of these powers.

Proposed amendments to Article 141 of the Constitution provides a definition of community (village, settlement and city) as an administrative and territorial unit and brings the term of office of heads of communities in line with the term of office of deputies of local councils. The Constitutional Court regards these amendments as providing no cancellation or restriction on human rights and citizen's freedoms.

At the same time, the Constitutional Court believes that the law should define mechanisms of operation of rayon state administrations, local self-government bodies, until new compositions of local councils and other local self-government bodies are established, in accordance with the law.

The Law shall take effect after the regular elections to the local councils of the fifth convocation in March 2006.

Dissenting opinion of Judge V.I. Ivaschenko.

Languages:

Ukrainian.

Identification: UKR-2005-3-005

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 22.09.2005 / **e)** 5-rp/2005 / **f)** On conformity with the Constitution (constitutionality) of Article 92, paragraph 6 of Section X Transitional Provisions of the Land Code (case on permanent use of land plots) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 39/2005 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

1.3.5.5 **Constitutional Justice** − Jurisdiction − The subject of review − Laws and other rules having the force of law.
2.2.2.2 **Sources of Constitutional Law** − Hierarchy − Hierarchy as between national sources − The Constitution and other sources of domestic law.
5.3.39 **Fundamental Rights** − Civil and political rights − Right to property.

Keywords of the alphabetical index:

Land, plot / Land, use, permanent / Land, ownership, right / Land, ownership, private.

Headnotes:

The Constitution guarantees the right to private property over land, which is acquired and exercised by citizens, legal entities and the state, exclusively according to the law (Article 14.2).

Citizens have acquired ownership of land plots under the Land Code of 13 March 1992, the Decree of the Cabinet of Ministers on Privatisation of Land Plots of 26 December 1992, no. 15-82, and the Decrees of the President upon decisions of the relevant local councils and rayon state administrations.

Paragraph 6 of the Transitional Provisions of the new Land Code stipulates that owners of land plots must re-register their right to these plots by 1 January 2008 or otherwise be deprived of their right to these plots.

Summary:

According to the Constitution, everyone has the right to own, use and dispose of his/her property; the right to private property is acquired through a procedure determined by law; no one shall be unlawfully deprived of the right to property, which is inviolable (Article 41.1, 41.2, 41.4).

Everyone has the right to use natural objects of the people's right of property according to the law (Article 13.2 of the Constitution). In particular, such objects include land plots.

Subject to Article 41.3 of the Constitution, to satisfy their needs, citizens may use objects of state and municipal property according to the law.

The Constitution (Article 13) does not exclude the possibility to use land based on various titles granted by law, while securing ownership right of citizens to land.

The Land Code in force (hereinafter: the Code), adopted on 25 October 2001, defines the right to permanent use of land as the right to property and to use land in public or municipal property, for an unlimited period (Article 92.1).

The Law on State Registration of Property Rights to Real Estate and their Restrictions 1 July 2004, envisages mandatory state registration of the right to permanent use of land, the right to use land for agricultural purposes.

This norm neither restricts nor cancels the current right to permanent use of land, acquired by citizens under the established legal procedures of 1 January 2002, prior to re-registration thereof. Therefore, there are no reasons to recognise Article 92 of the Code as unconstitutional.

The term "to acquire rights" does not comply with the clarity requirement of a legal norm, in respect of the requirement of re-registration of the right to use land.

Instead, paragraph 6 of the "Transitional Provisions" of the Code provides for re-registration of the right to property or the tenant right of citizens and legal entities, who have land plots in permanent use- but the Code deprives them of such a right. Re-registration also has two meanings: repeated registration and new registration, subject to the new rules.

Comparative analysis of the provisions of paragraph 6 of the Resolution of the parliament *(Verkhovna Rada)* on Land Reform, 18 December 1990 (hereinafter: the Resolution), and paragraph 6 of the "Transitional Provisions" of the Code shows that the former deals with registration of the ownership right to land for citizens, enterprises, institutions and organisations, which enjoyed the right to use land prior to enforcement of the Land Code of the Ukrainian SSR (December 1990), and the latter deals with re-registration of the right to permanent use of land. Neither the Code nor other legal acts clarify the legal meaning of the terms "registration" and "re-registration" or define the correlation between them. The ambiguity of these terms affected practical implementation of subjective rights to land plots by citizens and legal entities.

The state has initiated the adoption of a new Land Code under which citizens are obliged to re-register their previously acquired rights into other rights, which is burdensome, time-consuming, complicated and expensive. In addition, this obligation of re-registration of ownership of land plots must be met by 1 January 2008, but as it would require a clear mechanism of implementation (subject to Articles 14.2 and 41.2 of the Constitution), citizens will not be able to comply with paragraph 6 of the Transitional Provisions of the Land Code in time because of a lack of legal mechanisms for re-registration.

The subjective right to permanent use of a land plot is very different from the subjective land property right and the subjective tenant's right. Although landowners and tenants are authorised to dispose of land plots alongside with ownership and use rights, in contrast to permanent users who are deprived of such possibilities, their right to land has a number of specific features and advantages: the right to permanent use of land is not limited in time, unlike the tenant's right, and may be terminated on legal grounds; rights and obligations of permanent land users are secured by laws in force and are not subject to contractual regulation; permanent land users, like landowners, shall pay the land-tax, the amount of which shall be established by the legislation in force; land plots shall be transferred into permanent use as free allocation with further

certification of the right with the state certificate on the right to permanent use of land; the only chargeable service is the execution of technical documents for a land plot under agreement with the authorised land surveying organisation.

Paragraph 6 of the Resolution envisages that citizens shall be deprived of the right to use land allocated to them prior to enforcement of the Land Code upon expiration of the term for registration of the land property right or the right to use land.

However, subject to Articles 13, 14, 92.1.7 of the Constitution, the legal regime of property and use of land shall be determined by the laws of Ukraine.

The Resolution of the parliament is a bylaw, so it may not contain legal provisions, establishing a legal regime for the land property right.

Languages:

Ukrainian.

Identification: UKR-2005-3-006

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 05.10.2005 / **e)** 6-rp/2005 / **f)** On official interpretation of Article 103.1 of the Constitution in the context of Articles 5, 156 thereof and on official interpretation of Article 5.2, 5.3 and 5.4 of the Constitution (case on the exercise of power by the people) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 41/2005 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

2.3.8 **Sources of Constitutional Law** − Techniques of review − Systematic interpretation.
4.1.2 **Institutions** − Constituent assembly or equivalent body − Limitations on powers.
4.9.2 **Institutions** − Elections and instruments of direct democracy − Referenda and other instruments of direct democracy.

Keywords of the alphabetical index:

Powers, balance / Sovereignty, popular / Referendum, constitutional right to request / State powers, usurpation.

Headnotes:

The constitutional provision “the people shall be the bearer of sovereignty” secures the principle of the sovereignty of the people, according to which the power of the people is initial, single and inalienable.

The people’s will shall be expressed through elections, referenda and other forms of direct democracy (Article 69 of the Constitution) under a procedure established by the Constitution and laws.

The execution of the people’s will in the said forms of direct democracy is the realisation of the people’s power through approval of relevant decisions (laws) and the creation of public authorities and bodies of local self-government.

Summary:

The case was heard as a result of a constitutional claim brought by 60 Members of Parliament regarding the official interpretation of part one of Article 103 (election of the President of Ukraine) of the Constitution and an appeal brought by three Ukrainian citizens, in the aftermath of the presidential election in 2004, on the ground that the electoral commissions, executive bodies and bodies of local self-government allegedly failed to respect the provisions of the Constitution and the Law on the elections of the President of Ukraine. The Constitution and the Law guarantee free expression of the will of voters and the alleged failure to respect them caused the violation of constitutional rights and freedoms during the elections of the President of Ukraine, regarding parts one, two, three and four of Article 5 of the Constitution in the light of Articles 5 and 156 of the Constitution (case on exercise of power by the people).

Subject to Article 5 of the Constitution, the people shall be the bearer of sovereignty and the only source of power in Ukraine, exercise power directly and through state bodies and bodies of local self-government (paragraph 2); right to determine and change the constitutional order of Ukraine belongs exclusively to the people and shall not be usurped by the state, its bodies or officials (Article 5.3).

In its Decision no. 3-zp of 11 July 1997, the Constitutional Court pointed out that adoption of the

Constitution by parliament *(Verkhovna Rada)* was an act of direct execution of the people's sovereignty (paragraph 4.1 of the statement of reasons).

Article 5.2 of the Constitution shall be interpreted as giving all power in Ukraine to the people, who shall have initial, single and inalienable power and exercise it through the free declaration of the people's will, through elections, referenda, other forms of direct democracy under procedure, established by the Constitution and laws, through public authorities and bodies of local self-government, created in accordance with the Constitution and laws.

Results of the people's will declared in forms of direct democracy, envisaged by the Constitution and laws, shall be mandatory.

Article 5.3 of the Constitution shall be deemed to empower the people to exercise their right to determine the constitutional order of Ukraine by adopting the Constitution through all-Ukrainian referendum.

The Universal Declaration of Human Rights states that:

> "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures" (Article 21.3).

