

THE BULLETIN

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

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

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

The decisions are presented in the following way:

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

G. Buquicchio

Secretary of the European Commission for Democracy through Law

THE VENICE COMMISSION

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

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Kyrgyzstan	K. E. Esenkanov		

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

Strasbourg, January 2007

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There was no relevant constitutional case-law during the reference period 1 January 2006 – 30 April 2006 for the following countries:

Cyprus, Denmark, Finland (Supreme Administrative Court), Luxembourg, Russia, Ukraine.

Précis of important decisions of the reference period 1 January 2006 – 30 April 2006 will be published in the next edition, *Bulletin* 2006/2 for the following country:

Greece.

Albania

Constitutional Court

Statistical data

1 January 2005 – 31 December 2005

Number of decisions: 256

Types of decisions

- final decisions taken in plenary session: 41
- inadmissibility decisions: 215

Final decisions on admissible applications

- appeal dismissed: 16
- appeal upheld: 23
- interpretation: 1
- committal for trial: 1
- decision to discontinue the proceedings: 0

Effects (decisions taken on admissible appeals and examined by the Court in plenary session)

- *ex tunc*: 1
- *ex nunc*: 40
- *erga omnes*: 7
- *inter partes*: 34
- immediate: 0
- deferred: 0

Proceedings initiated by (these statistics only refer to applicants whose appeal was found admissible)

- President of the Republic: 1
- Prime Minister: 0
- Group of 1/5th of the Deputies: 0
- Head of High State Control: 0
- Ordinary courts: 2
- People's Advocate: 0
- Local government bodies: 0
- Religious communities: 0
- Political parties, associations and other organisations: 5
- Individuals: 33
- Constitutional Court Judge: 0

Types of provisions reviewed

- Constitution (interpretation): 1
- Laws: 7
- International treaties: 0
- Decrees of the Cabinet of Ministers: 4
- Judicial decisions: 29
- Other administrative acts: 0

Types of litigation

- Fair trial: 33
- Conflict of powers/jurisdiction: 0
- Electoral disputes: 1
- Constitutionality of political parties: 0
- Impeachment: 0
- Constitutionality of acts of the executive (including appeals against decrees by the Cabinet of Ministers or by the President of the Republic or against decisions by the Central Election Commission): 0
- Constitutionality of laws: 6
- Interpretation of the Constitution: 1
- Constitutionality of international treaties: 0
- End of office of a constitutional judge: 0

Type of review

- Concrete review: 35
- Abstract review: 6
- Preventive review (*a priori*): 0
- *a posteriori* review: 41



Argentina

Supreme Court of Justice of the Nation

Important decisions

Identification: ARG-2006-1-001

a) Argentina / b) Supreme Court of Justice of the Nation / c) / d) 11.04.2006 / e) C. 77. XL / f) Cristalux S.A. c/ ley 24.144 / g) to be published in *Fallos de la Corte Suprema de Justicia de la Nación* (Official Digest), 329 / h) CODICES (Spanish).

Keywords of the systematic thesaurus:

2.2.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources.

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:

Criminal law, “blank” / Law, criminal, retroactive effect / *Lex benignior retro agit*.

Headnotes:

The principle that a more lenient criminal law has retroactive effect applies in the case of amendments to the legislation supplementing “blank” criminal laws.

Summary:

The Exchange Offences Act (no. 19.359) establishes penalties for certain kinds of activities, which are subsequently supplemented by governmental decrees. It therefore qualifies as so-called “blank” criminal law. In this case Decree no. 2581/64 was repealed by Decree no. 530/91, with the result that the defendant’s alleged activities, which were unlawful under the first decree, are now no longer prohibited. The Court was asked to determine whether the principle of the retroactive effect of a

more lenient criminal law applied to this type of legislation.

The Court held that since the entry into force of the American Convention on Human Rights and the International Covenant on Civil and Political Rights and, *a fortiori*, since the reform of the National Constitution in 1994, which gave these instruments constitutional rank, it was no longer possible to uphold the Court’s earlier opinion that the retroactive effect of a more lenient criminal law was a principle which the ordinary legislature could apply as it saw fit. The only lawful departures from this principle envisaged in the *travaux préparatoires* for the Covenant concerned criminal laws of a temporary or urgent nature.

The issue before the Court accordingly consisted in determining whether, in the case of a “blank” criminal law, defendants were entitled to benefit from amendments to the permanent legislation supplementing it. The reply could but be affirmative, since the amended rules were neither temporary nor, above all, variable in nature and the amendment did more than merely alter circumstantial elements. The amendment to the legislation indeed resulted in a considerable broadening of individual freedom to act and, hence, did away with the effective protective purpose of the system formerly in force.

In this regard the Court cited various German authors and a judgment of the German Federal Court of 8 January 1965 (*BGHSt*, t. 20 [1966], pp. 177 ff.).

Supplementary information:

In this case the Court abandoned the thesis endorsed by the majority in the *Ayerza* precedent (Judgment of 16.04.1998, *Fallos* 321 : 824); it subscribed to the dissenting opinion issued at that time by one of the judges, to which it referred.

The Court recognised, under certain specific conditions, the validity of so-called “blank” criminal laws, which allow the government to adopt regulations adding certain criminal-law aspects thereto. The substance of this kind of law is liable to change as a result of amendments to the regulations, without any outward formal change in the offence.

Languages:

Spanish.



Armenia

Constitutional Court

Statistical data

1 January 2006 – 30 April 2006

- 16 referrals made, 14 cases heard and 14 decisions delivered.
 - 13 decisions on the compliance of international treaties with the Constitution. All treaties examined were declared compatible with the Constitution.
 - 1 decision as to the compliance of several provisions of a law and Government Decision.
 - The admissibility of one referral has been rejected.
 - The examination of one case is pending.

Important decisions

Identification: ARM-2006-1-001

a) Armenia / b) Constitutional Court / c) / d) 18.04.2006 / e) DCC-630 / f) On the conformity with the Constitution of Article 218 of the Armenian Civil Code, Articles 104, 106 and 108 of the Armenian Land Code and Decision of Government no. 1151-N of 01.08.2002 / g) to be published in *Tegekagir* (Official Gazette) / h).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Expropriation, guarantees / Expropriation, procedure / Expropriation, justification.

Headnotes:

The state shall set out within legislation the procedure of expropriation. The owner will be entitled to an explanation before the event of the reason for this interference with his right to property and of the specific needs of the state which provide the rationale behind the expropriation. In any case, where there is interference with the right to property, by implication there must be a fair balance between the overriding interests of society as a whole and the need for a guarantee of fundamental human rights.

If expropriation takes place outside a clear legislative framework and without regard for restrictions imposed by the Constitution on the procedure, then such interference with property will not be deemed proportionate.

Summary:

I. The Human Rights Defender of the Republic of Armenia applied to the Armenian Constitutional Court for a ruling upon the conformity of Article 218 of the Civil Code, Articles 104, 106 and 108 of the Land Code and the Decision of the Government of 2002, 1 August, 1151-N with Article 31 of the Constitution.

Article 31 of the Constitution bestows the universal right to dispose, use, manage and bequeath one's property at will. The right to property may not be exercised so as to cause damage to the environment or to infringe the rights and lawful interests of other persons, society, or the state.

No one may be deprived of private property except by a court in cases prescribed by law.

Private property may be expropriated for the needs of society and the state only in cases of exceptional and overriding public interest, with due process of law, and with prior equivalent compensation.

The Applicant argued that the legal norms in question were in conflict with the Constitution because:

1. There is no clear definition of “public and state needs” and “cases of exceptional and overriding public interest” in any of the challenged legislation. Legislation alone forms the basis for restriction of right to property. Furthermore, the Articles of the Civil Code and Land Code mentioned above do not set out a sufficiently clear and rigorous procedure for taking parcels of land for “state needs”.

2. There should be separate legislation to regulate this type of issue of public law. There is no specific definition within the existing law of property of “exceptional importance” and “expropriation”, neither is there any mention of the type of state or public need which might be satisfied by the property which is seized.

II. In its interpretation of Article 31 of the Constitution, the Constitutional Court made the following observations:

- There are cases where rights are restricted, when the Constitution itself determines the criteria and framework of the restriction and does not bestow any competence upon the legislator. Property rights may only be restricted in cases prescribed by law. Any deprivation of property has to be carried out in a judicial manner as a compulsory act. “Expropriation of property” is a different concept from “deprivation of the property”. It should be exercised on the basis of Article 31.3 of the Constitution.
- The Constitution provides for the possibility of restrictions on the right to property and expropriation of property.
- Expropriation may only be carried out for public and state needs which should be clearly expressed and directed at a particular property.
- These needs should be exceptional and in the overriding interests of the state or society.
- The procedure of expropriation should be determined by legislation.
- Advance compensation should be guaranteed when property is to be expropriated.
- The compensation should be of equivalent value.

Having regard to the law pertaining to human rights, to precedents within constitutional law and international law on the protection of the right to property and on expropriation of property for public needs and in view of the new legal requirements formulated as a consequence of the most recent amendments to the Constitution, the Constitutional Court ruled that the government should not be allowed to define through its decisions the procedure of expropriation of property for state needs. This is directly related to the question of restrictions on the right to property and guarantees should be in place to ensure a balance between public interest and individual property rights.

On the basis of the requirements of Articles 3, 5, 8, 31, 43 and 83.5 of the Constitution, the legal procedure and framework for the expropriation of property for public and state needs should be set out clearly in legislation. The basic premise of such legislation must be that the right to property may only be restricted or terminated in cases prescribed in

Article 31 of the Constitution. The law shall determine the procedure of expropriation by specifying:

- a. the state agency which will decide whether expropriation should take place;
- b. the procedure for providing advance compensation of equivalent value (whether in kind or in monetary form) for the property which is to be seized;
- c. the procedure for appealing against the expropriation and the procedure under which it is carried out (for instance where there might be disagreement over the amount of compensation);
- d. the obligations and restrictions attached to the rights of the owner of the property to be seized;
- e. the procedure for legal execution following the expropriation and any new rights which may arise;
- f. instances where there may be different owners of the property for defined legal objectives.

According to the Constitutional Court, where property is seized with no consideration as to future ownership (whether the property should pass to the state, to the local community or to another natural or legal person), the legislation shall determine a guarantee for the use of this property for the needs of society on the basis of which the expropriation was carried out.

The legislation should also stipulate that the state or its appointed agent should enter into a contract with the owner as to the expropriation and the compensation to be paid. Bilateral obligations will be clearly set out, as well as a stipulation that compensation from such contracts is not to be regarded as taxable income.

The Constitutional Court went on to state that the legislative and government authorities have not created the legal norms within the Armenian legal system to implement the requirements of Article 31.3 of the Constitution. Where there is expropriation of property for reasons of the needs of the state, the requirements of Article 31 of the Constitution should form the basis of any legal act. Constitutional human rights should be considered as the superior value and as a directly applicable right.

The Court carried out a constitutional analysis of Article 218 of the Civil Code, Articles 104, 106, 108 of the Land Code, the Decision of the Government of the RA 1151-N as well as its own law-enforcement practice. It ruled that the legal norms mentioned above do not result in guaranteed constitutional protection of property rights. They do not secure a fair balance between individual interests and property rights and public interests as defined according to the rule of law. Neither can the protection of property rights be guaranteed, based on the reasoning of “exceptional overriding public interests”.

The Constitutional Court held that Article 218 of the Civil Code, Articles 104, 106 and 108 of the Land Code, and the Decision of the Government of 1 August 2002, 1151-N were not compatible with the requirements of Articles 3, 8.1, 31.3, 43, 83.5.1, 83.5.2 and 85.2 of the Constitution. The Constitutional Court also ruled that these legal norms would become invalid directly the new legislation governing expropriation of property for the needs of society as a whole came into force, but no later than 1 October 2006.

Languages:

Armenian.



Azerbaijan Constitutional Court

Important decisions

Identification: AZE-2006-1-001

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 31.01.2006 / **e)** M-224 / **f)** / **g)** Azerbaijan, Respublika, Khalg gazet, Bakinski rabochiy (Official Newspapers); *Azerbaycan Respublikasi Konstitusiyaya Mehkemesinin Melumati* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

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

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

Keywords of the alphabetical index:

Law, incorrect application, human rights, violation / Procedure, requirement, disregard, human rights, violation.

Headnotes:

Article 60.1 of the Constitution guarantees legal protection of the rights and liberties of all citizens. It also provides an effective and universal right to legal recourse in the case of disputes.

Courts must be impartial and fair, they should provide equality between parties, take their decisions on the basis of fact and settle legal disputes in the framework of established procedural roles and according to the law.

Where there is incorrect application of law and blatant disregard for procedural requirements, there is a danger that ill-founded and unlawful decisions may be

taken. Such actions may also lead to the breach of the right to a defence and a fair trial.

Summary:

It was argued that Article 48 of the Housing Code, Articles 58 and 420 of the Civil Procedural Code (hereinafter referred to as "CPC") as well as provisions of the decree of the Cabinet of Ministers of 14 September 1999 relating to the passing of social/cultural and communal/welfare entities from unions, former ministries and state corporations to other local administration authorities had not been correctly followed by the Courts. The Constitutional Court was asked to overturn decisions by the Court of Appeal and the Supreme Court because they did not comply with the Constitution or other legislation.

The applicant, N. Mammadova, had lived with her family for seven years in a room in Flat 52, House 141 (hostel N1) located at "AB" living space, in the Yeni Gunashli settlement of Baku on the basis of having worked at the factory for twenty six years. She had been on the waiting list for an apartment for twenty three years. In her claim, the applicant requested the cancellation of the mutual protocol N2 between N. Mammadova and Baku Tikish Evi DESC and its Trade Union Committee, authorisation N 44 given to G. Rahmanova of 10 October 2002, and the registration of herself and her family in the accommodation.

The Nasimi District Court granted her request on 7 July 2003.

Appeals by Baku Tikish Evi DESC and G. Rahmanova were upheld by the decision of the Judicial Board on Civil Cases of the Court of Appeal (hereinafter the JBCC of the Court of Appeal) of 8 September 2003. The decision of Nasimi District Court of 7 July 2003 was overturned, the claim was rejected and the counterclaim was also granted. By way of satisfying the counterclaim, the Court ruled that the applicant and her family should be evicted from the accommodation in question.

The decision of the JBCC of the Court of Appeal of 8 September 2003 was overturned by the decision of the Judicial Board on Civil Cases of the Supreme Court (hereinafter referred as the JBCC of the Supreme Court) of 7 January 2004 and the case was referred to the court of appellate instance for review on the basis of the appeal by the applicant.

The decision of Nasimi District Court of 7 July 2003 was again overruled, the claim was rejected and the counter claim was upheld by the decision of the JBCC of the Court of Appeal of 5 April 2004.

The decision of the JBCC of the Court of Appeal of 5 April 2004 was left unchanged in accordance with the decision of the JBCC of Supreme Court of 2 September 2004.

It was noted during the appellate proceedings that the hostel (where the room in dispute was located) was transferred to the local authority not to Baku Tikish Evi prior to the decision of the Court of Appeal. The applicant's eviction from the room on the basis of the counter claim of Baku Tikish Evi could not therefore be carried out, since Baku Tikish Evi had no property rights over the room.

In conformity with Article 418.3 of CPC, the JBCC of the Supreme Court overruled the decision of the court of appellate instance because Housing Office N 135 (hereinafter HO N135) of the Special Purpose Housing Union was not joined as a party to the proceedings and its position had not been judicially considered.

The suggestion was made that steps should be taken to join HO N 135 to the proceedings and its claim against the applicant regarding her eviction from the room should be examined in accordance with Article 58.1 and 58.2 of CPC. The problem of the disputed room should be resolved on the basis of legislation.

However, the JBCC of the Court of Appeal cancelled the first instance court decision during a fresh examination of the case and granted the counter claim of Baku Tikish Evi without regard to the directions of the court of cassation instance. The JBCC of the Supreme Court left the decision of the JBCC of the Court of Appeal unchanged without dealing with the directions.

Baku Tikish Evi, which was set up during privatisation of state enterprises, may acquire the same rights of ownership as any other legal entity in the order foreseen by legislation.