The people's power shall be executed within the territory in a way and in forms established by the Constitution and laws. The execution of constitutional rights and freedoms by citizens forms and integral part of the direct realisation of the people's power. Each citizen is obliged to adhere strictly to the Constitution and the laws and not to encroach upon the rights and freedoms, honour and dignity of other persons (Article 68.1 of the Constitution, Constitutional Court's Decision no. 4-rp/2001, 19 April 2001, *Bulletin* 2001/1 [UKR-2001-1-002]).

Subject to the Constitution, the state, its bodies, officers and officials shall not determine the constitutional order, the right of which falls within the people's domain exclusively. However, while securing the constitutional order, the Constitution gives no definition of the term. In its Decision no. 3-zp, 11 July 1997 (*Bulletin* 1997/2 [UKR-1997-2-003]), the Constitutional Court refers to principles of the constitutional order only, as established in Chapters I, III and XIII of the Constitution.

Article 5.4 of the Constitution shall be interpreted as prohibiting usurpation of the state power by violence or in any other unconstitutional or illegal way, by public authorities and bodies of local self-government, officials, citizens or their associations.

Chapter XIII of the Constitution determines the procedure of amending the Constitution. In particular, a special procedure has been provided for amending Chapters I, III and XIII of the Constitution, according to which the relevant draft law shall be submitted to parliament by the President of Ukraine, or by at least two-thirds of the constitutional composition of the parliament, and if adopted by no less than two-thirds of the constitutional composition of the parliament, it shall be approved by an all-Ukrainian referendum arranged by the President (Article 156.1).

The current Constitution has been adopted by the parliament on behalf of the Ukrainian people (Preamble). That is, the parliament embodied the sovereign will of the people at the adoption of the Constitution on 28 June 1996. The normative and legal content of Article 5.2 and 5.3 of the Constitution imply that the people shall have the right to adopt a new Constitution.

The Constitution prohibits any usurpation of the people's exclusive right to determine and change the constitutional order of Ukraine by the state, its bodies or officials. Thus, any acts of the state, its bodies or officials, which cause usurpation of this right, shall be unconstitutional and illegal.

The Constitutional Court concluded that usurpation of the state power means unconstitutional or illegal acquisition thereof by public authorities or bodies of local self-government, their officials, citizens or associations of citizens.

Constitutional principles of division of the state power in Ukraine into legislative, executive and judicial power (Article 6.1) and provision that state bodies and bodies of local self-government and their officials are obliged to act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and laws (Article 19.2) secure the state power from usurpation, which is pointed out in Constitutional Court's Decision no. 6-rp/99 in case on courts' financing, 24 June 1999, *Bulletin* 1999/2 [UKR-1999-2-004].

Languages:

Ukrainian.

Identification: UKR-2005-3-007

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 05.10.2005 / **e)** 7-rp/2005 / **f)** On the conformity with the Constitution (constitutionality) of the Decree of the President on Measures for Raising Efficiency of the Oil Industry Management, no. 814, 16 July 2004 (case on the oil industry management) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 42/2005 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.4.1.2 **Institutions** − Head of State − Powers − Relations with the executive powers.
4.6.2 **Institutions** − Executive bodies − Powers.

Keywords of the alphabetical index:

Company, state-owned, shares, transfer, / Decree, president, *ultra vires*.

Headnotes:

Under Article 106.3 of the Constitution, the President, on the basis of and in pursuance to the Constitution and the relevant laws, issues decrees and directives that are mandatory and must be executed in the territory. The head of state may issue such acts within the limits of his constitutional powers insofar as they do not infringe the competence of other public authorities or bodies of local self-government.

Under Article 113.2 of the Constitution, the Cabinet of Ministers is accountable to the President. Article 113.3 of the Constitution stipulates that the Cabinet of Ministers shall be guided, among others, by acts of the President in its activity. In accordance with Article 116.1 to 116.9 of the Constitution, the Cabinet of Ministers carries out some functions under the law (Article 116.5), in particular, it manages the objects of state property and other powers, taking into account acts of the President, subject to Article 116.10 of the Constitution.

The above-mentioned provisions of the Constitution imply that the President may give orders (instructions) to the Cabinet of Ministers through his acts, which may be given within the limits of his constitutional competence as head of state. However, the President may not change the functions of the Cabinet of Ministers, as determined by the Constitution, including its function to manage the objects of state property, and act in lieu of the supreme body in the system of executive authorities in performance of its functions.

Summary:

The provisions of the Decree of the President on Measures for raising Efficiency of the Oil Industry Management, no. 814, 16 July 2004 (as amended by Decree of the President, no. 1087, 14 September 2004) in the part concerning the order (instruction) to the Cabinet of Ministers to solve the question regarding the transfer of state-owned shares in the Joint Stock Company *Ukrtatnafta* and in the Open Joint Stock Company *Halychyna* Oil Refinery to the authorised fund of the National Joint Stock Company *Naftogaz Ukrainy,* as the state's contribution by 30 September 2004. This transfer is considered to be unconstitutional.

When charging the Cabinet of Ministers with the transfer of the state-owned share in the Joint Stock Company *Ukrtatnafta*, totaling 43.54 % of its market value, as determined under the established procedure, and the share in Open Joint Stock Company *Halychyna* Oil Refinery, totaling 25 %, to the authorised fund of the National Joint Stock Company *Naftogaz Ukrainy,* as the state's contribution (Paragraph 1 of the Decree), the President has actually managed the specific state property object (the state-owned share) and infringed on the competence of the Cabinet of Ministers of Ukraine, which covers management of the objects of state property.

Dissenting opinion of Judge V.I. Ivaschenko.

Languages:

Ukrainian.

Identification: UKR-2005-3-008

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 11.10.2005 / **e)** 8-rp/2005 / **f)** On a case upon constitutional petition of the Supreme Court and 50 national deputies on conformity with the Constitution (constitutionality) of Paragraphs 13.3 and 13.4 of Section XV (Final Provisions) of the Law on General Mandatory State Pension Insurance and the official interpretation of provisions of Article 11.3 of the Law

on Status of Judges (case on the pension level and perpetual monthly monetary allowance) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 42/2005 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.7.4.1.6 **Institutions** − Judicial bodies − Organisation − Members − Status.
5.4.16 **Fundamental Rights** − Economic, social and cultural rights − Right to a pension.

Keywords of the alphabetical index:

Judge, pension, allowance, conditions / Judge, pension, calculation.

Headnotes:

The right of a retired judge to a pension and a monthly allowance secures the independence of working judges. Pecuniary aid and social protection granted to a judge at the expense of the state budget (salary, pension, monthly allowance etc.) secures his/her high status and independence.

Subject to Article 126 of the Constitution, Article 11.3 of the Law on Status of Judges and Article 14.8 of the Law on Judicial System shall be treated as securing the achieved level of independence of the judiciary and prohibiting adoption of new laws and other statutory acts, amendments, cancellation thereof or restriction of any current guaranties of independence of judges, including arrangements for their legal protection, material and social support.

Summary:

The right to pension benefits forms an integral part of the constitutional right to social protection. This right is guaranteed by a general, mandatory state social insurance, which is funded by insurance payments made by citizens, enterprises, institutions and organisations, and from budgetary and other sources of social security (Article 46 of the Constitution).

The right to pension benefits, general terms and conditions, procedures of calculation and amount of pensions shall be determined by the Laws on Pension Benefits, on General Mandatory State Pension Insurance (hereinafter: the Law on Pension Insurance).

Paragraph 13.3 of Section XV (Final Provisions) of the Law on Pension Insurance restricts the level of wage payments to be used as a basis for the calculation of pensions. This level is fixed as the highest amount of actual expenditures for remuneration of employees. Paragraph 13.4 of Chapter XV stipulates that if the amount of a pension, the monthly allowance (including all bonuses, wage rises, supplementary pension benefits, special pecuniary aid and pensions for special merits and other additional payments to pensions established by the law), granted in pursuance of legal acts, as referred to in paragraphs 13.1 and 13.2 herein, exceeds 90 % of the highest amount of actual expenditures for remuneration of employees, taxable income (profit), consolidated taxable income (the maximum sum of wage (income), from which insurance contributions (charges) are collected for social funds, as defined by the Law of pension payments to such persons), pension or monthly allowance shall not exceed the said limit.

The provisions of paragraphs 13.3 and 13.4, which limit the pension amount in the solidary pension system, fail to comply with the constitutional provisions for a guaranteed right to social protection, which includes pension benefits covered by the state budget (Article 46 of the Constitution).

After considering the case, the Court concluded that Article 55.5 of the Law supplemented Article 43 of the Law on Pension Benefits of Servicemen, Command and Ordinary Personnel of Interior Bodies and Some Other Persons, no. 2262-XII of 9 April 1992, by adding paragraphs 4 and 5. Based on Article 61.3 of the Law on the Constitutional Court, the latter declared the above-mentioned provisions of the Law unconstitutional, because they affect the rendering of a fair and unbiased decision of the case.

A monthly allowance is a special form of social protection for judges, which is a state-guaranteed monthly tax-free payment that assures material security for judges, including the retired ones. The Law on the Status of Judges sets forth terms and conditions of such payments.