Azerbaijan legislation does not preclude the possibility of the transfer of social/cultural and communal/welfare organisations (including hostels, welfare centres, nursery schools, sports buildings, tailors' shops and boiler-houses) of privatised state institutions and unions, former state companies and concerns to local administration bodies. However, only the authorised state body can take the decision to transfer.

There are no references to documents confirming the rights of Baku Tikish Evi to ownership, possession, use and disposal of the house located at 141/AB, Yeni Gunashli settlement of Baku, in decisions adopted by the common courts.

It is evident from the decree of the Cabinet of Ministers that the house (hostel N1) was transferred to DESC N135.

It is impossible to come to any conclusions about the legality of the authority given to G. Rahmanova on the basis of mutual decisions by the head of Baku Tikish Evi and the Trade Union Committee and the legality of the applicant remaining in the room without the rights to ownership, possession, use and disposal of Baku Tikish Evi over the house (hostel N1) having been determined by the common courts. It is also impossible to advance a definitive opinion as to whether the lawful rights of any of the parties have been breached.

Civil procedural legislation provides that the court of cassation instance shall verify the precise application of material and procedural legal norms by the court of appellate instance (under Article 416 of CPC). If there have been any breaches or incorrect application of the law, it will refer the case to the court of appellate instance for review (see also Articles 418.1, 418.3 and 417.0.3 of CPC).

By its decision of 2 September 2004, the JBCC of the Supreme Court left in place the decision of the Court of Appeal of 5 April 2004 with the type of procedural violations named above, without fully considering the position of all sides and without taking into consideration directives from the court of cassation instance. This is in contravention of Articles 418.1, 418.3 and 417.0.3 of CPC.

As a result, the applicant's right to judicial protection as set out in Article 60.1 of the Constitution was breached.

The Constitutional Court therefore pronounced null and void the decision of the JBCC of the Supreme Court regarding the cancellation of mutual protocol N2 of the applicant with Baku Tikish Evi and its Trade Union Committee, the authorisation N 44 given to G. Rahmanova and the claim about the passport registration of G. Rahmanova and her family members. Article 60.1 of the Constitution and Articles 416, 417.0.3, 418.1, 41.3 of CPC had not been respected.

Languages:

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



Identification: AZE-2006-1-002

a) Azerbaijan / **b)** Constitutional Court / **c)** / **d)** 22.03.2006 / **e)** R-82 / **f)** / **g)** Azerbaijan, Respublika, *Khalq gazeti, Bakinski rabochiy* (Official Newspapers); *Azerbaycan Respublikasi Konstitusiyası Mehkemesinin Melumatı* (Official Digest) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Cassation, re-trial, evidence.

Headnotes:

The right to judicial protection must be in accordance with principles of justice and the restitution of rights must be available from courts of all instances.

Summary:

I. Imran Rajabov brought legal proceedings to evict the respondent Z. Farhadov and others from his apartment. Z. Farhadov responded with a counter-claim as to the validity of the agreement on purchase and sale of the apartment in question, and property rights over the apartment.

In proceedings against R. Jafarova, Z. Farhadov and Z. Aleskerova, Imran Rajabov sought to evict them from the apartment, on the basis that it had been his private property and that the status of R. Jafarova and members of her family as tenants had come about by approbation of the previous owner. They had refused to leave, despite his repeated requests.

In a decision of 5 April 2004, the Nasimi District Court of Baku City upheld I. Rajabov's suit and rejected Z. Farhadov's counter-claim.

On 24 June 2004 the Judicial Board on Civil Cases (referred to here as "JBCC") of the Court of Appeal left the decision of Nasimi district court in place, with no changes.

On 6 October 2004, the JBCC of the Supreme Court overturned the above decision by the Court of Appeal and referred it back to the Court of Appeal for re-examination.

By decision of the JBCC of the Court of Appeal of 28 December 2004, the decision of Nasimi District Court of 5 April 2004 was reversed, Rajabov's suit was rejected and Z. Farhadov's counter-claim was upheld.

On 3 June 2005, the JBCC of the Supreme Court left this decision in place, with no changes.

However, the additional cassation complaint by the applicant was not satisfied and on 28 June 2005, the Chairman of the Supreme Court informed I. Rajabov by letter no. 8m-443/05 that there were no grounds to refer the case to the Plenum of the Supreme Court.

Rajabov submitted a complaint to the Constitutional Court, pointing out that, as the owner of the apartment in question, he had not given anybody else the power to sell it. Moreover, in its decision, the Court of Cassation instance had breached his rights, as set out in Articles 13, 29, 60, 71.2, 127.2 and 127.4 of the Constitution. It had acted illegally in leaving unchanged the Appeal Court's decision. This was in contravention of Articles 14, 152.1, 152.4, 324.1, 329.2, 332.1, 359.1 and 362.2 of the Civil Code (CC).

The Plenum of the Constitutional Court observed that, in his lawsuit to evict R. Jafarova, Z. Farhadov and Z. Aleskerova, I. Rajabov had emphasised that the apartment was his private property and that R. Jafarova and members of her family lived in it as tenants by approbation of the previous owner. They refused to move out, despite his repeated requests.

In his counter-claim, Z. Farhadov sought legal recognition of the agreement on purchase and sale of the apartment between him and I. Rajabov. He pointed out that it had been purchased from I. Rajabov's parents in 2001 for 6 000 US dollars. Thereafter, I. Rajabov had refused to recognise the legal validity of the agreement, even though Z. Farhadov had carried out extensive repairs to the apartment and had lived there with members of his family since 2001.

Both the Court of first instance and the Court of Appeal, which had left its decision unchanged, had arrived at their decisions on the basis that the respondent Z. Farhadov and others lived illegally in the apartment and I. Rajabov was entitled to demand his property back by virtue of Article 157.2 of the Civil Code (CC). Moreover, the respondents had not

provided the Court with any concrete proof that the purchase and sale agreement was valid.

When the JBCC of the Supreme Court examined the case on the basis of Z. Farhadov's complaint, they concluded that in Z. Farhadov's counter-claim, the rights and duties of the parties were not defined in accordance with the rules prescribed by Article 336.2 of the CC and the demands and objections of the parties were not properly based upon precedent. In this connection, the Court of Appeal's decision of 24 July 2004 was overturned by the Court of Cassation's decision of 6 December 2004. The case was referred to the same court for appellate review. The Court of Appeal then overturned the Nasimi Court's original decision.

The Court of Appeal noted evidence given by Z. Farhadov and witnesses I. Hajiyev, L. Sarvanova, G. Alekperov, together with an act dated 1 May 2004 which was enclosed with the other court paperwork. It concluded that when the plaintiff received 6 000 US dollars for the apartment in 2001, he handed the property over to the respondent but then declined to legalise the act notarially. The Judicial Board, taking into account Article 336.2 of the CC, recognised the 2001 agreement as valid.

The JBCC of the Supreme Court concurred with the observations put forward by the Court of Appeal by its decision of 3 June 2005, and left this decision unchanged.

II. The Plenum of the Constitutional Court held that the decision by the Cassation Court of 6 October 2004 and subsequent court decisions were in contravention not only of the Constitution but also of the material and procedural norms of the legislation.

It was noted that the Court of Cassation had infringed the requirements of Article 416 of the Civil Procedure Code (CPC) and thereby exceeded the limits of its power. When it re-examined the case, the Court of Appeal based its decision only upon the proof put before the Court of Cassation.

All the adopted decisions by the courts determined that the apartment had been the private property of I. Rajabov since 2001.

Article 13.1 of the Constitution states that "Property in Azerbaijan Republic is inviolable and protected by the state." Article 29.1 of the Constitution states that "Everyone has the right to own property." Paragraph 4 of the same article states that "No one shall be deprived of his or her property except by court decision."

Article 152.1 of the CC defines ownership rights as the “acknowledged right, protected by the state, of a subject to possess, use and dispose of property belonging to such subject at their discretion.”

Article 60.1 of the Constitution guarantees the “legal protection of the rights and liberties of every citizen.” Under this provision, no restrictions may be placed upon the right to legal protection.

There is a consistent line of authority from the Constitutional Court to the effect that the right to judicial protection must be in accordance with principles of justice and that the restitution of rights must be available from courts of all instances.

The Plenum of the Constitutional Court accordingly overturned the decision of the JBCC of the Supreme Court of 3 June 2005, arising from the complaint of I. Rajabov against Z. Farhadov and others, as it did not conform to Article 60 of the Constitution and Articles 416 and 418.1 of the Civil Procedure Code. The case would now have to be reviewed on the basis of the current decision and by means of the procedure set out in the civil procedure legislation of Azerbaijan.

Languages:

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



Belgium

Court of Arbitration

Important decisions

Identification: BEL-2006-1-001

a) Belgium / b) Court of Arbitration / c) / d) 18.01.2006 / e) 11/2006 / f) / g) *Moniteur belge* (Official Gazette), 03.02.2006 / h) CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.3.5.3 **Constitutional Justice** – Jurisdiction – The subject of review – Constitution.

1.4.2 **Constitutional Justice** – Procedure – Summary procedure.

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

Keywords of the alphabetical index:

Constitutional Court, jurisdiction, limit / Municipality, municipal council, composition, gender, balance.

Headnotes:

The Constitution guarantees to women and men the equal exercise of their rights and freedoms, and promotes in particular their equal access to elective and public office (Article 11bis of the Constitution).

No legislative provision empowers the Court of Arbitration to rule on an application for annulment which would lead to judgment being passed on an obligation imposed by the drafters of the Constitution.

Summary:

I. A private individual lodged an application for annulment and suspension with the Court of Arbitration against a provision contained in a decree of the Flemish Region relating to local authorities. This decree provides (paragraph 1) that the board of burgomaster and aldermen (the executive body at local level) consists of persons of different sex and (paragraph 2) that if the composition of the board is found not to comply with paragraph 1, the last ranking alderman to have been elected shall be replaced as of right by the municipal councillor of the other sex

elected on the same list who received the most personal votes.

II. In this case, the reporting judges initiated a filtering procedure (preliminary proceedings) which allows the Court, sitting as a smaller bench, to issue a decision of lack of jurisdiction. The applicant filed a statement of reasons.

The Court refused jurisdiction because the impugned provision gives effect, in respect of the Flemish Region, to Article 11bis of the Constitution, which guarantees to women and men the equal exercise of their rights and freedoms and promotes in particular their equal access to elective and public office. The article requires legislators to ensure the presence of persons of different sex within the permanent deputations of the provincial councils, the boards of burgomaster and aldermen, the social welfare boards, the permanent offices of the public social welfare centres and the executives of all other interprovincial, intermunicipal or intramunicipal territorial bodies.

In the Court's view, it is clear from the statement of reasons and the direct link between the impugned provision and Article 11bis of the Constitution that the complaint is in fact directed against this provision of the Constitution. However, neither Article 1 of the Special Law of 6 January 1989 nor any other legislative provision empowers the Court to rule on an application which would lead to judgment being passed on an obligation imposed by the drafters of the Constitution.

Languages:

French, Dutch, German.



Identification: BEL-2006-1-002

a) Belgium / **b)** Court of Arbitration / **c)** / **d)** 22.03.2006 / **e)** 46/2006 / **f)** / **g)** *Moniteur belge* (Official Gazette), 06.06.2006 / **h)** CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

2.1.3.2.2 **Sources of Constitutional Law** – Categories – Case-law – International case-law – Court of Justice of the European Communities.

2.2.1.6 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law.

3.16 **General Principles** – Proportionality.

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.

5.3.9 **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, free movement / Foreigner, residence, unlawful / European Union, citizen, status / Foreigner, family reunification / European Union, nationals of other member states, rights / Foreigner, marriage, to other foreigner lawfully residing in the territory.

Headnotes:

The European Union member states form a community which has a specific legal order and which has established a citizenship of its own characterised by a number of rights and obligations. A difference of treatment founded on membership of this community, whereby nationals of a member state of the community are given advantages on the basis of reciprocity, is based on an objective criterion.

In requiring a non-EU foreigner whose visa has expired and who has married a non-EU national holding a residence permit in Belgium to return to his or her country of origin to request the required authorisation, the provisions in question do not interfere disproportionately with that foreigner's right to respect for family life and do not constitute interference that cannot be justified on the general interest grounds set out in Article 8.2 ECHR.

As regards the application of the provisions in question, it is not for the Court, but, where appropriate, for the competent judge, if necessary sitting in chambers, to assess whether or not a negative decision is contrary to the legal provisions or whether the unreasonably long absence of an authorisation decision would constitute unjustified interference with family life.

Summary:

I. The Court of Appeal of Liège questioned the Court of Arbitration on the compatibility with the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution) of several provisions of the Law of

15 December 1980 on the admission, residence, settlement and removal of foreigners, in that they require non-EU foreigners who have entered Belgium without the required documents or who have remained in Belgium after the expiry date of those documents but have married a non-EU national authorised to reside in Belgium, to produce the required documents, failing which they will be removed from the country and be obliged to return to their country of origin without having obtained them, even if they fulfil the conditions required by law to be allowed to reside lawfully in Belgium for over three months. In the instant case, the Court of Appeal asked the Court of Arbitration to compare the foreigner's situation with what it would be if he married a Belgian or EU national, since, in accordance with the Judgment of 25 July 2002 by the Court of Justice of the European Communities, *MRAX v. Belgian State*, he could not be expelled for the same reasons.

II. The Court of Arbitration pointed out first of all that it emerged from the case file and from the grounds for the referral decision that the case pending before the Court of Appeal concerned a non-EU foreigner who had entered Belgium with a valid passport stamped with a visa, but who had remained in Belgium after that document's expiry date and who, after that date, had married a non-EU national authorised to reside in Belgium. The Court confined its review to this category of foreigners.

Secondly, the Court noted that the legislative provisions at issue did not expressly create a difference of treatment between the two categories of foreigners, but that this difference of treatment was the result of the previously mentioned judgment of the Court of Justice of the European Communities.

In accordance with European Directives 64/221/EEC, 68/360/EEC and 73/148/EEC, as interpreted by the Court of Justice of the European Communities in the previously mentioned judgment of 25 July 2002, the legislative provisions at issue created a difference of treatment between non-EU foreigners who marry a non-EU national authorised to reside in Belgium and non-EU foreigners who marry a Belgian or EU national. Only the first category of non-EU foreigners is obliged to request the required documents from the diplomatic or consular representative of his or her country of origin, before entering the country.

The Court considered first of all that this difference of treatment was based on an objective criterion, the nationality of the spouse who was joined. In the first case, it was a non-EU national, in the second a Belgian or EU national. The Court added that the European Union member states formed a community

which had a specific legal order and had established a citizenship of its own characterised by a number of rights and obligations. A difference of treatment founded on membership of that community, whereby the nationals of a member state of the community were given advantages on the basis of reciprocity, was based on an objective criterion.

The Court then pointed out that the difference of treatment was in line with the legislator's aim, which was to curb immigration while taking due account of the situation of foreigners who had ties with Belgians or EU nationals. It was not inconsistent with this aim to make the family reunification of two spouses subject to stricter conditions than the family reunification of two spouses, one of whom was a Belgian or EU national.

Lastly, the Court considered whether the legislation interfered disproportionately with the right to family life. It noted in this connection that, by requiring foreigners whose residence had become unlawful through their own fault to return to their country of origin to request the authorisation required to be admitted to Belgian territory, the legislator had wanted to ensure that they were not able to derive any advantage from their infringement of this rule and that illegality was not rewarded. It added that these provisions were not, moreover, contrary to Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Article 5.3 of which provided that, except in appropriate circumstances where a member state wished to derogate from it, applications for entry and residence within the framework of the right to family reunification were to be submitted and examined "outside the territory of the member state in which the sponsor resides". Lastly, it noted that the legislative provisions did not preclude enjoyment of the right to family reunification, but simply laid down the conditions which had to be met before being able to exercise that right.

The Court found no disproportionate interference with the right to family life (Article 22 of the Constitution, Article 8 ECHR) since the interference was provided for by law and could only lead to possible temporary removal, which did not involve any breaking of the ties between the individuals concerned, in order to obtain the required authorisations. The Court added that, with regard to application of the provisions in question, it was for the competent judge, if necessary sitting in chambers, to assess whether or not a negative decision was contrary to the legal provisions or whether the unreasonably long absence of an authorisation decision would constitute unjustified interference with family life.

The Court therefore found no violation of Articles 10 and 11 of the Constitution.

Languages:

French, Dutch, German.



Identification: BEL-2006-1-003

a) Belgium / b) Court of Arbitration / c) / d) 22.03.2006 / e) 47/2006 / f) / g) *Moniteur belge* (Official Gazette), 31.05.2006 / h) CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

1.3.5.3 **Constitutional Justice** – Jurisdiction – The subject of review – Constitution.

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

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

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

Keywords of the alphabetical index:

Constitutional Court, jurisdiction, limit / Media, press, freedom, scope of protection / Responsibility, for others.

Headnotes:

Article 25 of the Constitution provides that the press shall be free and that censorship may never be introduced. In providing that, where the author is known and resident in Belgium, neither the editor, nor the printer nor the distributor may be prosecuted, the second paragraph establishes the principle of “*responsabilité en cascade*” (liability chain), which is a key element in the constitutional protection of freedom of the press.

Since the legislator cannot be presumed to have intended to violate Article 25.2 of the Constitution, Article 18 of the Law of 3 July 1978 on contracts of employment, which limits workers' civil liability, has to be interpreted as not applying to journalists who

exercise their profession under a contract of employment.

The Court does not have jurisdiction to rule on a difference of treatment resulting from a choice by the drafters of the Constitution.

Summary:

I. A private individual brought proceedings before the Brussels Court of First Instance, then before the Brussels Court of Appeal, against two journalists who he alleged had made serious accusations against him in newspaper articles. The Court of Appeal noted that these journalists had behaved in a wrongful manner, but were bound by a contract of employment. Article 18 of the Law of 3 July 1978 on contracts of employment, under which employers were liable for damage caused by their employees, except in the case of serious offences or minor offences which were habitual rather than accidental, might result in these journalists being exempt from all liability if they had committed an occasional minor offence.

The Court of Appeal therefore questioned the Court of Arbitration on the conformity of this provision with Article 25 of the Constitution, if it applied to journalists under a contract of employment, and on the compatibility of this provision with Articles 10 and 11 of the Constitution, if it did not apply to journalists under a contract of employment but did apply to other categories of workers bound by a contract of employment.

II. Article 25 of the Constitution established the principle of “liability chain”: when the author of a press article was known and resident in Belgium, neither the publisher, nor the printer, nor the distributor could be prosecuted. The Court of Arbitration noted that, with this provision, the drafters of the 1831 Constitution had sought to break with the previous system, under which collective actions had been allowed, and to introduce a system of successive, separate liability in order to prevent the author from being subjected to the pressure which the publisher, printer or distributor would be likely to exert on him if they were liable to prosecution when the author himself was known and resident in Belgium. This is therefore a key element in the constitutional protection of freedom of the press.

The Court further noted that this provision, as the Court of Cassation had stated, gave publishers, printers and distributors the privilege of being able to evade all liability, both criminal and civil, where the author was known and resident in Belgium, and therefore placed a restriction on the applicability of Article 1382 of the Civil Code relating to civil liability.

The Court further noted that, in the view of the Court of Appeal, Article 18 of the previously mentioned law of 3 July 1978 might apply to journalists who were bound by a contract of employment. A journalist who had committed an occasional minor offence would in that case not be accountable for damage caused to the employer or to third parties in the performance of his contract.

The Court held that, according to this interpretation, the provision would violate Article 25.2 of the Constitution because it would go against the system of "liability chain". As a result of the exemption enjoyed by the employed journalist, the employer would bear sole liability for the journalist's writings. Such a consequence would be contrary to the letter and spirit of Article 25.2 of the Constitution because the journalist would run the risk of having his writings censored by the employer because the latter would bear sole responsibility for them.

Lastly, the Court added that the situation of journalists was no doubt different from what it had been when Article 25.2 of the Constitution had been adopted because a majority of journalists were currently bound by a contract of employment. But the Court did not have jurisdiction to call into question a choice made by the drafters of the Constitution.

On the basis of the presumption of constitutionality of the law, it held that the provision at issue should be interpreted as not applying to journalists who exercise their profession under a contract of employment and that, consequently, it violated neither Article 25.2 nor Articles 10 and 11 of the Constitution.

With regard to the second preliminary question, on the difference of treatment between workers bound by a contract of employment and journalists under a contract of employment, the Court replied that the difference of treatment did not stem from the provision at issue, but from Article 25.2 of the Constitution, which precluded the application of this legislative provision to journalists. The Court did not therefore have jurisdiction to give a ruling on this difference of treatment because it was the result of a choice by the drafters of the Constitution.

Languages:

French, Dutch, German.



Identification: BEL-2006-1-004

a) Belgium / b) Court of Arbitration / c) / d) 19.04.2006 / e) 52/2006 / f) / g) *Moniteur belge* (Official Gazette), 08.05.2006 / h) CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

1.6.7 **Constitutional Justice** – Effects – Influence on State organs.

1.6.9.1 **Constitutional Justice** – Effects – Consequences for other cases – Ongoing cases.

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

5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Preliminary question, judge *a quo* and judge *ad quem*, division of jurisdiction / Constitutional Court, interpretation, binding effect.

Headnotes:

When the Constitutional Court, in answering a preliminary question (effect *inter partes*, *ex nunc*) has found a statutory provision unconstitutional, the organic law on the Court of Arbitration provides that an action can be brought by persons who have an interest, and by certain authorities, for the annulment of the provision in question (with *erga omnes* effect, *ex tunc*).

When the Constitutional Court, in answering a preliminary question, has found a statutory provision as construed by the judge *a quo* to be unconstitutional, but when there is another interpretation in keeping with the Constitution, this interpretation is binding on all courts. Having regard to this interpretation of the provision, the application to have it annulled is dismissed.

Summary:

I. The public limited company "*Compagnies des ciments belges*" had brought an action for the annulment of Article 418 of the Income Tax Code. Before being amended by the Law of 15 March 1999, its terms had been: "Where taxes are refunded, default interest shall be awarded at the rate of 0.8% per calendar month". In the opinion of the tax authorities, corroborated by the prevailing case-law, this provision applied solely to basic taxes and not to tax increases. Such increases are payable in the

event of failure to declare income or of incomplete or inexact declaration. They are recovered according to the same rules as the tax, but tax increases wrongfully levied are refunded without default interest.

In earlier litigation between the applicant and the tax authorities, the Court of Arbitration in its Judgment no. 85/2004 of 12 May 2004, ruling on a preliminary question (see www.arbitrage.be), held that the difference between refund of tax (with default interest) and refund of tax increases (without interest) was inimical to the constitutional principle of equality and non-discrimination (Articles 10 and 11 of the Constitution). In this judgment the Court ruled that the challenged provision could be given an interpretation in keeping with the Constitution. The law was moreover amended to that effect in the meantime, non-retroactively.

The applicant brought an action to have the earlier provision annulled in accordance with Article 4.4 of the Special Law of 6 January 1989 on the Court of Arbitration, enabling the interested persons as well as certain authorities to bring an action for annulment of a statutory provision where the Court, ruling on a preliminary question, has declared the provision to be in breach of the Constitution (with *inter partes* effect, *ex nunc*). If annulled, this provision can then be removed from the legal system (with *erga omnes* effect, *ex tunc*).

In a second objection to the admissibility of this proceeding (leaving aside the first), the Council of Ministers (as guardian of the law) contended that the possibility of restarting the period prescribed by the aforementioned Article 4.4 for bringing an action was inapplicable because according to preliminary ruling no. 85/2004 the Constitution had been breached not by a statutory provision but by an interpretation thereof.

In the Court's opinion, the requirements of Article 4 were met since in its Judgment no. 85/2004 it had held that the norms whose observance it supervised were infringed by the statutory provision in question, albeit according to an interpretation put to it by the judge *a quo*.

II. The Court observed in this connection that it was an inherent feature of the preliminary proceedings in which the Court was to answer a question put by a lower court that the form taken by the operative clauses of the ruling given in reply should be governed by the form of the question put. Thus, when a judge questions the Court about the constitutionality of a provision with a given construction placed upon it, the Court generally answers the question by

examining the provision thus construed. After finding this interpretation of the provision contrary to the Constitution, the Court may in some cases hold that a different interpretation of the same provision would dispel the unconstitutionality which it has found.

As to the merits, after recalling the content of its Judgment no. 85/2004, the Court stated that the following inferences could be made from the terms of its operative clauses. Article 418 of the Income Tax Code before it was amended by Article 43 of the law of 15 March 1999 on tax litigation, construed as permitting default interest to be awarded on refunds of tax increases, did not infringe Articles 10 and 11 of the Constitution. The provision could thus be applied thereafter, provided that it was interpreted in such a way as to render it consistent with the Constitution.

The Court observed that the Law of 15 March 1999 had brought the impugned Article 418 into line with Articles 10 and 11 of the Constitution.

The Court concluded that the action for annulment must be dismissed in the light of these considerations, since the former Article 418 had to be construed as permitting default interest on refunds of tax increases.

The Court added that the above interpretation was a question of law determined by the Court, binding on the courts under Article 9.2 of the Special Law of 6 January 1989. Consequently, the courts were required to apply this provision according to the interpretation deemed compatible with Articles 10 and 11 of the Constitution.

Supplementary information:

- See [BEL-1996-C-001] and the supplementary information on this abridged decision.
- See CODICES for the fulltext of the Special Law of 6 January 1989 on the Court of Arbitration.

Languages:

French, Dutch, German.



Identification: BEL-2006-1-005

a) Belgium / b) Court of Arbitration / c) / d) 19.04.2006 / e) 57/2006 / f) / g) *Moniteur belge* (Official Gazette) / h) CODICES (French, Dutch, German).

Keywords of the systematic thesaurus:

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

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

4.7.15 **Institutions** – Judicial bodies – Legal assistance and representation of parties.

5.2 **Fundamental Rights** – Equality.

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:

Lawyer, fee / Liability, civil / Damage, reparation / Legislator, omission / Court, expenses, equality of arms.

Headnotes:

In Belgium, any party to proceedings must defray its own counsel's fees and expenses. In the opinion of the Court of Arbitration, it may be appropriate to amend this rule to the advantage of parties who have suffered a contractual or non-contractual tort (new Court of Cassation precedent), but the issue exceeds the scope of civil liability and bears on the actual principle of the rights of the defence and equality of arms. The party who must defend the suit may also need a lawyer. A respondent (at civil law) or defendant (in criminal proceedings where damages are claimed) who win the liability suit against them undergo discrimination in that counsel's fees and expenses needing to be paid for their defence cannot be charged to the claimant (at civil law) or complainant (in criminal proceedings) who loses the case. However, this difference in treatment does not stem from the provisions of the Civil Code mentioned in the preliminary questions, but is due to the lack of provisions enabling the court to charge the lawyer's fees and expenses to the unsuccessful party. It rests with the legislator to determine how and to what extent the recoverability of lawyer's fees and expenses is to be regulated, it being understood that the legislator may be guided by the regulation of the recoverability of lawyer's expenses particularly in the Netherlands, France and Germany, and by Council of Europe Committee of Ministers' Recommendation no. R(81)7 on measures facilitating access to justice.

Summary:

I. In Belgian law, all parties to proceedings must normally defray the fees and expenses of their counsel themselves. In a judgment of 2 September 2004, the Court of Cassation, the highest court in the ordinary judicial system, accepted that Article 1151 of the Civil Code, providing that damages for breach of contract "shall comprise only what is a necessary outcome of the fulfilment of the agreement", which implied that fees and expenses for legal or technical counsel incurred by the victim of a contractual tort could constitute an element of the damage sustained, giving cause for compensation insofar as they possessed this character of necessity.

Having regard to this change in the practice of the Court of Cassation, a number of courts put preliminary questions to the Court of Arbitration to ascertain whether or not the constitutional principles of equality and non-discrimination (Articles 10 and 11 of the Constitution) were infringed. Specifically, the question arose whether, assuming that Articles 1149, 1382 and 1383 of the Civil Code were to be construed as including lawyer's fees and expenses in the damage subject to compensation, discrimination might be disclosed between claimants and defendants in proceedings on contractual or non-contractual liability or between defendants in such cases, depending whether or not they lost.

The Court replied firstly that the difference in treatment between the claimant or complainant, who could include lawyers fees and expenses in the damage sustained, and the respondent or defendant, who lacked this possibility, followed from the rules of civil liability embodied in Articles 1149, 1382 and 1383 of the Civil Code and was therefore founded on a relevant criterion: if the civil liability suit was declared valid, it was judicially established that the respondent or defendant had committed a tort, whereas the decision dismissing the claimant's or complainant's case did not contain the proof of a tort allegedly committed by them.

II. The Court nevertheless found that the issues raised by the preliminary questions exceeded the scope of civil liability. The right to apply to a court equally concerned freedom to bring action and to defend oneself before the courts.

In this matter the Court invoked the right to a fair hearing secured by Article 6 ECHR and the case-law of the European Court of Human Rights concerning the right of access to a court and the principle of equality of arms.

The Court observed that both a party incurring damage and a party contesting responsibility for such damage may need a lawyer and that the possible cost of an action may influence not only the decision to bring it but also the decision to defend it. As Belgian law now stands, the parties to proceedings can only receive compensation for lawyer's fees and expenses by submitting to the above-mentioned differences of treatment between claimants and respondents, and between respondents. Although these differences are justified under the rules of civil liability, they do not meet the requirements of a fair hearing and equality of arms since the parties bear the risk of an action to an unequal degree.

However, the Court did not consider that the discrimination lay in the above-mentioned provisions of the Civil Code; it was due to the lack of provisions enabling a court to charge the lawyer's fees and expenses to the losing party.

The Court held that in order to remove this discrimination, the legislator should determine how and to what extent the recoverability of lawyer's fees and expenses should be regulated.

The Court observed in this respect that their recoverability was the subject of statutory provisions particularly in the Netherlands, France and Germany and that according to Council of Europe Committee of Ministers' Recommendation no. R(81)7 on measures facilitating access to justice, "except in special circumstances a winning party should in principle obtain from the losing party recovery of his costs including lawyers' fees, reasonably incurred in the proceedings".

The Court concluded that the parties to proceedings were treated differently without reasonable justification but that this discrimination did not stem from Articles 1149, 1382 or 1383 of the Civil Code, so that the preliminary questions were to be answered in the negative.

Languages:

French, Dutch, German.



Bosnia and Herzegovina Constitutional Court

Important decisions

Identification: BIH-2006-1-001

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 02.12.2005 / **e)** U 14/05 / **f)** / **g)** *Službeni glasnik Bosne i Hercegovine* (Official Gazette), 2/06 / **h)** *Bulletin of the CCBH* 2005/II; CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Saving, foreign currency, protection, obligation / Obligation to act / State succession, property.

Headnotes:

Foreign currency savings constitute property within the meaning of Article 1 Protocol 1 ECHR.

Bosnia and Herzegovina is under a duty to protect the property rights of holders of foreign currency savings accounts. These rights are enshrined in the Constitution. Parliament must put in place a legislative framework to resolve this issue in accordance with the standards set out in Article 1 Protocol 1 ECHR.

Summary:

I. The Chairman of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina (referred to here as "the applicant") asked the Constitutional Court to assess the constitutional compliance of the Law on Establishment and Mode of Settlement of Internal

Obligations of the Federation of Bosnia and Herzegovina, the Law on Establishment and Mode of Settlement of Internal Obligations of the Republika Srpska and the Law on Settlement of Obligations on the Basis of Old Foreign Currency Savings of the Brcko District of Bosnia and Herzegovina. The applicant argued that the Brcko District and the Entities had acted *ultra vires* in enacting these laws and therefore Article 3 of the Constitution was breached. The applicant also suggested that old foreign currency savings are not an internal debt of the Entities but that there is an obligation on Bosnia and Herzegovina to resolve this issue in a consistent manner across its territory.