Subject to Article 130 of the Constitution, the state ensures the funding of and proper conditions for the operation of courts and the activity of judges. Expenditures for the maintenance of courts are allocated separately under the State Budget. This provision provides for the funding of monthly allowances for judges out of the State Budget, and not out of the State Pension Fund.

The procedure for the calculation of monthly allowances, as established by the Law on Pension Insurance, restricts the amount of monthly allowances for judges determined by the Law on the Status of Judges. While preserving the right to monthly allowances for judges, the Law has restricted the

scope of this right to the upper limit of the monthly allowance for judges and, at the same time, decreased the achieved level of guaranties of the independence of judges.

Languages:

Ukrainian.

Identification: UKR-2005-3-009

a) Ukraine / **b)** Constitutional Court / **c)** / **d)** 13.10.2005 / **e)** 9-rp/2005 / **f)** On the official interpretation of provisions of Articles 106.1.10, 118.1, 118.2, 118.4, 133.3 and 140.2 of the Constitution, Articles 1.4, 8.2 and 9.4 of the Law on Local State Administrations, Paragraph 2 of Section VII (Final Provisions) of the Law on the Capital City − the Hero City Kyiv (case of specific features of the executive power and local self-governance in Kyiv city districts) / **g)** *Ophitsiynyi Visnyk Ukrainy* (Official Gazette), 42/2005 / **h)** CODICES (Ukrainian).

Keywords of the systematic thesaurus:

4.8.3 **Institutions** − Federalism, regionalism and local self-government − Municipalities.
4.8.6.2 **Institutions** − Federalism, regionalism and local self-government − Institutional aspects − Executive.

Keywords of the alphabetical index:

District, mayor / Municipality, special status / Capital, administration.

Headnotes:

A district state administration in Kyiv may be headed only by an elected head of a district state administration in Kyiv who shall be appointed by the President.

Summary:

In cities such as Kyiv and Sebastopol, which have a special status (Article 133.3 of the Constitution), particular aspects of the implementation of the executive power and local self-governance, subject to Articles 118.2 and 140.2 of the Constitution, shall be determined by special laws. In this respect, the Constitution allows the legislative regulation of particular aspects of the implementation of the executive power and local self-governance in Kyiv city and city districts to differ from the general procedure of the implementation of the executive power and local self-governance in other administrative and territorial units regulated by the Laws on Local Self-Governance and on Local State Administrations. In addition, Article 133.1 of the Constitution defines Kyiv city districts as administrative and territorial units, which are an integral part of Kyiv as an administrative and territorial unit.

Specific aspects of the implementation of the executive power and local self-governance in the city of Kyiv are determined by the Law on the Capital City − the Hero City Kyiv. Therefore, the local territorial community of the city shall execute local self-governance directly or through the Kyiv city council and the city district councils, which shall form their own executive bodies (Articles 8.1 and 10).

Towards that end, Kyiv city council and city district councils shall form their own executive bodies, in accordance with the Law, on the basis of the relevant state administration, which shall simultaneously act as executive authorities. It is the specific feature of the implementation of the executive power in Kyiv city (paragraph 2 of Section VII).

The systematic analysis of the above-mentioned legal acts shows that forms of the implementation of the local self-governance and the procedure of creation of their own executive bodies in Kyiv city district councils and city council are regulated by harmonised organisational and legal principles.

Following the constitutional petition by 61 members of parliament, the Constitutional Court examined the case on specific aspects of the implementation of the executive power and local self-governance in the city of Kyiv and referred, *inter alia*, to its Decision no. 21-rp/2003 of 25 December 2003 (case on specific features of the implementation of the executive power and local self-governance in the city of Kyiv). The Court resolved that the “City state administration in Kyiv may be headed by an elected Kyiv city mayor only, this person shall be appointed to the office of the head of Kyiv city administration by the President of Ukraine”.

Evaluation of provisions of the Law on the Capital City − the Hero City Kyiv, legal position of the Constitutional Court, as given in the said decision, implies that the current legislation provides for the unified organisational procedure for the formation of state administration both on the city and district levels. Such administrations shall combine the functions of executive power and local self-governance as local executive authorities and executive bodies of the relevant Kyiv city district councils and city council.

Languages:

Ukrainian.

United Kingdom
House of Lords

Important decisions

Identification: GBR-2005-3-001

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 16.12.2004 / **e)** / **f)** A v. Secretary of State for the Home Department / **g)** [2004] UKHL 56 / **h)** [2005] 2 *Appeals Cases* 68; [2005] 2 *Weekly Law Reports* 87; [2005] 3 *All England Reports* 169.

Keywords of the systematic thesaurus:

3.19 **General Principles** − Margin of appreciation.
4.7.12 **Institutions** − Judicial bodies − Special courts.
5.1.1.3 **Fundamental Rights** − General questions − Entitlement to rights − Foreigners.
5.1.4 **Fundamental Rights** − General questions − Emergency situations.
5.2.2.4 **Fundamental Rights** − Equality − Criteria of distinction − Citizenship or nationality.
5.3.5.1 **Fundamental Rights** − Civil and political rights − Individual liberty − Deprivation of liberty.

Keywords of the alphabetical index:

Detention, without trial / Derogation, European Convention on Human Rights / State, duty to protect / Terrorism, fight.

Headnotes:

I. It was unlawful for the Secretary of State, under national terrorist legislation, to discriminate between nationals and non-nationals in determining which suspected terrorists should be detained without charge. Further, national legislation, promulgated after a derogation from the European Convention on Human Rights, was nonetheless found to be disproportionate in the way in which it infringed Article 5 ECHR as it did not rationally address the threat that international terrorism poses to the United Kingdom.

Summary:

In response to the threat of international terrorism, the United Kingdom Government concluded that there

was a public emergency threatening the life of the nation within the meaning of Article 15 ECHR and thus derogated from the Convention in 2001 from the right to personal liberty guaranteed by Article 5.1 ECHR.

Under Section 23 of the Anti-terrorism, Crime and Security Act 2001, non-nationals could be detained if the Home Secretary believed that their presence in the United Kingdom was a risk to national security and he suspected that they were terrorists who, for the time being, could not be deported to their home countries or third party countries because of fears for their safety (their deportation would amount to a violation of Article 3 ECHR) or other practical considerations.

The nine claimants had been detained under the 2001 Act without charge or trial and appealed to the Special Immigration Appeals Commission. The commission concluded that as there was an public emergency as defined in Article 15 ECHR and that the Government's derogation was consequently lawful as it was limited to what was strictly required by the exigencies of the situation. However, the commission quashed the 2001 Derogation Order and granted a declaration that Section 23 of the 2001 Act was incompatible with Articles 5 and 14 ECHR in so far as it permitted the detention of suspected terrorists in a way which discriminated against them on the ground of nationality, since there were no provisions under the 2001 Act for the detention of British suspected terrorists.

The claimants advanced three claims. First, the derogation from the provisions of the Convention was not permissible because there was no 'public emergency threatening the life of the nation'. Secondly, the derogation was not proportionate because the legislative objective could have been achieved by means which did not, or did not so severely, restrict the fundamental right to personal freedom. Thirdly, Section 23 was discriminatory in providing for the detention of suspected international terrorists who were not United Kingdom nationals but not for the detention of suspected international terrorists who were United Kingdom nationals.

II. The majority of the Lords held, having regard to the jurisprudence of the European Court of Human Rights, that it was not necessary for government to identify a specific threat of an immediate terrorist attack but merely had to show that there was a risk of such an attack at some unspecified time. This assessment is pre-eminently of a political character and should not lightly be interfered with by the courts.

However, although the response necessary to protect national security was a matter of political judgment for the executive and Parliament, where Convention rights were in issue national courts were required to afford them effective protection by adopting an intensive review of whether such a right had been infringed, and the courts were not precluded by any doctrine of deference from examining the proportionality of a measure taken to restrict such a right.

The right to personal liberty was among the most fundamental rights protected and the restrictions imposed by Section 23 of the 2001 Act called for close scrutiny. The Lords held that Section 23 did not rationally address the threat to security, was a disproportionate response, and was not strictly required by the exigencies of the situation for the following reasons.

First, it discriminated between non-nationals and United Kingdom nationals who were considered to present qualitatively the same threat. This was particularly relevant as there had been no derogation from the Article 14 ECHR prohibition on discrimination. Further, since the purpose of Section 23 was to protect the United Kingdom from the risk of a terrorist attack presented by both groups, and since only the non-national suspects were detained, the measure unjustifiably discriminated against them on grounds of their nationality or immigration status. Secondly, it permitted non-national suspects to leave the United Kingdom when they could operate just as effectively abroad. Thirdly, it did not address the threat from United Kingdom nationals. Fourthly, it was capable of applying to individuals who did not pose that threat.

Languages:

English.

Identification: GBR-2005-3-002

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 13.10.2005 / **e)** / **f)** R (on the application of Jackson) v. Attorney General / **g)** [2005] UKHL 56 / **h)** [2005] 3 *Weekly Law Reports* 733; [2005] 4 *All England Reports* 1253.