II. The Constitutional Court drew attention, firstly, to sub-paragraph 4 of the Preamble to the Constitution. Bosnia and Herzegovina is obliged to promote general welfare and economic growth by protecting private property and promoting a private economy. Bosnia and Herzegovina ought to have persevered with the resolution of the issue of old foreign currency savings. In the Court's view, resolving this issue would result in the resolution of a series of issues which are not only economic but also political by nature. For the problem to be solved effectively, the succession issues arising from the property of the former SFRY (i.e. the implementation of the Succession Agreement) must also be tackled. Under the Succession Agreement, which was ratified in 2001, Bosnia and Herzegovina is charged with undertaking all necessary actions to resolve the issue of old foreign currency savings.

Under Article II.1 of the Constitution, Bosnia and Herzegovina and both Entities must ensure the highest level of internationally recognised human rights and fundamental freedoms. Pursuant to Article II.2 of the Constitution, the rights and freedoms set forth in the European Convention on Human Rights and its Protocols shall have direct effect in Bosnia and Herzegovina.

According to Article II.3.k of the Constitution, all persons within the territory of Bosnia and Herzegovina shall enjoy the right to property. The Constitutional Court stated that it could not be disputed that claims by holders of old foreign currency savings accounts constitute their private property in the light of Article 1 Protocol 1 ECHR.

Under the General Framework Agreement, Bosnia and Herzegovina was meant to secure mechanisms for the protection of human rights at state level. However, with regard to property rights of holders of foreign currency savings accounts, Bosnia and Herzegovina has failed to undertake all necessary measures in order to make sure that these individuals

can exercise their right to property at the most fundamental level, as enshrined in the Constitution and the European Convention on Human Rights. Bosnia and Herzegovina has failed to create the necessary legislative and institutional framework for resolving this problem in a consistent manner throughout Bosnia and Herzegovina.

The Constitutional Court observed that Bosnia and Herzegovina, by enacting the Framework Law on the Privatisation of Enterprises and Banks, gave a "green light" to the commencement of the privatisation process in Bosnia and Herzegovina without putting in place a clear and consistent framework for resolving the problem of old foreign currency savings while privatisation took place. In other words, Bosnia and Herzegovina cannot be released from the obligation to ensure the protection of the property rights of holders of foreign currency savings accounts.

This particular petition only questioned the constitutional basis under which the legislative authorities of the Entities and Brcko District had enacted the challenged laws and not the substance of the laws. Nonetheless, the Constitutional Court mentioned at this point that it had already dealt with issues relating to the quality of the challenged laws. Specifically, in its earlier decisions, the Constitutional Court has established a violation of property rights under Article II.3.k of the Constitution and Article 1 Protocol 1 ECHR with respect to the way certain provisions of the challenged law had been applied to the issue "of pecuniary and non-pecuniary damage that occurred in the period of war activities". This, like old foreign currency savings, was included in the internal debt of the Republika Srpska or the Federation of Bosnia and Herzegovina.

The Constitutional Court held that Bosnia and Herzegovina, in view of Article III.5.a of the Constitution and in order to fulfil obligations under Annex 6 to the General Framework Agreement, is responsible for enacting the legislative framework to resolve the issues of old foreign currency savings in a consistent manner for all its citizens. Only when this condition has been satisfied will the Entities and Brcko District be able, within their respective competences, to regulate the issue in accordance with principles previously determined through unified legislation enacted at state level.

The Court held that the challenged laws did not comply with Article III of the Constitution.

Languages:

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



Identification: BIH-2006-1-002

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 31.03.2006 / **e)** U-4/04 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 47/06 / **h)** CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

- 4.2.1 **Institutions** – State Symbols – Flag.
- 4.2.3 **Institutions** – State Symbols – National anthem.
- 4.2.4 **Institutions** – State Symbols – National emblem.
- 5.1.1.1 **Fundamental Rights** – General questions – Entitlement to rights – Nationals.
- 5.2.2.3 **Fundamental Rights** – Equality – Criteria of distinction – National or ethnic origin.

Keywords of the alphabetical index:

Discrimination, national / Community, national or ethnic, right to use national symbols / Constitutionality, review / Equality, collective.

Headnotes:

Under the Constitution of Bosnia and Herzegovina national symbols of the Federation of Bosnia and Herzegovina and of Republika Srpska must represent all citizens of the Entities. In other words, all citizens of the Entities must identify with those symbols.

Summary:

I. The Chairman of the Presidency of Bosnia and Herzegovina (referred to here as “the applicant”) asked the Constitutional Court to review the constitutionality of Articles 1, 2 and 3 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska, and Articles 2 and 3 of the Law on the Use of Flag, Coat of Arms and Anthem.

The applicant suggested that the prescribed appearance of the flag, coat of arms and the text of the anthem of the Republika Srpska only represent the symbols and emblems of the Serb people. However, they cannot be official symbols and emblems of the Entity since the Entity of Republika Srpska is a community consisting not only of Serb people but also of Bosnian, Croatian and other

peoples and citizens, who are equal in all respects. The prescribed flag, coat of arms and anthem have resulted in direct discrimination against Bosnian, Croatian and other citizens of Bosnia and Herzegovina on national grounds. This has given rise to a feeling of fear and distrust against the authorities of the Republika Srpska, and non-Serbs are hesitant about returning to their original homes in the Republika Srpska. According to the applicant, the present case raises issues of discrimination with regard to the right to return, prohibition of discrimination on the grounds of national origin and provision of equal treatment with regard to the freedom of movement within state boundaries.

The applicant pointed out that Article 2 of the Law on the Use of the Flag, the Coat of Arms and the Anthem provides that the flag, coat of arms and anthem of the Republika Srpska shall represent the statehood of the Republika Srpska. These provisions imply the statehood of the Republika Srpska, which it does not have under the Constitution. The applicant also considered that Article 3 of the Law is incompatible with Articles II.3 and II.5 of the Constitution insofar as it provides that the flag, coat of arms and anthem of the Republika Srpska shall “be used with the moral norms of the Serb people”. The applicant argued that such a provision bestows preferential treatment upon Serb people and it associates the use of the symbols of the Republika Srpska with only one of the three constituent peoples in Bosnia and Herzegovina. This results in discrimination against the Bosnian, Croatian and other citizens of Bosnia and Herzegovina on national grounds without any objective and reasonable justification.

II. The Constitutional Court observed that the laws mentioned above were passed in a specific political context, prior to the Decision on the “constituent status of the peoples” adopted by the Constitutional Court, no. U-5/98 [BIH-2000-1-002], and before the amendments to the entity constitutions were passed on the basis of that Decision, which established mechanisms for all three constituent peoples in both Entities to participate equally in the legislative process as well as mechanisms for the protection of their vital national interests.

The Constitutional Court also emphasised that these laws of the Republika Srpska were passed during the hostilities in Bosnia and Herzegovina, at a time when the Republika Srpska was “the State of the Serb people and of all its citizens” according to Article 1 of the Constitution of the Republika Srpska which was then in force.

The Court examined the facts presented by the *amicus curiae* in observations during the public

hearing. She mentioned unwillingness on the part of many refugees and displaced persons to return to their homes of origin because of symbols which reminded them of the war and which they regarded as provocative and offensive. The Constitutional Court observed that the challenged symbols were undeniably used during the war in Bosnia and Herzegovina.

The Constitutional Court, in its decision in Case no. U-5/98 on the recognition of the rights of the constituent peoples across the whole territory of Bosnia and Herzegovina, established that the recognition of constituent peoples and the underlying constitutional principle of collective equality imposed a particular obligation on the Entities not to discriminate against those constituent peoples who were in a minority position in the respective Entity. Individual rights and the rights of groups both enjoy protection. The territorial delimitation of the Entities cannot bestow constitutional legitimacy on ethnic domination, national homogenisation or the right to uphold the effects of ethnic cleansing.

The challenged provision of Article 2 of the Law on Use of the Flag, Coat of Arms and Anthem of the Republika Srpska provides that these items "represent the statehood of the Republika Srpska". The Constitutional Court notes that according to the Constitution the Republika Srpska and the Federation of BiH are not "States" but "Entities". Article I.1 and I.3 of the Constitution guarantee the sovereignty and territorial integrity, political independence and role within the international community of the State of Bosnia and Herzegovina. The Constitutional Court therefore concluded that Article 2 of the Law on Use of the Flag, Coat of Arms and Anthem of the Republika Srpska, insofar as it provides that they represent the statehood of the Republika Srpska, is not in conformity with Article I.1 and I.3 of the Constitution.

The Constitutional Court also ruled that the provisions were discriminatory by nature and at odds with the constitutional principle of equality of the constituent peoples, citizens and others and that the obligation under the International Convention on the Elimination of All Forms of Racial Discrimination had not been respected here.

Supplementary information:

The applicant also requested the review of several articles of the Law of the Coat of Arms and Flag of the Federation of Bosnia and Herzegovina. The Constitutional Commission of the House of Representatives of the Parliament of the Federation of BH informed the Court that the request was fully

justified and that they had submitted proposals to the House of Representatives for changes to the emblems, coat of arms and flag.

Cross-references:

- Decision U-5/98 of 30.01.2000 was published in précis form in *Bulletin* 2000/1 [BIH-2000-1-002].

Languages:

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



Identification: BIH-2006-1-003

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 31.03.2006 / **e)** U-5/04 / **f)** / **g)** *Sluzbeni glasnik Bosne i Hercegovine* (Official Gazette), 49/06 / **h)** CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

- 1.2.1.1 **Constitutional Justice** – Types of claim – Claim by a public body – Head of State.
- 1.3.5.3 **Constitutional Justice** – Jurisdiction – The subject of review – Constitution.
- 2.1.1.1.1 **Sources of Constitutional Law** – Categories – Written rules – National rules – Constitution.
- 2.1.1.4.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
- 2.2.1.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Treaties and constitutions.
- 4.9.5 **Institutions** – Elections and instruments of direct democracy – Eligibility.
- 5.1.1.1 **Fundamental Rights** – General questions – Entitlement to rights – Nationals.
- 5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
- 5.2.2.3 **Fundamental Rights** – Equality – Criteria of distinction – National or ethnic origin.
- 5.3.4.1.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.
- 5.3.4.1.2 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to stand for election.

Keywords of the alphabetical index:

Discrimination, national / Election, candidacy, restriction.

Headnotes:

The Constitutional Court is not competent to decide upon the conformity of certain provisions of the Constitution of Bosnia and Herzegovina with the European Convention on Human Rights and its Protocols.

Summary:

The Chair of the Presidency of Bosnia and Herzegovina (the applicant), asked the Constitutional Court to review the conformity of several articles of the Constitution with the provisions of Article 14 ECHR and Article 3 Protocol 1 ECHR.

The applicant suggested that Article IV.1 of the Constitution was not compatible with the right to non-discrimination under Article 14 ECHR in conjunction with the right to free elections within the meaning of Article 3 Protocol 1 ECHR. The latter provision enshrines the principle of equal treatment of all citizens in the exercise of their right to vote and to be elected under conditions which will ensure the free expression of the opinion of the people in the make-up of the legislature. Under Article IV.1 of the Constitution, only members of three constituent peoples in Bosnia and Herzegovina, (Bosnians, Croats and Serbs) may be delegates to the House of Peoples of the Parliamentary Assembly. Members of other ethnic groups are excluded from this level of public office. This constitutes direct discrimination on ethnic, religious and racial grounds against citizens who are members of other ethnic groups. Furthermore, it follows from the provisions of Article IV.1 of the Constitution that only Bosnians and Croats from the Federation of Bosnia and Herzegovina and only Serbs from Republika Srpska may be delegates to the House of Peoples of the Parliamentary Assembly. Serbs from the Federation and Bosnians and Croats from Republika Srpska are not given the chance to stand for election to the House of Peoples and thus effectively prevented from exercising the right to stand as candidates at state parliamentary level.

The applicant referred in his argument to Article V.1 of the Constitution. This provides that the Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosnian and one Croat, each directly elected from the territory of the Federation, and one Serb, directly elected from the territory of the

Republika Srpska. He suggested that it contravened Article 14 ECHR and Article 3 Protocol 1 ECHR. It follows from this provision that citizens from other ethnic groups cannot be members of the Presidency and accordingly they have suffered direct discrimination in the exercise of their passive election rights on the grounds of ethnicity, religion and race. Furthermore, any provisions reserving public office for a Bosnian, Croat or Serb with no possibility for election of a citizen from other ethnic groups are in violation of Article 5 of the International Convention on Elimination of All Forms of Racial Discrimination. Under Annex I to the Constitution, this is to be applied in Bosnia and Herzegovina. It is not simply one of the obligations of the State of Bosnia and Herzegovina but is also a safeguard of individual rights, political rights (particularly the right to participate in elections), the right to vote and stand for election, the right to participate in government, and in the management of public office at all levels and the right of access under equal conditions to public office.

The applicant here had requested an examination of the conformity of certain provisions of the Constitution with the European Convention on Human Rights and its Protocols. The Constitutional Court accordingly had to establish whether it has competence to examine constitutional provisions to assess their compatibility with the European Convention on Human Rights. Admissibility of the request depends primarily upon the relationship between the Constitution and the European Convention on Human Rights. Article II.2 of the Constitution clearly states that the rights and obligations provided for by the European Convention on Human Rights have direct effect in Bosnia and Herzegovina. It follows from the case law of the European Court of Human Rights that domestic law must meet the requirements prescribed by the European Convention on Human Rights. According to Article VI.3 of the Constitution, the Constitutional Court shall uphold the Constitution. The Constitutional Court, in order to uphold the Constitution, may refer to the text of the Constitution and to the European Convention on Human Rights; this also derives from Article VI.3.c of the Constitution.

The Constitutional Court observed that rights under the European Convention on Human Rights cannot have a superior status to the Constitution. The European Convention on Human Rights, as an international document, entered into force in the municipal law of Bosnia and Herzegovina by virtue of the Constitution. The constitutional authority of the European Convention derives from the Constitution and not from the European Convention on Human Rights itself as an instrument of international law.

The Constitution does not expressly state that the Constitutional Court's jurisdiction should be limited to interpretation of the Constitution or the framework in which this is to be done. However, it is clear that the Constitutional Court cannot exercise its jurisdiction without first interpreting the relevant constitutional provisions, and the provisions of the law subject to abstract review by the Constitutional Court on a request to the Court as well as the provisions relating to its own jurisdiction. The Constitutional Court must always adhere to the text of the Constitution, which in the present case does not allow it to exercise its jurisdiction in such a way as to hold part of the Constitution to be incompatible with other standards, in view of the Court's obligation to "uphold this Constitution".

The Court therefore ruled that it was not within its competence to decide in the present case on the conformity of certain provisions of the Constitution with the European Convention on Human Rights and its Protocols.

Languages:

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



Identification: BIH-2006-1-004

a) Bosnia and Herzegovina / **b)** Constitutional Court / **c)** Plenary session / **d)** 01.04.2006 / **e)** AP-164/04 / **f)** / **g)** *Sluzbeni glasnik Republike Srpske* (Official Gazette), 49/06 / **h)** CODICES (Bosnian, English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Saving, lost / State succession / Obligation, positive / Obligation, state / Property, guarantee / Property, private, right.

Headnotes:

The rationale behind Article 1 Protocol 1 ECHR is the protection of individuals from arbitrary interference by public authorities. It not only imposes an obligation on the state to refrain from such interference, but also imposes a positive obligation aimed at respect of the right to property. This positive obligation applies only to the measures that the state should undertake and not to the results sought to be achieved.

Summary:

I. Between January 2004 and June 2005 numerous appeals were lodged with the Constitutional Court against Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska. They sought payment of foreign currency savings at Ljubljanska Bank d.d. Ljubljana, Branch Office Sarajevo and at Investbank Belgrade.

According to the legislation in force prior to the dissolution of the SFRY, the Federation guaranteed foreign currency accounts and foreign currency saving deposits at banks. When the former SFRY republics became independent states, in mid-1991 and early 1992, responsibility for foreign currency savings, in accordance with the laws then in force, was transferred to the newly established states. However, the new states only provided safeguards for foreign currency deposits with those banks which had their main offices and were registered as independent legal entities within their borders.

In 2001 Bosnia and Herzegovina ratified the Succession Agreement. Article 7 of Annex C to the Succession Agreement provided that "Guarantees by the SFRY or its NBY of hard currency savings deposited in a commercial bank and any of its branches in any successor State before the date on which it proclaimed independence shall be negotiated without delay, taking particular note of the necessity of protecting the hard currency savings of individuals. Such negotiations are to take place under the auspices of the Bank for International Settlements."

II. The Constitutional Court examined Article 14 of the Law on Banks and other financial organisations of SFRY (Official Gazette of the Socialist Federative Republic of Yugoslavia no. 28/91). This stipulates that a bank is an independent legal entity and that its branch offices, in transactions with third parties, act exclusively in the name of and on behalf of the bank. The appellants, in the former SFRY, were not able to launch proceedings against the branch officers of the banks mentioned above, since they did not have status of legal entity.

The Constitutional Court therefore held that Bosnia and Herzegovina is not *ratione personae* responsible with reference to foreign currency in relation to Ljubljanska Bank d.d. Ljubljana, and Investbank Belgrade. Bosnia and Herzegovina cannot be considered to have liabilities towards the appellants since they occurred in the other states' territories. The appeals are thus incompatible *ratione personae* with provisions of Article VI.3.b of the Constitution.

However, the Constitutional Court observed that within Article 1 Protocol 1 ECHR is the positive obligation upon the State to protect its citizens. It was not in dispute that the claims of the holders of old foreign currency savings should be regarded as the holders' own possessions in the sense of Article II.3.k of the Constitution and Article 1 Protocol 1 ECHR.

The cases in point relate to failure on the part of public authorities to protect effectively the appellants' rights to peaceful enjoyment of their property. The Court also observed that Article 1 Protocol 1 ECHR may give rise to a positive obligation on the part of a state to secure effective protection of individual rights. This may entail taking effective, reasonable and appropriate measures which may result in the appellants being able to repossess their property.

Bosnia and Herzegovina failed to undertake all necessary measures to ensure that the holders of old foreign currency savings can exercise their right to property, as enshrined in the Constitution and the European Convention on Human Rights, although they did assume responsibility for undertaking all necessary measures to resolve this issue. By implication, finding an effective solution to this matter depends on resolving the issue of succession to property of the former SFRY, in other words on the implementation of the Succession Agreement of 2001. Under that agreement, Bosnia and Herzegovina assumed the responsibility to carry out all necessary activities in order to resolve the issue of old foreign currency savings deposited with the Ljubljanska Bank and Invest Bank Belgrade.

Bosnia and Herzegovina is under a duty to undertake political measures, make proposals and requests in attempts to persuade the Republic of Slovenia and the State Union of Serbia and Montenegro to adopt appropriate measures in resolving the issue of old foreign currency savings deposited with the Ljubljanska Bank d.d. Ljubljana through the Sarajevo Branch Office and Invest Bank Belgrade. Furthermore, according to Article 7 of Annex C to the Agreement on Succession, Bosnia and Herzegovina and other former SFRY Republics undertook to negotiate without delay on the necessity to protect individuals' foreign currency savings of individuals.

The negotiations were to take place under the auspices of the Bank for International Settlements. Bosnia and Herzegovina should insist on the continuation of these negotiations.

The Constitutional Court noted that Bosnia and Herzegovina failed to submit any justification for the inefficiency of public authorities to ensure the necessary legal protection of the appellants' rights to property in the case in point.

The Constitutional Court held that the State failed to fulfil its positive obligation and to react in a timely and consistent manner to an issue of general interest. It failed to fulfil its obligation to act and protect citizens' rights to property safeguarded in the European Convention on Human Rights. Thus, Bosnia and Herzegovina violated the principle of fair balance between requirements of general interest and requirements imposed by the protection of the right of an interested party to protection of property, as well as the appellants' rights to peaceful enjoyment of property.

The Court held that no liability attached to Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska in terms of the payment of old foreign currency savings deposited with the Ljubljanska Bank d.d. Ljubljana, Sarajevo Main Branch Office and Invest Bank Belgrade, since the appeals were incompatible *ratione personae* with the Constitution of Bosnia and Herzegovina. Bosnia and Herzegovina is responsible for violating the right to property by failing to protect effectively the rights of individuals to peaceful enjoyment of their property.

Languages:

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



Bulgaria

Constitutional Court

Statistical data

1 January 2006 – 30 April 2006

Number of decisions: 4

Important decisions

Identification: BUL-2006-1-001

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 07.03.2006 / **e)** 08/05 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), no. 23, 17.03.2006 / **h)**.

Keywords of the systematic thesaurus:

1.1.3.1 **Constitutional Justice** – Constitutional jurisdiction – Status of the members of the court – Term of office of Members.

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

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

Keywords of the alphabetical index:

Term of office, end / Mayor, duration of office / Term of office, extension.

Headnotes:

The terms of office of members of the Constitutional Court, mayors, presidents of the Supreme Court of Cassation and the Supreme Administrative Court and the principal state prosecutor are defined by the Constitution of the Republic of Bulgaria and may not be extended by law.

Summary:

I. Proceedings were instituted at the instigation of the principal state prosecutor of the Republic of Bulgaria in order:

1. To establish the unconstitutionality of Section 5.2 of the Law on the Constitutional Court, Section 38.5 of the Law on local self-government and local administration and Section 125.8.a of the Law on the judiciary. The applicant alleged that the provisions in question were unconstitutional in the light of the main grounds for Decision no. 4/2005 of the Constitutional Court, according to which any law extending the exercise of the powers of senior officials beyond the period laid down in the Constitution was unconstitutional.
2. To obtain a binding interpretation of Article 93.1 of the Constitution, which, according to the applicant, could be interpreted in two ways.

II. The Constitutional Court examined the parties' arguments. Bearing in mind, firstly, what the three contested provisions had in common and, secondly, the differences in the powers assigned to the three categories of posts and in the legal rules governing them, the Constitutional Court examined the constitutionality of each of the three provisions separately.

Section 5.2 of the Law on the Constitutional Court

Section 5.2 of the Law on the Constitutional Court provides that the term of office of Constitutional Court judges is nine years, and Article 147.2 of the Constitution provides that they may not be re-elected. The purpose of this period is to restrict the exercise of the powers assigned to Constitutional Court judges to the period laid down. Given that this period is binding, the Constitution makes no provision for any possibility of extending it. There is not even any such provision in Article 148.3 of the Constitution, for the one-month period is provided for only for the purposes of replacing a Constitutional Court judge whose term of office has been suspended before its expiry.

The Constitutional Court therefore considers that the provision in Section 5.2 of the Law on the Constitutional Court is unconstitutional, for it provides for the performance of duties even after the expiry of the term of office, despite the fact that the latter puts an end to the relevant powers.

Section 38.5 of the Law on local self-government and local administration

During the discussions on the constitutionality of Section 38.5 of the Law on local self-government and local administration, two opposing positions emerged. When a vote was taken, the required majority of seven votes was not achieved, with the result that the application was dismissed in this respect. The lack of

a majority in favour of either position prevented the Court from setting out common grounds for its decision in this respect. The two positions and the grounds for each are set out below:

According to the first position, the mayor is, under Article 139.1 of the Constitution, the executive organ of the municipality and is elected for a four-year period by means of a procedure laid down by law. The Law on local self-government and local administration, passed in accordance with Article 146 of the Constitution, merely governs the organisation and method of operation of local self-governing bodies: it may neither extend nor shorten the periods laid down in the Constitution. The arguments concerning the exercise of power for a specific period put forward above in connection with Constitutional Court judges therefore also apply to mayors.

According to the second position, the provision in Section 38.5 of the Law on local self-government and local administration is not contrary to the Constitution. It applies only in cases where the mayor is sworn in at the first meeting of the new municipal council. This provision does not extend the mayor's powers for an indefinite period; it simply ensures continuity in the performance of mayoral duties.

Furthermore, under the Constitution, the activities of the mayor are linked to those of the municipal council. If the powers of the municipal council are extended, it is necessary to extend the mayor's term of office until such time as his or her successor takes office.

Section 125.8.a of the Law on the judiciary

Further to the first amendments to the Bulgarian Constitution, all persons in managerial positions within the judiciary have acquired the status of organs whose status is laid down in the Constitution. With the exception of the president of the Supreme Court of Cassation, the president of the Supreme Administrative Court and the principal state prosecutor, these persons are appointed for a five-year period and are entitled to be appointed to their posts a second time. The amendment to Article 129.3 of the Constitution shows that the legislator treats the presidents of the two Supreme Court and the principal state prosecutor in the same way as other persons in managerial positions within the judiciary. Their powers must therefore also lapse when their term of office expires. The second sentence of Article 125.8.a is at variance with Article 129.5 of the Constitution, for it allows the holder of a managerial position to continue performing his or her managerial duties until such time as his or her successor takes office.

The fact that it is possible to appoint persons in managerial positions within the judiciary a second time does not constitute grounds for reaching a different decision on the constitutionality of the contested provision, because the powers of the organ in question lapse on the expiry of the term of office.

In the light of the foregoing, the Constitutional Court:

1. Declares Section 5.2 of the Law on the Constitutional Court and the second sentence of Section 125.8.a of the Law on the judiciary unconstitutional.
2. Dismisses the principal state prosecutor's application to have Section 38.5 of the Law on local self-government and local administration and the first sentence of Section 125.8.a of the Law on the judiciary declared unconstitutional.

Languages:

Bulgarian.



Canada

Supreme Court

Important decisions

Identification: CAN-2006-1-001

a) Canada / b) Supreme Court / c) / d) 02.03.2006 / e) 30322 / f) Multani v. Commission scolaire Marguerite-Bourgeoys / g) *Canada Supreme Court Reports* (Official Digest), [2006] 1 S.C.R. xxx, 2006 SCC 6 / h) Internet: [http://scc.lexum.umontreal.ca/en/index/html:\[2006\] S.C.J. no. 6 \(Quicklaw\); CODICES \(English, French\).](http://scc.lexum.umontreal.ca/en/index/html:[2006] S.C.J. no. 6 (Quicklaw); CODICES (English, French).)

Keywords of the systematic thesaurus:

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

3.20 **General Principles** – Reasonableness.

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

Keywords of the alphabetical index:

Education, school, religious symbol, wearing / Religion, kirpan, prohibition against wearing / Religion, freedom, positive / Education, school, pupil, religious identity / Multiculturalism, principle / Tolerance, religious.

Headnotes:

A decision prohibiting an orthodox Sikh student from wearing a kirpan (knife) at school infringes his freedom of religion guaranteed by the Constitution, and this infringement is not justifiable in a free and democratic society. An absolute prohibition against wearing a kirpan at school does not minimally impair the student's freedom of religion.

Summary:

I. G. and his father B. are orthodox Sikhs. G. believes that his religion requires him to wear a kirpan at all times. In 2001, G. accidentally dropped the kirpan he was wearing under his clothes in the school yard. The school board sent G.'s parents a letter in which, as a reasonable accommodation, it authorized their son to

wear his kirpan to school provided that he complied with certain conditions to ensure that it was sealed inside his clothing. G. and his parents agreed to this arrangement. The governing board of the school refused to ratify the agreement on the basis that wearing a kirpan at the school violated Article 5 of the school's Code of conduct, which prohibited the carrying of weapons. The school board's council of commissioners upheld that decision and notified G. and his parents that a symbolic kirpan in the form of a pendant or one in another form made of a material rendering it harmless would be acceptable in the place of a real kirpan. B. filed in the Superior Court a motion for a declaratory judgment to the effect that the council of commissioners' decision was of no force or effect. The Superior Court granted the motion, declared the decision to be null, and authorized G. to wear his kirpan under certain conditions. The Court of Appeal set aside the Superior Court's judgment and restored the council of commissioners' decision. It concluded that the decision in question infringed G.'s freedom of religion under Section 2.a of the Canadian Charter of Rights and Freedoms, but that the infringement was justified for the purposes of Section 1 of the Canadian Charter of Rights and Freedoms.

II. The Supreme Court of Canada set aside the Court of Appeal's judgment and declared null the decision of the council of commissioners. The majority of the Supreme Court held that the council of commissioners' decision prohibiting G. from wearing his kirpan to school infringes his freedom of religion. G. genuinely believes that he would not be complying with the requirements of his religion were he to wear a plastic or wooden kirpan, and none of the parties have contested the sincerity of his belief. The interference with G.'s freedom of religion is neither trivial nor insignificant, as it has deprived him of his right to attend a public school. The infringement of G.'s freedom of religion cannot be justified under Section 1 of the Canadian Charter of Rights and Freedoms. Although the council's decision to prohibit the wearing of a kirpan was motivated by a pressing and substantial objective, namely to ensure a reasonable level of safety at the school, and although the decision had a rational connection with the objective, it has not been shown that such a prohibition minimally impairs G.'s rights. The decision to establish an absolute prohibition against wearing a kirpan does not fall within a range of reasonable alternatives. The risk of G. using his kirpan for violent purposes or of another student taking it away from him is very low, especially if the kirpan is worn under certain conditions. It should be added that G. has never claimed a right to wear his kirpan to school without restrictions. Furthermore, there are many objects in schools that could be used to commit

violent acts and that are much more easily obtained by students. The evidence also reveals that not a single violent incident related to the presence of kirpans in schools has been reported. Although it is not necessary to wait for harm to be done before acting, the existence of concerns relating to safety must be unequivocally established for the infringement of a constitutional right to be justified. The argument that the wearing of kirpans should be prohibited because the kirpan is a symbol of violence and because it sends the message that using force is necessary to assert rights and resolve conflict is not only contradicted by the evidence regarding the symbolic nature of the kirpan, but is also disrespectful to believers in the Sikh religion and does not take into account Canadian values based on multiculturalism. Religious tolerance is a very important value of Canadian society. If some students consider it unfair that G. may wear his kirpan to school while they are not allowed to have knives in their possession, it is incumbent on the schools to discharge their obligation to instil in their students this value that is at the very foundation of our democracy.

In a concurring opinion, two judges found that recourse to a constitutional law justification is not appropriate where, as in this case, what must be assessed is the propriety of an administrative body's decision relating to human rights. Whereas a constitutional justification analysis must be carried out when reviewing the validity or enforceability of a norm such as a law, regulation or other similar rule of general application, the administrative law approach must be retained for reviewing decisions and orders made by administrative bodies. In addition, a decision or order made by an administrative body cannot be equated with a "law" within the meaning of Section 1 of the Canadian Charter of Rights and Freedoms. The expression "law" used in Section 1 naturally refers to a norm or rule of general application. In the instant case, it is the standard of reasonableness that applies to the decision of the school board's council of commissioners. The council did not sufficiently consider either the right to freedom of religion or the proposed accommodation measure. It merely applied literally the Code of conduct in effect at the school. By disregarding the right to freedom of religion without considering the possibility of a solution that posed little or no risk to the safety of the school community, the council made an unreasonable decision.

In a concurring opinion, a judge mentioned that it is not always necessary to resort to the Charter when a decision can be reached by applying general administrative law principles or the specific rules governing the exercise of a delegated power. However, where a decision is contested on the basis that the administrative body's exercise of the

delegated power is vitiated by the violation of a fundamental right, the only way to determine whether the infringement of the constitutional standard is justified is to consider the fundamental rights in issue and how they have been applied. Here, the school board has not shown that its prohibition was justified and met the constitutional standard.

Languages:

English, French (translation by the Court).



Croatia

Constitutional Court

Important decisions

Identification: CRO-2006-1-001

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 07.12.2005 / **e)** U-I-906/2000 / **f)** / **g)** *Narodne novine* (Official Gazette), 2/06 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.10 **General Principles** – Certainty of the law.
- 3.12 **General Principles** – Clarity and precision of legal provisions.
- 5.3.5.1.3 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty – Detention pending trial.
- 5.3.13.1.3 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Scope – Criminal proceedings.

Keywords of the alphabetical index:

Detention pending trial, constitutionality.

Headnotes:

When formulating legislation on criminal law and its institutions, and on the rights and obligations of parties to criminal proceedings, the legislator must take into consideration the demands placed upon him by the Constitution. Specifically, he must bear in mind the principles of the rule of law (public interest, suppression of crime) and the protection of human rights and fundamental freedoms guaranteed in the Constitution (rights of a suspect or accused).