Keywords of the systematic thesaurus:

2.1.1.1.2 **Sources of Constitutional Law** − Categories − Written rules − National rules − Quasi-constitutional enactments.
4.5.1 **Institutions** − Legislative bodies − Structure.
4.5.2 **Institutions** − Legislative bodies − Powers.
4.5.6 **Institutions** − Legislative bodies − Law-making procedure.
4.5.6.5 **Institutions** − Legislative bodies − Law-making procedure − Relations between houses.

Keywords of the alphabetical index:

Hunting, right / Powers, delegation / Parliament, powers, restrictions / Parliament, powers, nature.

Headnotes:

The Parliament Act 1949 had been validly made under the power contained in the Parliament Act 1911 to enact legislation without the consent of the House of Lords, and therefore the Hunting Act 2004, made pursuant to the 1911 and 1949 Acts, had been validly made.

Summary:

I. The Hunting Act 2004, which made the hunting of wild animals with dogs unlawful, was enacted pursuant to Section 2 of the Parliament Act 1911 (as amended by Section 1 of the Parliament Act 1949), which laid down the circumstances in which, save for stated exceptions, 'any public Bill' could be enacted without the consent of the House of Lords.

The 1949 Act reduced the period which had to elapse before the Lords' consent could be dispensed with from two years to one. The claimants, the Countryside Alliance, who were pro-fox hunting, contended that the 1949 Act was invalid because it had itself been enacted under the provisions of the 1911 Act. They contended that the 1911 Act could only be amended with the consent of the House of Lords and sought declarations that the 1949 Act was not an Act of Parliament and of no legal effect and that, accordingly, the same was true of the Hunting Act 2004.

II. The House of Lords was hesitant as to whether considering this case was within the ambit of its constitutional role but concluded for both legal (the case involved statutory construction and was thus within its remit) and practical (the 1949 Act had been employed on previous occasions and a judicial decision was required to clarify its legitimacy) that it was. The Lords detailed the historical and constitutional context in which the Parliament Act 1911 had been enacted and concluded that its legislative purpose was not to enlarge the powers of the House of Commons or to delegate powers to it but to restrict the powers of the House of Lords, subject to conditions, to defeat measures supported by a majority in the Commons.

The Lords rejected the Court of Appeal's conclusion that the changes to the 1911 Act were 'relatively modest' and it also rejected this as the relevant test as to whether the amendments were constitutional or not as it was too vague. They also rejected the Appellants' key contention that the 1949 Act was delegated or subordinate legislation. This conclusion was based on the construction of the 1911 Act. The 1911 Act states that any enactment under it 'becomes an Act of Parliament'. The fact that the preamble to the 1949 Act states that it is enacted 'in accordance with the Parliament Act 1911' does not render it delegated legislation.

Section 2.1 of the 1911 Act used language only to denote primary legislation and thereby created a parallel route by which, subject to stated exceptions, any public Bill introduced into the House of Commons could become an Act of Parliament. The term 'any' was to be understood in its broad colloquial sense and since stated exceptions had been expressly excluded from the ambit of Section 2.1 there was no room to imply further exclusions. This was justified by the historical record as to how the Act came into being. Indeed, some Lords noted that the 1911 Act expressly excluded its use for legislation extending the duration of Parliament.

The Lords held that there was no constitutional principle or principle of statutory construction which prohibited a legislature from altering its own constitution by enacting alterations to the instrument from which its powers derived by virtue of powers in the same instrument provided that its powers extended so far. The 1911 Act thus did not preclude use of the Section 2.1 procedure to amend itself and a Bill having that effect might properly be passed under that procedure. Accordingly, the 1949 Act was an Act of Parliament of full legal effect as was the Hunting Act 2004.

Languages:

English.

Identification: GBR-2005-3-003

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 03.11.2005 / **e)** / **f)** R (on the application of Limbuela) v. Secretary of State for the Home Department / **g)** [2005] UKHL 66 / **h)** [2005] 3 *Weekly Law Reports* 1014.

Keywords of the systematic thesaurus:

5.1.1.3.1 **Fundamental Rights** − General questions − Entitlement to rights − Foreigners − Refugees and applicants for refugee status.
5.3.1 **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.
5.4.18 **Fundamental Rights** − Economic, social and cultural rights − Right to a sufficient standard of living.

Keywords of the alphabetical index:

Asylum, seeker / Subsistence, minimum, right.

Headnotes:

It was incompatible with Article 3 ECHR, as scheduled in the Human Rights Act 1998, to deny government support to asylum seekers on the basis that they had not claimed asylum as soon as reasonably practicable, when they were prohibited from obtaining employment and thus unable to satisfy the most basic needs of any human being.

Summary:

I. Three destitute asylum seekers had been refused support under Section 95 of the Immigration and Asylum Act 1999 (which set out the categories of person to whom support could be granted) on two grounds. First, they had not claimed asylum as soon as reasonably practicable after their arrival in the United Kingdom as required by Section 55.1 of the Nationality, Immigration and Asylum Act 2002. Secondly, the Secretary of State concluded that support was not necessary to prevent a breach of their Convention rights. Section 55.1 was qualified by Section 55.5.a which enabled the Secretary of State to exercise his powers to provide support under the 1999 Act and accommodation under the 2002 Act before the ultimate state of inhuman or degrading treatment was reached. The House of Lords found that Section 55.5 was a preventative measure in that it required the Secretary of State to 'avoid' a situation in which the asylum seekers' Convention rights were violated.

Due to a statutory prohibition on asylum seekers taking employment, each claimant had no means of obtaining money to find accommodation or buy food other than by reliance on charity. Each claimant thus sought judicial review of the Secretary of State's decision to refuse support, on the ground that their suffering was so severe that a breach of their right not to be subjected to inhuman or degrading treatment under Article 3 ECHR was imminent.

II. The House of Lords held that a decision to withdraw statutory support was an intentionally inflicted act for which the Secretary of State was directly responsible so as to engage Article 3 ECHR. Where the inhuman or degrading treatment or punishment resulted from acts or omissions for which the state was directly responsible, there was an absolute obligation on states to refrain from such conduct. The fact that an act of a positive nature was required to prevent the treatment from attaining the minimum level of severity which engaged the Article 3 ECHR prohibition does not alter the essential absolute nature of the article. In determining whether treatment in a particular case had reached the minimum level of severity, the court was not to apply a more exacting test where the treatment or punishment which would otherwise be found to be inhuman or degrading was the result of legitimate government policy.

The correct test was for the court to look at the context and facts of the particular case. Relevant factors were: age; gender; mental and physical health; the weather and time of year; and the length of period spent or likely to be spent without the required means of support. The Court must ask whether the entire package of work restrictions and deprivations that surrounded the claimants was so severe that it could properly be described as inhuman or degrading treatment. No simple test is applicable in all cases. In this case, the claimants were obliged to sleep in the street, were seriously hungry and were forced to live in an unhygienic state and thus had to be entitled to support.

Languages:

English.

Identification: GBR-2005-3-004

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 08.12.2005 / **e)** / **f)** A v. Secretary of State for the Home Department / **g)** [2005] UKHL 71 / **h)** [2005] 3 *Weekly Law Reports* 1249.

Keywords of the systematic thesaurus:

5.1.4 **Fundamental Rights** − General questions − Emergency situations.
5.3.3 **Fundamental Rights** − Civil and political rights − Prohibition of torture and inhuman and degrading treatment.
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:

State, duty to protect / Torture, evidence obtained through torture / Terrorism, fight / Evidence, obtained through torture / Evidence, illegally obtained / Evidence, exclusionary rule, strict.

Headnotes:

Evidence which might have been obtained by torture (by third party states) was inadmissible before the Special Immigration Appeals Commission despite the fact that, by its statutory rules, it was entitled to receive evidence that would not be admissible in a court of law.

Summary:

I. In these proceedings, the House of Lords addressed further issues arising out the detention of foreign nationals (see Identification [GBR-2005-3-001], *A v. Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68 for the facts of the case). The claimants had appealed their certification and detention under the Anti-terrorism, Crime and Security Act 2001 to the Special Immigration Appeals Commission.

The commission was by Rule 44.3 of the Special Immigration Appeals Commission (Procedure) Rules 2003 entitled to receive evidence that would not be admissible in a court of law. It reviewed the evidence in respect of each claimant and in a number of open and closed judgments dismissed their appeals. In one case it was alleged that the Secretary of State had relied on evidence of a third party obtained through his torture in a foreign state.

The commission held that, if there was such material which had been obtained without the complicity of British authorities, they might examine it and determine the proper weight to be attached to it and that there would be no prohibition on its admission within the meaning of Article 15 of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1990). They concluded, however, that there was no such material.

II. In the House of Lords, throughout all of their judgments, the Lords referred extensively to academic material, a wealth of common law and a variety of international jurisprudence and concluded that evidence of a suspect or witness which had been obtained by torture had long been regarded as inherently unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles on which courts should administer justice. Therefore, such evidence was inadmissible against a party to proceedings in a United Kingdom court, irrespective of where, by whom or on whose authority the torture had been inflicted.