Summary:

I. The Constitutional Court did not accept the proposal several attorneys submitted, for the review of the constitutionality of Article 102.1.4 of the Criminal Procedure Act (nos. 110/97, 27/98, 58/99, 112/99, 58/02 and 143/02; hereinafter: the ZKP) contending that this provision violates Articles 3, 5, 16, 18, 22, 24, 28 and 140 of the Constitution.

The petitioners argued that the article did not show clearly the main reason for detaining a person on remand, or the legitimate purpose to be achieved by detention. They stressed that detention is a procedural measure which has to have a specific procedural purpose, and the circumstances under which the offence was committed, the way in which it was committed and other serious circumstances surrounding the offence must not have a bearing on its application. In the petitioners' view, the disputed provision anticipates a prison sentence even before the final judgment, and cannot be described as an exceptional procedural measure with the aim of ensuring the proper and lawful course of criminal procedure. The applicants also state that legislation in progressive democratic countries does not include the grounds for detention on remand contained in this article.

It may introduce an arbitrary note into the Croatian legal order. Its lack of clarity and precision mean that judicial bodies are given the discretionary right to assess which circumstances they will consider especially serious in a particular case and to use them as grounds for detention on remand. This could potentially give rise to grave breaches of fundamental human rights and freedoms. The imprecise nature of the disputed provision also leads to the obligatory nature of the ground for detention on remand, which is contrary to the intention of the Act and the norms of international law. The disputed legal provision, because of its extremely unclear wording, does not contain appropriate guarantees for the protection of persons remanded in custody. The petitioners allege that when detention is ordered, on the grounds contained in the disputed provision, detainees are deprived of the right to an effective legal remedy brought before a court or other authorised body. They consider the contents of the disputed provision as being diametrically opposed to the constitutional presumption of innocence. The manner in which the criminal offence was committed cannot be grounds for ordering detention, since these are the facts and circumstances on which the accused person's guilt depends and they are yet to be established in criminal proceedings.

According to the petitioners, the disputed provision does not conform to the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular to Articles 5 and 17 ECHR, which was ratified in the Ratification Act of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols nos. 1, 4, 6, 7 and 11 thereto). Article 18 ECHR explicitly prohibits signatory states from amending or limiting exceptions from the rule beyond those provided for in the Convention.

At the time when the proposal was submitted, and before the entry into force of the Criminal Procedure (Revisions and Amendments) Act (no. 58/02), the disputed provision of Article 102/1.4 read as follows:

If there is reasonable suspicion that a person has committed a criminal offence, the person may be detained on remand: (...)

- in the case of the following criminal offences: murder, robbery, rape, terrorism, kidnapping, abuse of narcotics, extortion, or any other criminal offence for which the law prescribes a possible prison sentence of eight or more years, if this is justified due to the manner in which the offence was committed or other especially serious circumstances of the offence.

Article 37 of the Criminal Procedure (Revisions and Amendments) Act (no. 58/02) substituted the disputed provision, and it currently reads as follows:

- If there is reasonable suspicion that a person has committed a criminal offence, the person may be detained on remand: (...)
- In the case of the following criminal offences: murder, robbery, rape, terrorism, kidnapping, abuse of narcotics, extortion, abuse of authority in business operations, abuse of position or authority, conspiracy to commit a criminal offence, or any other offence for which the law prescribes a prison sentence of twelve or more years, if this is justified due to the especially serious circumstances of the offence.

II. Having reviewed the opinion of the Ministry of Justice, Administration and Local Self-Government and the opinions of legal experts in the field of criminal procedure law, the Constitutional Court rejected the petitioners' arguments.

Articles 24.1 and 3 and Article 25.2 and 3 of the Constitution cover the issue of detention. It is left to the legislator to decide upon the grounds for detention on demand. When regulating criminal law and its institutions, the legislator must take into consideration the demands placed upon him by the Constitution. He particularly has to bear in mind the principles of the rule of law and the protection of human rights and fundamental freedoms laid down in the Constitution.

In Croatia, detention on remand can be described as a procedural measure of compulsion depriving the suspect or accused of liberty, lawfully ordered by a competent judiciary body before or during criminal proceedings, as an exceptional measure that is only

ordered if the same purpose cannot be achieved by another more lenient measure. Other purposes of ordering detention on remand with the purpose of implementing criminal prosecution are defined by law. In ordering detention on remand the following substantive presumptions must be fulfilled: degree of probability that the person committed the offence and the presence of the danger that detention is to forestall, and the competent judiciary bodies must establish the existence of at least one of the lawful grounds for remand. The duration of detention is limited, and regular legal remedies are available to control the lawfulness of the legal remedy. After the expiry of the statutory term the competent body is obliged to reassess whether the grounds for detention still exist.

The doubt as to the clarity and precision of the disputed legal provision stems from the legislator's obligation to publish the relevant law in the way required by Article 89 of the Constitution.

According to the Constitutional Court, laws must be of equal and universal application, and legal effects must be foreseeable for those to whom they will be applied (legitimate expectations).

The Constitutional Court stressed that the disputed legal provision defines the general conditions for detention in a clear and unambiguous way, and the fact that these must exist for the entire duration of the criminal proceedings. The special requirement for ordering detention on remand is the combination of general requirements and the gravity of the criminal offence. This is, in the Court's view, precise enough, so it is used as a legal standard by the competent body which orders the detention and controls its duration and grounds.

Bearing in mind that the justified purpose to be achieved by ordering detention on remand is an especially sensitive issue, the Criminal Procedure Act also lays down two additional requirements in the disputed provision, which must be satisfied in each specific case for the detention order to be legally grounded. These are: the serious nature of the criminal offence and other especially serious circumstances surrounding the criminal offence. The Court stated that it is important to define the grounds for detention in this way because it narrows down and defines more precisely the disputed legal provision, which helps to prevent an arbitrary approach to its application.

The Court dismissed the petitioners' argument that the disputed provision effectively constituted the anticipation of imprisonment. When courts order detention in criminal proceedings, they are obliged in

each specific case to bear in mind the legitimacy and rationality of the purpose to be achieved by keeping a person in custody. If the court ordered detention in anticipation of a sentence, this would not lead to the conclusion that the disputed legal provision contravenes the Constitution, but that the court had misapplied and misinterpreted the applicable law. Legal protection exists if this is the case. Moreover, Article 25.4 provides for the right to damages and a public apology to anybody detained due to an error on the court's part.

When formulating criminal procedural rules, the legislator aims at achieving a balance between the needs of society for the efficient suppression of crime and the protection of the suspect's rights.

The Act recognises only one obligatory reason for ordering detention, which is contained in its Article 102/4. It states that a person who has been sentenced to five or more years in prison is always held in custody. The other legal grounds for detention, including those contained in the disputed provision, are not obligatory.

The Court pointed out that at the heart of the petitioners' case was concern that the disputed provision might be arbitrarily applied. However, it ruled that the provision complied with the Constitution, with the obligations stemming from international treaties, with jurisprudence from the European Court of Human Rights and also with analysis of other relevant provisions of legislation.

Languages:

Croatian, English.



Identification: CRO-2006-1-002

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 08.12.2005 / **e)** U-III-344/2002 / **f)** / **g)** *Narodne novine* (Official Gazette), 2/06 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

3.13 General Principles – Legality.
5.2 Fundamental Rights – Equality.

Keywords of the alphabetical index:

Property, socially owned, purchase.

Headnotes:

Every enactment of a competent body which decides on the rights and obligations of parties must comply with the objective of the act that is being applied to a particular case.

Summary:

I. A constitutional complaint was lodged against a second instance judgment, overturning a first instance judgment, rejecting the applicant's request that the court pass a judgment in substitution for the sales contract for the flat to which she enjoyed specially protected tenancy rights. The Court upheld the rejection of the applicant's claim with the expiry of the preclusive deadline for submitting a request to purchase a flat in Article 4.2 of the Sale of Flats with Specially Protected Tenancies Act (nos. 27/91, 33/92, 43/92 – consolidated wording, 69/92, 25/93, 26/93, 48/93, 2/94, 29/94, 44/94, 58/95, 11/96, 11/97 and 68/98; hereinafter: the Sale of Flats Act).

II. Under the Sale of Flats Act, holders of specially protected tenancy rights (hereinafter referred to as tenants) may submit a written request to purchase a flat to the person with the right to dispose of the flat, or to the owner who acquired ownership in the transformation of ownership carried out according to special regulations (hereinafter referred to as the vendor) and the vendor is obliged to sell it. The Act bestows the right to buy not only on the tenant but also, with his agreement, on members of his family. The definitions of tenant and members of his family household are contained in housing regulations. According to Article 1 of the Sale of Flats (Amendments and Revisions) Act (no. 44/94), which amended Article 4.2 of the Sale of Flats Act, the request to purchase the flat had to be submitted by 31 December 1995, and the purchaser had to request signing the sales and purchase contract for the flat within six months after submitting the request to purchase the flat.

II. In accordance with the Sale of Flats Act, the Constitutional Court emphasised in particular that every enactment of the competent body which decides on the rights and obligations of parties must comply with the objective of the act that is being applied to a particular case. Here, for example, the

purpose of the Act is to provide what was formerly socially-owned property to clearly defined holders of property rights. Such holders should, in the first place, be the persons who had previously legally occupied the flats. Given the complex circumstances surrounding its application, the Sale of Flats Act was amended several times, and some of the amendments referred, among other things, to extending deadlines for the holders of specially protected tenancy rights or other authorised persons to undertake specific activities to realise the rights connected to the purchase of socially-owned flats. It is obvious that the legislator here bore in mind the actual circumstances which in particular cases prevented citizens from undertaking certain activities within the stipulated deadlines. This clearly demonstrates that it was not the legislator's intention for citizens to lose their rights because of prescriptive deadlines, as this would be contrary to the objective of the Act.

According to the Constitutional Court the decision of the second instance court was ill-founded and contrary to the objective of the Sale of Flats Act. This court was of the opinion that Article 4.2 of the Sale of Flats Act was prescriptive in nature: exceeding the deadline led to the unconditional loss of the right to the flat by the applicant.

The Second Instance Court did not take into account the fact that during the time for submitting the request to purchase the flat under Article 4.2 of the Sale of Flats Act the applicant could not have been considered to have been covered by this legislation, because her specially protected tenancy had been terminated by the judgment of the Municipal Court, and she had lost her status of tenant, which she regained by judgment of the same First Instance Court, which took effect from 19 March 2001.

The Constitutional Court found that the legal stance expressed in the disputed judgment was not based upon an acceptable interpretation of relevant substantive law. It violated the applicant's constitutional right to equality before the law, guaranteed in Article 14.2 of the Constitution.

The Constitutional Court did not specifically examine the violation of other constitutional rights and constitutional provisions which the applicant mentioned in the constitutional complaint, since the violation of the constitutional right described above is sufficient reason to admit the constitutional complaint.

Languages:

Croatian, English.



Identification: CRO-2006-1-003

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 11.01.2006 / **e)** U-III-3920/2003 / **f)** / **g)** *Narodne novine* (Official Gazette), 15/06 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Civil proceedings, intervention, effects.

Headnotes:

The procedural actions of someone intervening in a case have legal effect for the original parties to the case if they are not in contradiction to actions taken by that party.

Summary:

I. The Constitutional Court accepted the applicant's constitutional complaint because his appeal as an intervenor in the civil proceedings was dismissed. The provisions of Articles 18.1 and 29.1 of the Constitution (right to appeal and right of access to the court) were found to be relevant in the constitutional complaint.

Under Article 208.1, 208.3 and 208.4 of the Civil Procedure Act, the Court found that an intervenor shall accept the status of the case at the point where they become involved in the case. In the further course of the litigation they are authorised to present motions and take all other procedural actions within the same time limits as the parties they have joined. If the intervenor presents a legal remedy, a copy of his or her submission shall be served on the party he or she joined. The procedural actions of an intervenor have legal effect for the party they have joined if they are not contrary to the acts of that party.

In the case in point, the applicant was permitted, by a court ruling, to intervene in litigation on the side of the respondent, an insurance company, for the possible payment of a refund if the claim for payment of damage caused in the traffic accident was accepted. The applicant, as an intervenor on the side of the respondent, was present at all trial hearings and undertook all permitted legal actions as did the original party to the proceedings, he also appealed within the legal timeframe against the first instance judgment. The respondent did not dispute the appeal served on him.

II. The Constitutional Court found that the respondent did not deliver an opinion about the appeal of the intervenor to the effect that the intervenor had by lodging this legal remedy acted contrary to the respondent's legal actions and interests, and that the Second Instance Court, by dismissing the applicant's appeal as not permissible, had misinterpreted and misapplied the provision of Article 208.4 of the Civil Procedure Act, and thereby violated the above mentioned constitutional rights of the applicant as intervenor.

Languages:

Croatian, English.



Identification: CRO-2006-1-004

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 13.01.2006 / **e)** U-III A-3645/2005 / **f)** / **g)** *Narodne novine* (Official Gazette), 20/06 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

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

1.5.4.1 **Constitutional Justice** – Decisions – Types – Procedural decisions.

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:

Offence, criminal / Trial within reasonable time, remedy / Procedural measure, suspension.

Headnotes:

Where a constitutional complaint has been lodged because a court did not arrive at a decision within a reasonable time, any alleged violations of Article 29.1 of the Constitution must be examined against the background of the proceedings at issue (for instance the rights or obligations in question or suspicion or accusation of a criminal offence committed by the applicant).

Proceedings to decide upon a proposal to cancel a remand order are not proceedings within the meaning of Articles 62.1 and 63.1 of the Constitutional Act on the Constitutional Court of Croatia, and thus not an area where the Court has competence.

Summary:

I. The applicant lodged a complaint with the Constitutional Court, contending that omitting to decide on a proposal to release him from detention on remand violated his right to a fair trial under Article 29.1 of the Constitution. The Constitutional Court rejected the complaint on the grounds of non-competence.

The case file and the constitutional complaint show that the applicant was arrested on reasonable suspicion of having committed an offence of gross indecency. The County Court ordered his detention, and also ordered that he be remanded in custody. The Court rejected the applicant's appeal. The day after an indictment request was lodged, the County Court annulled the remand order, and the applicant was released from custody. The Zagreb Municipal Public Prosecutor's Office appealed against this ruling. The County Court overturned the decision at first instance and reinstated the remand order.

There is no right to appeal against this ruling. Meanwhile, the applicant/accused had absconded. His defence counsel requested that the remand order be annulled. The Court did not decide on this request. The proceedings effectively lasted for about five months.

II. In view of the procedural requirements in Article 62.1 of the Constitutional Act, the Constitutional Court found that the constitutional complaint about the unreasonable length of time taken to arrive at a decision could be lodged only in

respect of proceedings in which the competent court decides on the merits of the case, (for example the rights or obligations or about suspicion or accusation of a criminal offence committed by the applicant).

Proceedings to decide upon a request to annul a remand order are not proceedings within the meaning of Article 63.1 of the Constitutional Act in relation to which the Constitutional Court has the competence to provide the applicant with its protection.

Article 107.4 of the Criminal Procedure Act stipulates that the accused and his defence counsel may at any time ask the court to annul an order for detention on remand, and that no appeal is permitted against the ruling of the council rejecting the request to cancel remand. Remand shall always be annulled, and the prisoner released from custody, in cases when the court pronounces a judgment releasing the defendant from charges or when the charges are dismissed.

Therefore, the Court found that in matters of remand, the criminal court does not decide on the accused's rights and obligations, nor about suspicion or accusation for a criminal offence but instead it is a question of ruling on one of a series of proposals lodged by the applicant to annul the remand order.

Languages:

Croatian, English.



Identification: CRO-2006-1-005

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 25.01.2006 / **e)** U-III-1842/2002 / **f)** / **g)** *Narodne novine* (Official Gazette), 16/06 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

5.1.4 **Fundamental Rights** – General questions – Emergency situations.

5.2 **Fundamental Rights** – Equality.

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

5.4.13 **Fundamental Rights** – Economic, social and cultural rights – Right to housing.

Keywords of the alphabetical index:

Law, unclear, ambiguous wording / Housing, lease termination, extension to co-tenants.