The essence of each judgment is that in interpreting Rule 44.3, a court cannot simply accept the literal meaning of the words but must read them in light of the fundamental principle of the common law that evidence obtained by torture is inadmissible. Thus, even though the commission might admit a wide range of material which was inadmissible in ordinary judicial proceedings, express statutory words would be required to override the exclusionary rule barring evidence procured by torture.

However, in stark contrast, the Lords held that the Secretary of State did not act unlawfully in relying on such tainted material when certifying, arresting and detaining a person under the 2001 Act whom he suspected of international terrorism. The Commission was to be regarded differently as it was established to exercise judicial supervision of the Secretary of State's exercise of those powers and was required to assess whether at the time of the hearing before it there were reasonable grounds for his suspicion.

The House divided as to where the burden of proof lay in determining whether evidence was obtained by torture. Lord Bingham held that a conventional approach to the burden of proof was inappropriate in determining whether a statement should be excluded as it had been procured by torture. All that could be asked of a detainee is that he should to do more than raise a plausible reason that material might have been so obtained and, where he did so, it was for the commission to initiate relevant inquiries. Other Lords questioned the practicality of requiring the Secretary

of State to conduct inquiries into how evidence was obtained by foreign authorities.

Languages:

English.

European Court of Human Rights

Important decisions

Identification: ECH-2005-3-004

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 06.10.2005 / **e)** 74025/01 / **f)** Hirst v. the United Kingdom (no. 2) / **g)** *Reports of Judgments and Decisions of the Court* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1.2 **Sources of Constitutional Law** − Categories − Written rules − National rules from other countries.
3.16 **General Principles** − Proportionality.
3.18 **General Principles** − General interest.
3.19 **General Principles** − Margin of appreciation.
5.1.1.4.3 **Fundamental Rights** − General questions − Entitlement to rights − Natural persons − Prisoners.
5.1.3 **Fundamental Rights** − General questions − Limits and restrictions.
5.3.41.1 **Fundamental Rights** − Civil and political rights − Electoral rights − Right to vote.

Keywords of the alphabetical index:

Prisoner, electoral rights, exclusion / Election, prisoner, exclusion.

Headnotes:

Any limitations on the right to vote must be imposed in pursuit of a legitimate aim, be proportionate to that aim and not thwart the free expression of the people in the choice of the legislature.

Restrictions on electoral rights may be imposed on individuals who have seriously abused a public position or by their conduct threatened to undermine the rule of law or democratic foundations but there must be a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned.

A general, automatic and indiscriminate disenfranchisement of convicted prisoners is incompatible with the right to vote.

Summary:

I. The applicant was serving a sentence of life imprisonment for manslaughter but was released from prison on licence in 2004. As a convicted prisoner, he was barred by law from voting in parliamentary or local elections. Some 48,000 other prisoners are similarly affected. He issued proceedings in the High Court, under Section 4 of the Human Rights Act 1998, seeking a declaration that the relevant legislation was incompatible with the Convention. His claim and subsequent appeal were both rejected.

In the application lodged with the Court, the applicant claimed that the disenfranchisement of convicted prisoners violated the right to vote, inherently protected by Article 3 Protocol 1 ECHR.

II. The Court stressed that the rights guaranteed under Article 3 Protocol 1 ECHR were crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law and also that the right to vote was a right and not a privilege. Nonetheless, the rights bestowed by this provision were not absolute and there was room for implied limitations. Any limitations on the right to vote had to be imposed in pursuit of a legitimate aim, be proportionate to that aim and not thwart the free expression of the people in the choice of the legislature. Prisoners generally continued to enjoy all the fundamental rights and freedoms guaranteed under the Convention, except for the right to liberty, where lawfully imposed detention expressly fell within the scope of Article 5 ECHR. Article 3 Protocol 1 ECHR nevertheless did not exclude that restrictions on electoral rights be imposed on an individual who had, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations. However, the severe measure of disenfranchisement was not to be undertaken lightly and the principle of proportionality required a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned. As in other contexts, an independent court, applying an adversarial procedure, provided a strong safeguard against arbitrariness.

The Court accepted that the domestic legislation might be regarded as pursuing the legitimate aim of preventing crime and enhancing civic responsibility and respect for the rule of law. As to the proportionality of the voting ban, 48,000 prisoners barred from voting was a significant figure which included a wide range of offenders and sentences, from one day to life and from relatively minor offences to offences of the utmost gravity. Nor was it apparent that there was any direct link between the facts of any individual case and the removal of the right to vote. There was no evidence that parliament had ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote. The domestic courts, for their part, did not undertake any assessment of the proportionality of the measure itself.

It was undisputed that the United Kingdom was not alone among Convention countries in depriving all convicted prisoners of the right to vote. It might also be said that the law in the United Kingdom was less far-reaching than in certain other States. However, the fact remained that it was a minority of Contracting States in which a blanket restriction on the right of convicted prisoners to vote was imposed or in which there was no provision allowing prisoners to vote. Moreover, and even if no common European approach to the problem could be discerned, that could not of itself be determinative of the issue. While the margin of appreciation in this field was wide, it was not all-embracing. The law in question remained a blunt instrument, applied automatically to convicted prisoners in prison, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right had to be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 Protocol 1 ECHR. There had therefore been a violation of Article 3 Protocol 1 ECHR.

Cross-references:

- *X. v. Germany,* no. 2728/66, Commission decision of 06.10.1967, Collection 25, p. 38;
- no. 6573/74, Commission decision of 19.12.1974, *Decisions and Reports* 1, p. 87;
- *Golder v. the United Kingdom,* Judgment of 21.02.1975, Series A, no. 18;
- *Glimmerveen and Hagenbeek v. the Netherlands,* nos. 8348/78 and 8406/78, Commission decision of 11.10.1979, *Decisions and Reports* 18, p. 187;
- *Hamer v. the United Kingdom,* no. 7114/75, Commission report of 13.12.1979, *Decisions and Reports* 24, p. 5;
- *Draper v. the United Kingdom,* no. 8186/78, Commission report of 10.07.1980, *Decisions and Reports* 24, p. 72;
- *X. v. the United Kingdom,* no. 9054/80, Commission decision of 08.10.1982, *Decisions and Reports* 30, p. 113;
- *Silver and Others v. the United Kingdom,* Judgment of 25.03.1983, Series A, no. 61;

- no. 9914/82, Commission decision of 04.07.1983, *Decisions and Reports 33*, p. 245;
- *T. v. the United Kingdom*, no. 8231/78, Commission report of 12.10.1983, *Decisions and Reports* 49, p. 5;
- *Campbell and Fell v. the United Kingdom,* Judgment of 28.06.1984, Series A, no. 80;
- *Mathieu-Mohin and Clerfayt v. Belgium*, Judgment of 02.03.1987, Series A, no. 113;
- *Thynne, Wilson and Gunnell v. the United Kingdom*, Judgment of 25.10.1990, Series A, no. 190-A;
- *Singh v. the United Kingdom,* Judgment of 21.02.1996, *Reports of Judgments and Decisions* 1996-I;
- *United Communist Party of Turkey and Others v. Turkey*, Judgment of 30.01.1998, *Reports of Judgments and Decisions* 1998-I;
- *Patrick Holland v. Ireland,* no. 24827/94, Commission decision of 14.04.1998, *Decisions and Reports* 93, p. 15;
- *Matthews v. United Kingdom [GC],* no. 24833/94, *Reports of Judgments and Decisions* 1999-I;
- *Hilbe v. Liechtenstein* (dec.) no. 31981/96, *Reports of Judgments and Decisions* 1999-VI;
- *Labita v. Italy [GC*], no. 26772/95, *Reports of Judgments and Decisions* 2000-IV;
- *Podkolzina v. Latvia*, no. 46726/99, *Reports of Judgments and Decisions* 2002-II;
- *Stafford v. the United Kingdom [GC],* no. 46295/99, *Reports of Judgments and Decisions* 2002-IV;
- *Kalashnikov v. Russia,* no. 47095/99, *Reports of Judgments and Decisions* 2002-VI;
- *Ploski v. Poland,* no. 26761/95, 12.11.2002;
- *M.D.U. v. Italy* (dec.), no. 58540/00, 28.01.2003;
- *Van der Ven v. the Netherlands,* no. 50901/99, *Reports of Judgments and Decisions* 2003-II;
- *Poltoratskiy v. Ukraine,* no. 38812/97, *Reports of Judgments and Decisions* 2003-V;
- *Yankov v. Bulgaria,* no. 39084/97, *Reports of Judgments and Decisions* 2003-XII;
- *Assanidze v. Georgia [GC],* no. 71503/01, *Reports of Judgments and Decisions* 2004-II;
- *Broniowski v. Poland [GC],* no. 31443/96, *Reports of Judgments and Decisions* 2004-V;
- *Aziz v. Cyprus,* no. 669949/01, *Reports of Judgments and Decisions* 2004-V;
- *Melnychenko v. Ukraine,* no. 17707/02, *Reports of Judgments and Decisions* 2004-X;
- *Öcalan v. Turkey [GC],* no. 46221/99, *Reports of Judgments and Decisions* 2005.