Headnotes:

The Constitutional Court has accepted case law from lower courts that the termination of a specially protected tenancy applies not just to the holder of the tenancy but also to any co-holders such as spouses and members of a family household. This is because the co-holders' rights derive from those of the holder of the tenancy. This interpretation, according to the Court, derives from the analogous application of Article 64.2 of the Housing Relations Act.

Summary:

The applicant lodged a constitutional complaint against a judgment from the second instance court. It had refused her appeal against an earlier judgment upholding the owner's claim for the termination of the lease for a flat and ordering her to move out of the flat.

The applicant complained of incorrect and incomplete establishment of the facts and misapplication of substantive law, namely Article 102 of the Housing Relations Act then in force (nos. 51/85, 42/86, 37/88, 47/89, 22/90, 22/92, 58/93 and 70/93; hereinafter referred to as ZSO). She pointed out that she had not participated in any nefarious activities during the aggression against Croatia. No criminal proceedings had even been instituted against her, let alone completed for that or any similar actions. She argued that there were no grounds to terminate a specially protected tenancy in her case.

The lower courts upheld the disputed judgment by analogy with the final effective criminal judgment against her husband, who held a specially protected tenancy, because he commanded his subordinates to undertake random armed activities against civilian infrastructures and civilians. By analogous application of Article 64.2 of the ZSO, which confers upon a co-habiting spouse the right to a specially protected tenancy if their spouse is the holder of one, they accepted the claim by the Croatian Republic and the Ministry of Defence, represented by the Public Attorney.

It was argued that the principle of the equality of all before the law had been breached, under Article 14.2 of the Constitution. However, the Constitutional Court found that the relevant substantive law had been correctly applied and that a constitutionally acceptable interpretation of the law had been made in the judgment under dispute. They found no indication

of random interpretation or arbitrary application of the relevant substantive law.

The suggestion had also been made that insufficient heed had been paid to the presumption of innocence before the establishment of guilt for a criminal offence in a court judgment that has become legally effective (see Article 28 of the Constitution). The Court found that as the judgment in question did not decide upon any criminal offence on the part of the applicant, no such right on her part could have been breached.

The Court found no violation of the right to respect for and legal protection of personal and family life, dignity, reputation and honour (see Article 35 of the Constitution).

Judges Jasna Omejec, Željko Potočnjak, Agata Račan and Smiljko Sokol produced and signed a separate opinion. They stated that the only possible legally-correct interpretation of Article 102a.1 and 102a.2 of the ZSO is that specially protected tenancies terminate only for those persons who have participated or are participating in enemy activities against Croatia, assuming that a valid judgment is in force to the effect that they are guilty of such an offence. Termination of specially protected tenancies cannot be extended to other specially protected co-tenants, if they themselves have not been sentenced for these activities. The judges mentioned above took the view that this different interpretation of the stated provision of the ZSO meant that the constitutional right in Article 28 of the Constitution had been breached.

The judges in their dissenting opinion also pointed out that an incorrect interpretation and conclusion had been derived from Article 64.2 of the ZSO. In their view, this provision does not provide for the termination of the tenancy for the spouse as a co-holder of the specially protected tenancy, especially when the cumulative requirements prescribed in Article 102a.1 of the Housing Relations (Amendments) Act were not fulfilled. This meant that the applicant's right to equality before the law in Article 14.2 of the Constitution was directly violated.

They went on to assert that the Court departed from the established practice, and that its decision did not resolve the legal position of the members of the applicant's family household after the termination of the housing lease, under Article 102a.2 of the ZSO. Under this provision, once the Court has decided to terminate the tenancy, the owner must provide the members of the family household with the use of that property or of some other suitable accommodation. This was decided on in the first court judgment, given that the applicant and members of her family continued to use the accommodation. The Second

Instance Court confirmed the obligation on the part of the owner but the Constitutional Court made no mention of it.

Languages:

Croatian, English.



Identification: CRO-2006-1-006

a) Croatia / **b)** Constitutional Court / **c)** / **d)** 25.01.2006 / **e)** U-III-1333/2003 / **f)** / **g)** *Narodne novine* (Official Gazette), 16/06 / **h)** CODICES (Croatian, English).

Keywords of the systematic thesaurus:

4.7.15.1.4 **Institutions** – Judicial bodies – Legal assistance and representation of parties – The Bar – Status of members of the Bar.
5.2.1 **Fundamental Rights** – Equality – Scope of application.
5.4.4 **Fundamental Rights** – Economic, social and cultural rights – Freedom to choose one's profession.

Keywords of the alphabetical index:

Bar, admission / Offender, rehabilitation, duty.

Headnotes:

The applicant's request for entry on the List of Attorneys was refused. It was alleged that, in so doing, the relevant authorities had acted contrary to the explicit legal prohibition on gathering and using data on a criminal offence for which the applicant had been rehabilitated in accordance with the law and that this resulted in a breach of the applicant's constitutional right to equality before the law (see Article 14.2 of the Constitution).

Under the Criminal Act, after the expiry of statutory time periods, the perpetrator of a criminal offence is deemed rehabilitated, i.e. free of convictions, and any use of data about him as a perpetrator of a criminal offence is prohibited and is of no legal consequence. The rehabilitated applicant has the right to deny the former conviction and cannot suffer any legal consequences as a result.

Summary:

I. The petitioner had been refused entry in the list of Attorneys of the Croatian Bar Association (hereinafter: HOK) in proceedings before the council of the HOK, as well as in appellate proceedings against decisions by the HOK Council before the Supreme Court of the Republic of Croatia. The HOK Council and the Supreme Court based their decision to refuse him entry on Article 49 of the Legal Profession Act which reads:

1. A person is not a fit and proper person to practice law if he or she has been sentenced for a criminal offence against the Croatian Republic, for a criminal act in violation of his or her official office, for a criminal act committed for personal gain or for any other criminal act committed for a dishonest motive or one that makes the person morally unworthy of practicing law. Such a person shall not have the right to be enrolled in the list of attorneys for ten years after the sentence has been served, remitted or expired, and if the person has been fined, five years from the day the judgment becomes final. If somebody is placed on probation, they will not have the right to be entered on the list during the period of probation.
2. A person whose previous conduct or activity does not guarantee the conscientious performance of the legal profession is not a fit and proper person to practice law.
3. If an application for an entry on the list of attorneys is rejected because the applicant is not a fit and proper person to practice law for the reasons referred to in Section 2 of this article, a new application cannot be submitted before the expiry of a period of two years from the date the decision to reject them became final.

Over thirteen years had passed from the date the applicant had served his prison sentence to the date of the first-instance decision refusing his request for entry on the List of Attorneys. The criminal offences were committed between 1982 and 1983. The Court took the view that the petitioner had in fact been rehabilitated, pursuant to the provisions of Article 85 of the Criminal Act. He is deemed to be free of convictions. Any use of data about him as the perpetrator of a criminal offence is prohibited and produces no legal effect. Now that he is rehabilitated, he is entitled to deny the former conviction and cannot be called into account for that reason.

II. The Constitutional Court found that the HOK and the Supreme Court of the Republic of Croatia, in rejecting the petitioner's request for entry on the List

of Attorneys, acted contrary to the explicit legal prohibition on using data about the perpetrator of a criminal offence who has been rehabilitated. This resulted in a breach of his constitutional right to equality before the law (Article 14.2 of the Constitution). All previous decisions and judgments were repealed and the matter was referred back to the Croatian Bar Association for fresh proceedings.

Judge Mario Kos gave a dissenting opinion, to the effect that the Court's decision had broader implications. In his view, it cast doubt over the possibility of an autonomous verification and evaluation of a candidate's fitness not only to be entered on the List of Attorneys but also to perform the duties of a judge and a public prosecutor.

Judge Kos cited other decisions by the Court, including U-III-439/1995 of 20 December 1995 (no. 106/95) and U-III-706/2003 of 8 July 2003, (no. 106/95), *Bulletin* 2003/2 [CRO-2003-2-008]. He pointed out that in the current case, the petitioner's conduct was factually and legally different from the conduct of the applicants whose constitutional complaints were accepted in the above-mentioned cases.

He went on to say that such a liberal interpretation of the Criminal Act and the Criminal Procedure Act regarding rehabilitation could result in the violation of the right to equality before the law. Certain candidates might, for instance, have acted illegally during their former judicial or legal office, but might not have faced trial because of the statute of limitations.

In his opinion, irrespective of the legal mechanisms of rehabilitation, unlawful behaviour remains permanently in the applicant's professional biography. However, after the Court's decision the same candidate could exercise again his function as a lawyer, judge and even public prosecutor and this always should be taken into account in his election procedure, to which, in the current case, Article 49.2 of the Legal Profession Act should be applied.

Languages:

Croatian, English.



Czech Republic

Constitutional Court

Statistical data

1 January 2006 – 30 April 2006

- Judgment of the plenum: 6
 - Judgment of panels: 73
 - Other decisions of the plenary Court: 7
 - Other decisions by chambers: 1 384
 - Other procedural decisions: 30
- Total: 1 184

Important decisions

Identification: CZE-2006-1-001

a) Czech Republic / b) Constitutional Court / c) Plenary / d) 28.02.2006 / e) Pl. US 20/05 / f) / g) / h) CODICES (Czech).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Parliament, failure to act / Failure to act, wrongful / Regulation, implementing statutes / Contractual relations / Constitutionalism, Constitutional Court, protector.

Headnotes:

It is unconstitutional for parliament to remain inactive for a lengthy period of time, a notable example being its failure to adopt a statute defining the circumstances in which lessors are entitled to impose unilateral rent increases and alterations to provisions of tenancy agreements.

It is not acceptable to transfer the social burdens of one group (lessees) to a second group (lessors), neither is it permissible to establish various classes of lessor, where rent for property owned by one class is subject to regulation, but that of the other class is not. Because of parliament's inactivity in this sphere, the Constitutional Court has had to compensate for the missing legislation to protect landlords' rights by applying constitutional law principles. The Constitutional Court stressed that the ordinary courts must provide proportional protection of individual rights and legally protected interests, and that they must afford protection to lessors so that any lawsuits they submit requesting designation of an increase in rents will not be rejected on the merits due to the lack of statutory rules.

Summary:

I. An appellate court petitioned the Constitutional Court to annul certain Civil Code provisions relating to the lease of flats. The first instance court in this case had resolved a lessor's claim against a lessee for the payment of rent by rejecting it on the merits. The lessor asked the lessee for rent as set out in the Civil Code. The amount of rent had never been agreed between them, it had only been officially designated by legislation which had subsequently been annulled by the Constitutional Court. According to a private expert opinion, the usual amount of rent was four times higher than the amount which the lessee was currently paying the lessor. The lessor accordingly asked for payment of the difference. The First Instance Court concluded that the action was not well-founded, since the amount actually paid corresponded to the level of rent last designated by official regulation, even though this regulation was now obsolete as a result of the Constitutional Court judgment. The lessor appealed, on the basis that this decision was in conflict not only with the constitutional provisions, but also with the relevant statutory provisions; the regulation in question had, after all, not been an enactment implementing the Civil Code. In the lessor's view, the Civil Code provisions in question could not be applied, if there is no further legal enactment implementing them; rather the court should designate the usual rent as the amount of rent applicable. The appellate court put forward the view that, unless the Civil Code provides otherwise, a contractual relationship cannot be modified without the agreement of both parties. According to the relevant provisions of the Civil Code, however, the manner of calculating rent, as well as further conditions of a rental agreement, can be laid down in separate legal enactment. The Court therefore petitioned the Constitutional Court to annul the relevant Civil Code provisions.

The appellate court pointed to an imbalance in the existing legal regulation of property rental. There are provisions in place to protect the rights of lessees, but not those of lessors. This affords a unilateral advantage to lessees. It also suggested that the gap in legislation alone resulted in an unconstitutional situation, due to the fact that the legal rules envisaged had yet to be adopted.

II. The Constitutional Court concluded that there were no grounds for annulling the affected provisions of the Civil Code. The wording of the Civil Code, which simply anticipates the adoption of additional rules, is not unconstitutional; what is unconstitutional is long-term inactivity of the legislature, resulting in constitutionally unacceptable inequality and ultimately in the violation of constitutional principles.

The nature of a lease – including the lease of a flat – within the law of obligations, presupposes the maximum scope for the assertion of the autonomy of the will and the freedom of contract of the parties to the lease. Unilateral interventions are of legal relevance only where there is explicit statutory provision for them. De lege lata the possibility for the unilateral increase in the rent is one of those interventions, limited by the conditions under which the lessor may modify the previously negotiated or designated rent. Such rules have commonly been given the designation of “the regulation of rent”. The absence of the envisaged legislation results in the situation where a change in the content of the lease is, for the duration of the lease, a matter for agreement between the parties to the lease. Should no such agreement be reached, then, because of the legislature’s inaction, there is no legal way of achieving a modification through the lessor’s unilateral manifestation of intent.

As a consequence, regulated rent has effectively been frozen, a situation which further deepens the infringement of the property rights of the owners of those flats which are affected by regulation. The imbalance can only be redressed by the adoption of the legislation envisaged. By failing to adopt it, the legislative body has brought about an unconstitutional situation, namely a “sanctioned” inequality between lessors, who are able to lease flats for the customary rent, and lessors who are obliged to let their property for a rent in the amount which prevailed prior to the annulment of the rules on the regulation of flats.

As the protector of constitutionalism, the Constitutional Court cannot restrict its function to that of a mere “negative” legislator and needs to establish some scope for the maintenance of fundamental rights and basic freedoms. Ordinary courts must, even in the absence of specific rules, decide on the increase in rent, according to the local conditions, and in such a

way that it does not result in discrimination. As such cases will involve the ascertainment and application of ordinary law, over which the Constitutional Court has no competence, it declined to suggest a specific decision-making approach which could displace the ordinary courts in their mission. The Constitutional Court accordingly rejected the petition on the merits.

Languages:

Czech.



Identification: CZE-2006-1-002

a) Czech Republic / b) Constitutional Court / c) Plenary / d) 08.03.2006 / e) Pl. US 50/04 / f) g) h) CODICES (Czech).

Keywords of the systematic thesaurus:

1.3.4.14 **Constitutional Justice** – Jurisdiction – Types of litigation – Distribution of powers between Community and member states.
 2.2.1.6 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law.
 3.1 **General Principles** – Sovereignty.
 3.3 **General Principles** – Democracy.
 3.9 **General Principles** – Rule of law.
 3.10 **General Principles** – Certainty of the law.
 3.26.1 **General Principles** – Principles of Community law – Fundamental principles of the Common Market.
 3.26.2 **General Principles** – Principles of Community law – Direct effect.

Keywords of the alphabetical index:

Community law, application by member States / Community law, directly applicable / Community legislation, interpretation / Community law, precedence / Constitutionalism, Constitutional Court, protector.

Headnotes:

Even if member states implement Community policy by means of their own legislation, their discretion is limited by the overarching general principles of Community law, including the protection of

fundamental rights. As such rules are in the form of national law, they must simultaneously conform to the Czech constitutional order.

Although the Constitutional Court's terms of reference have remained, even since 1 May 2004, the norms of the Czech Republic's constitutional order, the Constitutional Court cannot entirely overlook the impact of Community law on the formation, application, and interpretation of national law, all the more so in a field of law where the creation, operation, and aim of its provisions is intrinsically bound up with Community law. In other words, in this field the Constitutional Court interprets constitutional law with reference to Community law principles.

In Judgment no. Pl. ÚS 11/02, the Constitutional Court formed the doctrine of the continuity of its own case-law, which it derived from the attributes of a democratic state based on the rule of law. There is no doubt that the Czech Republic's accession to the EC, or EU, resulted in a fundamental change to the Czech legal order. From that point, the Czech Republic assumed within its national law the entire mass of European law. Just such a shift occurred in the legal environment formed by sub-constitutional legal norms, which necessarily must have an impact on the entire existing legal order, including constitutional principles and maxims.

The Czech Republic's accession to the EU resulted in a transfer of powers from national organs to supra-national organs on the basis of Article 10a of the Constitution. This happened immediately when the Treaty establishing the European Community became binding on the Czech Republic.