Languages:

English, French.

Identification: ECH-2005-3-005

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 10.11.2005 / **e)** 44774/98 / **f)** Leyla Şahin v. Turkey / **g)** *Reports of Judgments and Decisions of the Court* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.7 **General Principles** − Relations between the State and bodies of a religious or ideological nature.
3.19 **General Principles** − Margin of appreciation.
5.3.18 **Fundamental Rights** − Civil and political rights − Freedom of conscience.

Keywords of the alphabetical index:

Freedom of religion, positive / Religious belief / Religion, clothing, restriction / Religion, neutrality of the state / Education, higher, access.

Headnotes:

The principle of secularism is consistent with the values underpinning the European Convention on Human Rights. It prevents the State from manifesting a preference for a particular religion or belief and its defence may entail restrictions on freedom of religion.

A prohibition on the wearing the Islamic headscarf in universities pursues the legitimate aims of protecting the rights and freedoms of others and of protecting public order. Moreover, in the Turkish context, where the values of pluralism, respect for the rights of others and equality before the law of men and women are being taught and applied in practice, such a prohibition may be regarded as necessary in a democratic society.

Summary:

I. In February 1998 the Vice-Chancellor of Istanbul University issued a circular directing that students wearing the Islamic headscarf would be refused admission to lectures, courses and tutorials. The applicant, a student at the faculty of medicine, was refused access to a written examination on one of the subjects she was studying because she was wearing the Islamic headscarf. Subsequently, on the same grounds, the university authorities refused to enrol

her on a course, and to admit her to various lectures and a written examination. The faculty also issued her with a warning for contravening the university's rules on dress and suspended her from the university for a semester for taking part in an unauthorised assembly that had gathered to protest against the rules. All the disciplinary penalties imposed on the applicant were revoked under an amnesty law. The applicant lodged an application for an order setting aside the circular, but it was dismissed by the administrative courts, who found that that a university vice-chancellor had power to regulate students' dress for the purposes of maintaining order by virtue of the legislation and decisions of the Constitutional Court and the Supreme Administrative Court, and that the regulations and measures criticised by the applicant were not, under the settled case-law of those courts, illegal.

In the application lodged with the Court, the applicant claimed that the university's regulations on wearing the Islamic headscarf violated her freedom to manifest her religion and denied her right to education. She relied in particular on Article 9 ECHR and Article 2 Protocol 1 ECHR.

II. The Court found firstly that the circular issued by Istanbul University, which placed restrictions of place and manner on the students' right to wear the Islamic headscarf, constituted an interference with the applicant's right to manifest her religion. As to whether the interference had been "prescribed by law", the Court accepted that there was a legal basis for the interference in Turkish law, that the law was accessible and that its effects were foreseeable so that the applicant would have been aware, from the moment she entered the university, that there were restrictions on wearing the Islamic headscarf and, from February 1998, that she was liable to be refused access to lectures and examinations if she continued to wear the headscarf.

The interference pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order. As to whether it was necessary, the Court noted that it was based in particular on the principle of secularism, which prevented the State from manifesting a preference for a particular religion or belief and whose defence could entail restrictions on freedom of religion. That notion of secularism was consistent with the values underpinning the Convention and upholding that principle could be considered necessary to protect the democratic system in Turkey. In the Turkish context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women were being taught and applied in practice, it was understandable that the relevant authorities should consider it contrary to such values to allow religious attire to be worn on university premises. As regards the conduct of the university authorities, the Court noted that it was common ground that practising Muslim students in Turkish universities were free, within the limits imposed by educational organisational constraints, to manifest their religion in accordance with habitual forms of Muslim observance. In addition, various forms of religious attire were forbidden at Istanbul University. Further, throughout the decision-making process, the university authorities had sought to avoid barring access to the university to students wearing the Islamic headscarf, through continued dialogue with those concerned, while at the same time ensuring that order was maintained on the premises. In those circumstances, and having regard to the Contracting States' margin of appreciation, the Court found that the interference in issue was justified in principle and proportionate to the aims pursued, and could therefore be considered to have been "necessary in a democratic society". There had therefore been no violation of Article 9 ECHR.

With regard to the applicability of Article 2 Protocol 1 ECHR, the Court reiterated that while the first sentence essentially established access to primary and secondary education, it would be hard to imagine that institutions of higher education existing at a given time did not come within its scope. Nevertheless, in a democratic society, the right to education, which was indispensable to the furtherance of human rights, played such a fundamental role that a restrictive interpretation of the first sentence of the provision would not be consistent with the aim or purpose of that provision. Consequently, any institutions of higher education existing at a given time came within the scope of the first sentence of the provision, since the right of access to such institutions was an inherent part of the right set out in that provision. In the case before it, by analogy with its reasoning under Article 9 ECHR, the Court accepted that the regulations on the basis of which the applicant had been refused access to various lectures and examinations for wearing the Islamic headscarf constituted a restriction on her right to education. As with Article 9 ECHR, the restriction was foreseeable to those concerned and pursued legitimate aims and the means used were proportionate. The decision-making process had clearly entailed the weighing up of the various interests at stake and was accompanied by safeguards (the rule requiring conformity with statute and judicial review) that were apt to protect the students' interests. Further, the applicant could reasonably have foreseen that she ran the risk of being refused access to lectures and examinations if she continued to wear the Islamic headscarf. Accordingly, the ban on wearing the Islamic headscarf had not impaired the very essence of the

applicant's right to education. There had therefore been no violation of Article 2 Protocol 1 ECHR.

Cross-references:

- *"Belgian Linguistic case",* Judgment (on the merits) of 23.07.1968, Series A, no. 6; *Special Bulletin ECHR* [ECH-1968-S-003];
- *Delcourt v. Belgium,* Judgment of 17.01.1970, Series A, no. 11; *Special Bulletin ECHR* [ECH-1970-S-001];
- *De Wilde, Ooms and Versyp v. Belgium,* Judgment of 18.06.1971, Series A, no. 12; *Special Bulletin ECHR* [ECH-1971-S-001];
- *X. v. the United Kingdom,* no. 5962/72, Commission decision of 13.03.1975, *Decisions and Reports* 2, p. 50;
- *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Judgment of 07.12.1976, Series A, no. 23; *Special Bulletin ECHR* [ECH-1976-S-002];
- *Arrowsmith v. the United Kingdom,* no. 7050/75, Commission decision of 12.10.1978, *Decisions and Reports* 19, p. 5;
- *Sunday Times v. the United Kingdom* (no. 1), Judgment of 26.04.1979, Series A, no. 30; *Special Bulletin ECHR* [ECH-1979-S-001];
- *X. v. the United Kingdom,* no. 8844/80, Commission decision of 09.12.1980, *Decisions and Reports* 23, p. 228;
- *Young, James and Webster v. the United Kingdom*, Judgment of 13.08.1981, Series A, no. 44; *Special Bulletin ECHR* [ECH-1981-S-002];
- *Campbell and Cosans v. the United Kingdom*, Judgment of 25.02.1982, Series A, no. 48; *Special Bulletin ECHR* [ECH-1982-S-001];
- *C. v. the United Kingdom,* no. 10358/83, Commission decision of 15.12.1983, *Decisions and Reports* 37, p. 142;
- *Bartold v. Germany,* Judgment of 25.03.1985, Series A, no. 90*;*
- *Kruslin v. France,* Judgment of 24.04.1990, Series A, no. 176-A; *Special Bulletin ECHR* [ECH-1990-S-001];
- *Costello-Roberts v. the United Kingdom*, Judgment of 25.03.1993, Series A, no. 247-C;
- *Karaduman v. Turkey*, no. 16278/90, Commission decision of 03.05.1993, *Decisions and Reports* 74, p. 93;
- *Kokkinakis v. Greece,* 25.05.1993, Series A, no. 260-A; *Special Bulletin ECHR* [ECH-1993-S-002];
- *Casado Coca v. Spain*, Judgment of 24.02.1994, Series A, no. 285-A; *Bulletin* 1994/1 [ECH-1994-1-005];
- *Otto-Preminger-Institut v. Austria*, Judgment of 20.09.1994, Series A, no. 295-A; *Bulletin* 1994/3 [ECH-1994-3-012];
- *Kramelius v. Sweden,* no. 21062/92, Commission decision of 17.01.1996;
- *Sulak v. Turkey*, no. 24515/94, Commission decision of 17.01.1996, *Decisions and Reports* 84, p. 98;
- *Manoussakis and Others v. Greece*, Judgment of 26.09.1996, *Reports* 1996-IV;
- *Wingrove v. the United Kingdom,* Judgment of 25.11.1996, *Reports of Judgments and Decisions* 1996-V;
- *Valsamis v. Greece,* Judgment of 18.12.1996, *Reports of Judgments and Decisions* 1996-VI;
- *Kalaç v. Turkey,* Judgment of 01.07.1997, *Reports of Judgments and Decisions* 1997-IV;
- *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];
- *Buscarini and Others v. San Marino [GC],* no. 24645/94, *Reports of Judgments and Decisions* 1999-I;
- *Chassagnou and Others v. France [GC],* nos. 25088/94, 28331/95 and 28443/95, *Reports of Judgments and Decisions* 1999-III; *Bulletin* 1999/1 [ECH-1999-1-006];
- *Serif v. Greece,* no. 38178/97, *Reports of Judgments and Decisions* 1999-IX;
- *Lukach v. Russia* (dec.), no. 48041/99, 16.11.1999;
- *Georgiou v. Greece* (dec.), no. 45138/98, 13.01.2000;
- *Cha'are Shalom Ve Tsedek v. France [GC],* no. 27417/95, *Reports of Judgments and Decisions* 2000-VII;
- *Hasan and Chaush v. Bulgaria [GC],* no. 30985/96, *Reports of Judgments and Decisions* 2000-XI;
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- *Durmaz and Others v. Turkey* (dec.), no. 46506/99, 04.92001;
- *Tepeli and Others v. Turkey* (dec.), no. 31876/96, 11.09.2001;
- *Pichon and Sajous v. France* (dec.), no. 49853/99, *Reports of Judgments and Decisions* 2001-X;
- *Murphy v. Ireland,* no. 44179/98, *Reports of Judgments and Decisions* 2003-IX;
- *Gorzelik and Others v. Poland [GC],* no. 44158/98, *Reports of Judgments and Decisions* 2004-I; *Bulletin* 2004/1 [ECH-2004-1-001].

Languages:

English, French.

Identification: ECH-2005-3-006

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 15.12.2005 / **e)** 73797/01 / **f)** Kyprianou v. Cyprus / **g)** *Reports of Judgments and Decisions of the Court* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

3.16 **General Principles** − Proportionality.
5.3.13.15 **Fundamental Rights** − Civil and political rights − Procedural safeguards, rights of the defence and fair trial − Impartiality.
5.3.21 **Fundamental Rights** − Civil and political rights − Freedom of expression.

Keywords of the alphabetical index:

Contempt of court / Judge, impartiality / Impartiality, objective / Impartiality, subjective / Lawyer, freedom of expression.

Headnotes:

Fears as to the impartiality of a court may be regarded as objectively justified when a person has been summarily tried for criminal contempt of court where the contempt was aimed at the judges personally. Furthermore, in such circumstances, where statements made by the judges in their decisions indicate that they have not detached themselves sufficiently from the situation, misgivings about their impartiality may also be justified in that respect.

The imposition on a lawyer of a sanction of five days' imprisonment for contempt of court in respect of discourteous statements, following a summary trial tainted by procedural unfairness, may be regarded as a disproportionate interference with his freedom of expression.

Summary:

I. The applicant, acting as defence counsel during a murder trial before an Assize Court, was interrupted by the court while cross-examining a prosecution witness. He felt aggrieved and sought leave to withdraw from the case, but as leave was not granted, he responded by alleging that during the cross-examination members of the court had been talking to each other and sending each other notes ("*ravasakia*" − which can mean, among other things, short and secret letters/notes, or love letters, or messages with unpleasant contents). The judges stated they had been "deeply insulted" "as persons"; could not "conceive of another occasion of such a manifest and unacceptable contempt of court by any person, let alone an advocate"; and that "if the court's reaction is not immediate and drastic, ... justice will have suffered a disastrous blow". They gave the applicant the choice, either to maintain what he had said and to give reasons why a sentence should not be imposed on him, or to retract. As the applicant did neither, the court found him in contempt of court and sentenced him to five days' imprisonment, to be enforced immediately, which the court deemed to be the "only adequate response", as "an inadequate reaction on the part of the lawful and civilised order, as expressed by the courts would mean accepting that the authority of the courts be demeaned". The applicant served the prison sentence, although he was in fact released early, in accordance with the relevant legislation. His appeal was dismissed by the Supreme Court.

In the application lodged with the European Court of Human Rights, the applicant claimed that he had not received a fair trial by an impartial tribunal and that his conviction had violated his right to freedom of expression. He relied in particular on Articles 6 and 10 ECHR.

II. The Court considered that this complaint was directed at a functional defect in the relevant proceedings. The applicant's case had related to contempt in the face of the court, aimed at the judges personally. They had been the direct object of his criticisms as to the manner in which they had been conducting the proceedings. The same judges then had taken the decision to prosecute him, had tried the issues arising from his conduct, had determined his guilt and had imposed the sanction (a term of imprisonment) on him. In such a situation the confusion of roles between complainant, witness, prosecutor and judge could self-evidently prompt objectively justified fears as to the conformity of the proceedings with the time-honoured principle that no one should be a judge in his or her own cause and, consequently, as to the impartiality of the bench. Accordingly, the impartiality of the Assize Court had been capable of appearing open to doubt and the applicant's fears in that respect could therefore be considered to have been objectively justified.

Turning to the applicant's allegation that the judges concerned had acted with personal bias, the Court observed that the judges in their decision sentencing

the applicant had acknowledged that they had been "deeply insulted" "as persons" by the applicant. That statement in itself had showed that the judges had been personally offended by the applicant's words and conduct and had indicated personal embroilment on the part of the judges. In addition, the emphatic language used by the judges throughout their decision had conveyed a sense of indignation and shock, which had run counter to the detached approach expected of judicial pronouncements. The judges had proceeded to impose a sentence of five days' imprisonment, enforced immediately, which they had deemed to be the "only adequate response" to what had happened. In addition, the judges had expressed the opinion early on in their discussion with the applicant that they had considered him guilty of the criminal offence of contempt of court. After deciding that he had committed the above offence they had given him the choice, either to maintain what he had said and to give reasons why a sentence should not be imposed on him, or to retract. Although no doubt the judges were concerned with the protection of the administration of justice and the integrity of the judiciary and, for that purpose, felt it appropriate to initiate the procedure in question, they did not succeed in detaching themselves sufficiently from the situation. That conclusion was reinforced by the speed with which the proceedings had been carried out and the brevity of the exchanges between the judges and the applicant. Against that background and having regard in particular to the different elements of the judges' personal conduct taken together, the applicant's misgivings about the Assize Court's impartiality had been justified in this respect as well. As the Supreme Court had declined to quash the lower court's decision the defect in question had not been remedied. There had therefore been a violation of Article 6.1 ECHR.

The Court noted that the Assize Court had sentenced the applicant to five days' imprisonment which could not but be regarded as a harsh sentence, especially considering that it was enforced immediately. His conduct could be regarded as having shown certain disrespect for the judges of the Assize Court. Nonetheless, albeit discourteous, his comments had been aimed at and limited to the manner in which the judges had been trying the case, in particular concerning the cross-examination of a witness he had been carrying out in the course of defending his client against a charge of murder. The penalty in question had been disproportionately severe and had been capable of having a "chilling effect" on the performance by lawyers of their duties as defence counsel. The Court's finding of procedural unfairness in the summary proceedings for contempt served to compound that lack of proportionality. In sum, the Assize Court had failed to strike the right balance between the need to protect the authority of the judiciary and the need to protect the applicant's right to freedom of expression. There had therefore been a violation of Article 10 ECHR.

Cross-references:

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- *Piersack v. Belgium*, Judgment of 01.10.1982, Series A, no. 53;
- *De Cubber v. Belgium*, Judgment of 26.10.1984, Series A, no. 86;
- *Le Compte, Van Leuven and De Meyere v. Belgium*, Judgment of 23.06.1981, Series A, no. 43; *Special Bulletin ECHR* [ECH-1981-S-001];
- *Hauschildt v. Denmark*, Judgment of 24.05.1989, Series A, no. 154; *Special Bulletin ECHR* [ECH-1989-S-001];
- *Huber v. Switzerland*, Judgment of 23.10.1990, Series A, no. 188;
- *Demicoli v. Malta*, Judgment of 27.08.1991, Series A, no. 210; *Special Bulletin ECHR* [ECH-1991-S-003];
- *Brincat v. Italy*, Judgment of 26.11.1992, Series A, no. 249-A;
- *Padovani v. Italy*, Judgment of 26.02.1993, Series A, no. 257-B;
- *Holm v. Sweden*, Judgment of 25.11.1993, Series A, no. 279-A;
- *Pullar v. the United Kingdom*, Judgment of 10.06.1996, *Reports of Judgments and Decisions* 1996-III; *Bulletin* 1996/2 [ECH-1996-2-010];
- *Ferrantelli and Santangelo v. Italy*, Judgment of 07.08.1996, *Reports of Judgments and Decisions* 1996-III;
- *Castillo Algar v. Spain*, Judgment of 28.10.1998, *Reports of Judgments and Decisions* 1998-VIII;
- *Findlay v. the United Kingdom*, Judgment of 25.02.1997, *Reports of Judgments and Decisions* 1997-I;
- *De Haan v. the Netherlands*, Judgment of 26.08.1997, *Reports of Judgments and Decisions* 1997-IV;
- *Worm v. Austria*, Judgment of 29.08.1997, *Reports of Judgments and Decisions* 1997-V;
- *Zana v. Turkey*, Judgment of 25.11.1997, *Reports of Judgments and Decisions* 1997-VII; *Bulletin* 1997/3 [ECH-1997-3-020];
- *Schöpfer v. Switzerland*, Judgment of 20.05.1998, *Reports of Judgments and Decisions* 1998-III;
- *Assenov and Others v. Bulgaria*, Judgment of 28.10.1998, *Reports of Judgments and Decisions* 1998-VIII;
- *Ceylan v. Turkey* [GC], no. 23556/94, *Reports of Judgments and Decisions* 1999-IV;

- *Buscemi v. Italy*, no. 29569/95, *Reports of Judgments and Decisions* 1999-VI;
- *Morel v. France*, no. 34130/96, *Reports of Judgments and Decisions* 2000-VI;
- *Daktaras v. Lithuania*, no. 42095/98, *Reports of Judgments and Decisions* 2000-X;
- *Wettstein v. Switzerland*, no. 33958/96, *Reports of Judgments and Decisions* 2000-XII;
- *Tammer v. Estonia*, no. 41205/98, *Reports of Judgments and Decisions* 2001-I;
- *Nikula v. Finland*, no. 31611/96, *Reports of Judgments and Decisions* 2002-II;
- *Lavents v. Latvia*, no. 58442/00, 28.11.2002;
- *Lešník v. Slovakia*, no. 35640/97, *Reports of Judgments and Decisions* 2003-IV;
- *Skałka v. Poland*, no. 43425/98, 27.05.2003;
- *Steur v. the Netherlands*, no. 39657/98, *Reports of Judgments and Decisions* 2003-XI;
- *Grieves v. the United Kingdom* [GC], no. 57067/00, *Reports of Judgments and Decisions* 2003-XII;
- *Amihalachioaie v. Moldova*, no. 60115/00, *Reports of Judgments and Decisions* 2004-III;
- *Chauvy and Others v. France*, no. 64915/01, *Reports of Judgments and Decisions* 2004-VI;
- *Miller and Others v. the United Kingdom*, nos. 45825/99, 45826/99 and 45827/99, 26.10.2004;
- *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, *Reports of Judgments and Decisions* 2004-XI;
- *Steel and Morris v. the United Kingdom*, no. 68416/01, *Reports of Judgments and Decisions* 2005.

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.

1 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.

2 Constitutional Court or equivalent body (constitutional tribunal or council, supreme court, etc.).

3 E.g. Rules of procedure.

4 E.g. Age, education, experience, seniority, moral character, citizenship.

5 Including the conditions and manner of such appointment (election, nomination, etc.).

6 Including the conditions and manner of such appointment (election, nomination, etc.).

7 Vice-presidents, presidents of chambers or of sections, etc.

8 E.g. State Counsel, prosecutors, etc.

9 (Deputy) Registrars, Secretaries General, legal advisers, assistants, auditors, researchers, etc.

10 E.g. assessors, office members.

11 (Deputy) Registrars, Secretaries General, legal advisers, assistants, researchers, etc.

12 Including questions on the interim exercise of the functions of the Head of State.
13 Referrals of preliminary questions in particular.
14 Enactment required by law to be reviewed by the Court.
15 Review *ultra petita*.
16 Horizontal distribution of powers.
17 Vertical distribution of powers, particularly in respect of states of a federal or regionalised nature.
18 Decentralised authorities (municipalities, provinces, etc.).
19 This keyword concerns questions of jurisdiction relating to the procedure and results of referenda and other consultations. For questions other than jurisdiction, see 4.9.2.1.

20 This keyword concerns decisions preceding the referendum including its admissibility.

21 Examination of procedural and formal aspects of laws and regulations, particularly in respect of the composition of parliaments, the validity of votes, the competence of law-making authorities, etc. (questions relating to the distribution of powers as between the State and federal or regional entities are the subject of another keyword 1.3.4.3).

22 As understood in private international law.

23 Including constitutional laws.

24 For example, organic laws.

25 Local authorities, municipalities, provinces, departments, etc.

26 Or: functional decentralisation (public bodies exercising delegated powers).

27 Political questions.

28 Unconstitutionality by omission.

29 For the withdrawal of proceedings, see also 1.4.10.4.
30 Pleadings, final submissions, notes, etc.
31 May be used in combination with Chapter 1.2. Types of claim.
32 For the withdrawal of the originating document, see also 1.4.5.

[33] Comprises court fees, postage costs, advance of expenses and lawyers' fees.
[34] For questions of constitutionality dependent on a specified interpretation, use 2.3.2.

2 Sources of Constitutional Law

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    - 2.1.1.4.14 Statute of the International Criminal Court of 1998
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35 Only for issues concerning applicability and not simple application.

36 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.).

37 Including its Protocols.

38 Presumption of constitutionality, double construction rule.
39 Including the principle of a multi-party system.
40 Includes the principle of social justice.
41 See also 4.8.
42 Separation of Church and State, State subsidisation and recognition of churches, secular nature, etc.
43 Including maintaining confidence and legitimate expectations.
44 Principle according to which sub-statutory acts must be based on and in conformity with the law.
45 Prohibition of punishment without proper legal base.

46 Including compelling public interest.
47 Only where not applied as a fundamental right (e.g. between state authorities, municipalities, etc.).
48 Including questions of treason/high crimes.
49 Including prohibition on monopolies.
50 For the principle of primacy of Community law, see 2.2.1.6.
51 Including the body responsible for revising or amending the Constitution.

52 For example, presidential messages, requests for further debating of a law, right of legislative veto, dissolution.
53 For example, nomination of members of the government, chairing of Cabinet sessions, countersigning.
54 For example, the granting of pardons.
55 For regional and local authorities, see chapter 4.8.
56 Bicameral, monocameral, special competence of each assembly, etc.
57 Including specialised powers of each legislative body and reserved powers of the legislature.
58 In particular, commissions of enquiry.
59 For delegation of powers to an executive body, see keyword 4.6.3.2.
60 Obligation on the legislative body to use the full scope of its powers.
61 Representative/imperative mandates.
62 Presidency, bureau, sections, committees, etc.
63 Including the convening, duration, publicity and agenda of sessions.

64 Including their creation, composition and terms of reference.
65 State budgetary contribution, other sources, etc.
66 For the publication of laws, see 3.15.
67 For example, incompatibilities arising during the term of office, parliamentary immunity, exemption from prosecution and others. For questions of eligibility, see 4.9.5.
68 For local authorities, see 4.8.
69 Derived directly from the Constitution.
70 See also 4.8.
71 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.
72 Civil servants, administrators, etc.
73 Practice aiming at removing from civil service persons formerly involved with a totalitarian regime.

74 Other than the body delivering the decision summarised here.
75 Positive and negative conflicts.
76 Notwithstanding the question to which to branch of state power the prosecutor belongs.
77 For example, Judicial Service Commission, *Conseil supérieur de la magistrature*.
78 Comprises the Court of Auditors in so far as it exercises judicial power.

79 See also 3.6.
80 And other units of local self-government.
81 See also, keywords 5.3.41 and 5.2.1.4.
82 Organs of control and supervision.
83 For questions of jurisdiction, see keyword 1.3.4.6.
84 Proportional, majority, preferential, single-member constituencies, etc.
85 For aspects related to fundamental rights, see 5.3.41.2.
86 For the creation of political parties, see 4.5.10.1.
87 E.g. Names of parties, order of presentation, logo, emblem or question in a referendum.
88 Tracts, letters, press, radio and television, posters, nominations, etc.

89 Impartiality of electoral authorities, incidents, disturbances.
90 E.g. signatures on electoral rolls, stamps, crossing out of names on list.
91 E.g. in person, proxy vote, postal vote, electronic vote.
92 E.g. *Panachage*, voting for whole list or part of list, blank votes.
93 E.g. Auditor-General.
94 Parliamentary Commissioner, Public Defender, Human Rights Commission, etc.
95 E.g. Court of Auditors.
96 The vesting of administrative competence in public law bodies situated outside the traditional administrative hierarchy. See also 4.6.8.
97 *Staatszielbestimmungen*.

98 Institutional aspects only: questions of procedure, jurisdiction, composition, etc.; are dealt with under the keywords of Chapter 1.
99 Including state of war, martial law, declared natural disasters, etc. for human rights aspects, see also keyword 5.1.3.1.
100 Positive and negative aspects.
101 For rights of the child, see 5.3.44.
102 The criteria of the limitation of human hights (legality, legitimate purpose/general interest, proportionality) are indexed in chapter 3.
103 Includes questions of the suspension of rights. See also 4.18.
104 Taxes and other duties towards the state.

105 Here, the term “national” is used to designate ethnic origin.
106 For example, discrimination between married and single persons.
107 This keyword also covers “Personal liberty” It includes for example identity checking, personal search and administrative arrest.
108 Detention by police.
109 Including questions related to the granting of passports or other travel documents.
110 May include questions of expulsion and extradition.
111 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.
112 This keyword covers the right of appeal to a court.

113 Including the right to be present at hearing.
114 Including challenging of a judge.
115 Covers freedom of religion as an individual right Its collective aspects are included under the keyword “Freedom of worship” below.
116 This keyword also includes the right to freely communicate information.
117 Militia, conscientious objection, etc.

118 Aspects of the use of names are included either here or under “Right to private life”.
119 Including compensation issues.
120 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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