This conferral of part of its powers is by nature conditional, as the original holder of sovereignty, and the powers that result from it, remains the Czech Republic, whose sovereignty is still based on Article 1.1 of the Constitution. The conditional nature of the delegation of these powers is manifested on both the formal and the substantive plane, on the power attributes of state sovereignty and the exercise of state power. In other words, the delegation of part of the powers of national organs may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of a state based on the rule of law. In such determination the Constitutional Court is called upon to protect constitutionalism (Article 83 of the Constitution). Article 9.2 of the Constitution provides that the essential attributes of a democratic state governed by the rule of law, remain beyond the reach even of the Constituent Assembly.

Direct applicability in national law and precedence in application follow from Community law doctrine as derived from the case law of the European Court of Justice. Membership of the European Union brings with it certain limitations on the powers of national organs in favour of Community organs. One manifestation of such limitation must necessarily also be a restriction on the freedom of member states to designate the effect of Community law in their national legal orders. Article 10a of the Constitution operates both ways: it forms the normative basis for the transfer of powers and is at the same time the provision of the Czech Constitution which opens the national legal order to the operation of Community law, including rules relating to its effects within the legal order.

Summary:

Before the Czech Republic joined the European Union on 1 May 2004, it regulated the sugar sector by a system of quotas, for which it employed a "key" to determine the amount of quota each individual producer was granted (the key provided a formula tied to a producer's output over a certain period of time – the reference period). Before the Czech accession, the government regulation containing this key was declared unconstitutional because it breached the principle of equality. Since the EC regulation left it to member states' discretion to determine the key, the post 2004 key for the Czech Republic was contained in Government Regulation no. 364/2004, "Laying Down certain Conditions for the Implementation of Measures of the Common Organisation of the Markets in the Sugar Sector" Just as the previous key had been, the Regulation contested in this case was alleged to breach equality because it employs, as a reference period, a period during which the earlier unconstitutional key was in effect.

Although the regulation is in a field governed by EC law (agriculture), determination of the "key" was left to the discretion of the member states. The Constitutional Court therefore took the view that Czech constitutional standards would apply to the exercise of this discretion. Nonetheless, the Court decided that in applying the national standards to the regulation, it would be guided by the general principles of law as laid down by the Court of Justice of the European Communities (ECJ), including fundamental rights. The Court analysed the standards for fundamental rights as set out by the ECJ and came to the conclusion that the key did not violate any fundamental rights. This conclusion was in conflict with its existing jurisprudence, which it is generally bound to follow. The Court determined that the Czech Republic's entry into the EU was such a

momentous change as to justify the application of one of the exceptions to the binding nature of its decisions. Accordingly the Court decided to depart from its earlier ruling and to align its position with that of the ECJ.

Before the Court was able to reach its decision, the government repealed the regulation contested in this case, and replaced it with a new regulation incorporating by reference the key at the centre of the dispute. The Court duly amended the petition and reviewed this new regulation instead. It found that the key did not violate equality or any other fundamental right. Nonetheless, it invalidated another of the regulation's provisions, which laid down that each quota holder's quota shall be reduced, as laid down in Article 1 of Commission Regulation (EC) no. 1609/2005. Citing the ECJ's settled case-law that Member States may not merely reproduce in a national law any norm contained in a regulation, the Court concluded that, in view of Article 10a of the Constitution (authorising the Czech Republic's transfer of authority to the EC/EU), the Government now lacks authority to regulate a matter fully regulated by an EC norm. Hence its attempt to regulate the reduction in this way is an *ultra vires* act in violation of the Constitution.

Languages:

Czech.



Identification: CZE-2006-1-003

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 14.03.2006 / **e)** PI.US 30/04 / **f)** / **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
 3.22 **General Principles** – Prohibition of arbitrariness.
 5.2 **Fundamental Rights** – Equality.

Keywords of the alphabetical index:

Equality, principle, tests / Equality, inequality, impact on human rights of others / Housing, lease / Payment, obligation / Payment, delay.

Headnotes:

Provision within a statute for something which is beneficial for one group but which imposes an incommensurate obligation on another is permissible only with reference to a public good. The Constitutional Court has rejected the absolutist concept of the equality principle; it has declared that the equality of citizens cannot be perceived as an abstract category, rather as relative equality, which is how the concept is understood in every modern constitution. The equality principle will now be scrutinised in the context of acceptability under constitutional law. The first perspective to be used will be the exclusion of arbitrariness; the second perspective will be the inequality it is said to have introduced, with an impact on the fundamental rights or freedoms of others.

There may be differences in sanctions affecting parties to a rental relationship. This does not automatically make it unconstitutional. Differences in the level of sanctions or different methods of calculating them may be justified under the principles of equality and proportionality.

Summary:

I. The petitioner, an ordinary court, sought the repeal of a provision of the Civil Code. A local authority launched proceedings in that court against one of its tenants, for rental payment and a late payment charge. The petitioner took the view that the Civil Code provision which should be applied in the resolution of the matter was at odds with the principle of equality of rights.

The contested provisions of the Civil Code impose different sanctions on each party in the case of delay. This, the petitioner argued, meant that the legislator's approach to their rights breached the principle of equality of the parties. If a lessee is in arrears with his rent or the service charges associated with his apartment, the lessor is entitled to demand a late payment charge from him. On the other hand, if the lessor is in arrears with the refund of overpaid rent, the lessee is only entitled to request default interest. There is a significant difference between default interest and the late payment fee.

II. The Constitutional Court considered whether the Constitution and in particular the equality principle allowed for the enactment of legislation allowing for sanctions for delay in paying rent or service charges which differ significantly from those which apply when it is the lessor who is late in paying refunds. The Constitutional Court has interpreted the content of the equality principle in a number of judgments. It has declared: "The state may need to furnish certain groups with less advantages than others, in the interest of safeguarding its functions. However, it may not proceed in an entirely arbitrary fashion. Provision within a statute for something which is beneficial for one group but which imposes an incommensurate obligation on another is permissible only with reference to a public good."

The Constitutional Court held that the contested provisions of the Civil Code should not be considered unconstitutional. Interest for delay and late payment charges, which constitute ancillary rights, can generally be described as mechanisms which increase legal certainty for creditors. A certain difference in the level of these sanctions or a different way of calculating them can, in the case in point, be justified under the principles of equality and proportionality. A differentiated approach to the parties to a rental agreement can be adopted. The lessor will have performed his primary duties (to make the flat available for use and enjoyment), but if the lessee has not paid the rent, then he will not have kept to his side of the bargain. The late payment charge as a sanction for delay in paying rent is not on a par with sanctions against the lessor for delay in refunding over-payment of rent. This duty of the lessor is not a basic component of the lease, rather it is of a secondary character.

The Constitutional Court accordingly ruled that the legislator did not act arbitrarily in introducing the contested provisions into the Civil Code. The provisions – and other subsidiary legislation – accorded preferential treatment to one group as against another but this neither infringed the constitutional principle of equality nor did it violate the principle of proportionality. The legal situation as between the lessors and the lessees is not of a discriminatory nature.

The Constitutional Court held that not only was there no contravention of the equality principle, but also that no other constitutional principles of the Czech Republic had been breached. The petition was therefore rejected on its merits.

Languages:

Czech.



Identification: CZE-2006-1-004

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 28.03.2006 / **e)** Pl. US 42/03 / **f)** **g)** / **h)** CODICES (Czech).

Keywords of the systematic thesaurus:

5.2 Fundamental Rights – Equality.

5.4.13 Fundamental Rights – Economic, social and cultural rights – Right to housing.

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

Keywords of the alphabetical index:

Lease / Housing, living premises, lease / Housing, lease / Justice, principle / Housing, market regulation / Housing, fair distribution.

Headnotes:

The protection of the lease of flats is a legitimate aim which justifies the restriction on the rights of the owner, as it contributes towards the realisation of the right to an adequate living standard. If the protection of leases on social grounds is legitimate for that reason, then it is clear that additional restrictions upon the owner of the property above and beyond those needed to satisfy the lessee's basic residential needs would not pass muster under the test of proportionality. If the statute restricted the owner's right of disposition to such an extent that he could not terminate the lease, even in a situation where the lessee's basic residential needs were quite adequately met, for example because he himself had several residential possibilities at a commensurate level, such a restriction would quite evidently be disproportionate to the intended objective. To the extent that, in addition to the protection of leases, this measure is motivated by the state's efforts to regulate the market in residential leases and to ensure a fair distribution of flats when there is excessive demand, that would not be a proportionate measure. Rules restricting the ownership of flats might allow a lessee to accumulate several flats or inappropriate use of the available supply of residential flats, with the result that flats would remain unused and unoccupied.

Summary:

The District Court sought the repeal of certain provisions of the Civil Code. A dispute had been brought before the District Court, between the lessees of a flat and a residential cooperative, and the court's consent to the termination of the lease was sought. The lessees had obtained rental rights to the flat but had never moved into it or made use of it. A notice to terminate was served because the lessees had not paid rent for a long time, they had several flats and had no valid reason not to make use of the flat.

The petitioner argued that the contested provisions of the Civil Code were in conflict with the Constitution and the Charter of Fundamental Rights and Basic Freedoms (hereinafter "Charter"). The problem the petitioner saw, in the context of the principle of equality, was that the legislator had made no distinction between cooperative flats and other types of flats, but instead imposed the same conditions for the termination of lease rights in the case of both. This resulted in lessees of cooperative flats being disadvantaged by comparison to lessees of other types of flats. In enacting this legislation, the legislator had infringed the rights of lessees of cooperative flats, because they were not applicable to leases of cooperative flats. The petitioner pointed out another unconstitutional aspect of the legislation. Under the law, a lessor of a cooperative flat may serve lessees with notice of termination on the grounds that they have more than one flat or that the lessee is not using the flat. This allows the lessor to intrude upon the lessee's private and family life, as well as his freedom of residence.

The Constitutional Court took the view that the main rationale behind the Civil Code in the context of tenancy law is the protection of leases, in effect, lessees. These peremptory rules place a considerable restriction on the lessor's freedom to act. The provisions being disputed do not impinge upon the lessee's freedom, as they do not prevent lessees from having more than two flats or dictate the use they make or do not make of their flats. The law simply allows the lessor to end a lease, under certain restricted conditions, only with consent from the court and only if he provides alternative accommodation for the person he is evicting. A lessor's freedom is considerably curtailed by comparison with that of a lessee, when a lease is terminated.

Repeal of the contested provisions would result in an even greater restriction of lessors' rights in favour of lessees. Each additional restriction on lessors' rights to terminate a lease could result in their property rights being transformed into a quasi-ownership right.

Each additional curtailment of the grounds upon which lessors may terminate a lease runs against the spirit of private law, as it deepens the inequality between the parties to private law relationships.

There is no difference, under sub-constitutional law, between the lease of a cooperative flat and the lease of a non-cooperative flat. The lessee, as a member of the cooperative, is a party to a lease relationship with the same rights and duties as apply to any other lease unless the law provides otherwise. The practical difference between these leases results from the fact that the lease of a cooperative flat derives primarily from the cooperative members' equity investment in the acquisition of a flat and their membership of the residential cooperative. Residence in a cooperative does not result from a lease but rather from the legally-detached relationship of the members of the cooperative (lessees) with the cooperative (lessor).

The provisions of the Civil Code on the lease of flats do not represent an encroachment upon the principle of equality, as this is not a case where distinctions are drawn between the rights and duties of lessees, but instead it concerns a comparison between leases of cooperative flats and those of other types of flats, to which the principle of equality does not apply. The objection of inequality cannot validly be made where the law prescribes the same conditions for all citizens who can be included within the sphere of the legislation in question. In considering the general principle of justice, the differentiating factor in leases of cooperative flats merits a restrictive interpretation of the contested grounds for termination. The legal rules provide sufficient grounds for such an interpretation. Ordinary courts may take into account the special character of leases in cooperative flats when they determine whether the grounds for the termination of a lease have been met. They would assess whether it can justly be asked of a lessee that he make use of only one flat or whether there are significant grounds for his either not making use of the flat at all or doing so only infrequently.

The Constitutional Court rejected the petition on its merits, having found no grounds for repealing the contested provisions of the Civil Code.

Languages:

Czech.



Identification: CZE-2006-1-005

a) Czech Republic / b) Constitutional Court / c) Plenary / d) 04.04.2006 / e) Pl. US 5/05 / f) / g) / h) CODICES (Czech).

Keywords of the systematic thesaurus:

1.4.5 **Constitutional Justice** – Procedure – Originating document.

1.4.10.4 **Constitutional Justice** – Procedure – Interlocutory proceedings – Discontinuance of proceedings.

1.6.3.1 **Constitutional Justice** – Effects – Effect *erga omnes* – *Stare decisis*.

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

Keywords of the alphabetical index:

Bankruptcy, gratuitous transfer of property before / Housing, property, private / Constitutional Court, decision, binding force.

Headnotes:

In that part of the Act on the Constitutional Court governing proceedings to repeal statutes or other legislation, it is stated that if a petition has not been rejected on preliminary grounds or if grounds for its discontinuance have not arisen during the proceedings, the Court must act to resolve the matter, even if no other petitions are submitted. The principle of officiality applies to this type of proceeding, and so there is no provision in the Act for the petitioner to withdraw the petition and discontinue the case.

Summary:

I. One of the ordinary courts petitioned for the repeal of certain provisions within the legislation governing relationships between co-owners in buildings and certain ownership rights over apartments and non-residential property (hereinafter described as “Act on Ownership of Flats”). The first instance judgment in this case, brought against a trustee in bankruptcy, rejected on the merits an action which sought the exclusion from the inventory of the bankrupt estate of a dwelling unit and a co-owned share in the land. It was suggested that the plaintiff had no *locus standi*. The adjudication of bankruptcy resulted in the proceedings on the entry into the land registry of the plaintiff's property rights being suspended, with the result that the bankrupt remained the owner of the property in question.

The petitioner argued that the provisions of the Act on Ownership of Flats were unconstitutional, in conflict with the principle of the equal protection of ownership and the prohibition on its misuse. The problem with the provisions was not so much the wording, more the gap in the legislation whereby the possibility of a bankrupt cooperative was not taken into consideration and the obligations of members of a cooperative were not set out. The provision enabled the bankrupt debtor to transfer property free of charge to members of the cooperative. The petitioner submitted that this could result in a constitutionally unacceptable inequality of bankruptcy creditors.

II. Having reviewed the matter on its merits, the Constitutional Court reached the conclusion that the petition was not well-founded.

Following the submission of the petition proposing the repeal of the contested provisions of the Act on Ownership of Flats, some legislative developments occurred. The legislator, complying with a previous decision by the Constitutional Court, explicitly introduced into the Act the principle of the legal continuity of a natural person's legal claims, as well as the manner in which they are to be settled by the trustee in bankruptcy. This amendment means that to the extent that the trustee of the bankrupt estate is obliged to offer appropriate subjects the transfer, free of charge, of a flat, this strengthens the claim that it was not possible to include in the bankrupt estate the flats which had in fact been transferred free of charge to members of the cooperative by a contract between the bankrupt and the members of the cooperative. In the case in point, it was clear that the first instance judgment was at odds with the Constitutional Court's previously-expressed view that the Act on Bankruptcy may not be applied in cases of transfer of dwelling units free of charge, because the gratuitous nature of the transfer is called for *ex lege* and has not been done of the bankrupt's free will.

It is not the task of the Constitutional Court to unify case-law. Rather, it must decide as to the compatibility of certain provisions with the Constitution or whether it is possible to interpret them in a way which complies with the constitution. Organs and private individuals alike are bound by the supporting grounds, emerging from constitutional analysis of the matter and contained in the judgment's reasoning, and this includes judgments rejecting on the merits petitions seeking the repeal of contested provisions of certain legislation.

The Constitutional Court Plenum found no grounds to depart from decisions it had arrived at previously. The legislation above provides that following an adjudication of bankruptcy, any of the bankrupt's legal

transactions effected in the six months prior to the submission of a petition to declare bankruptcy or following such submission but before bankruptcy is declared, are invalid in relation to creditors if they transfer property to other persons free of charge. The Constitutional Court stressed that this is not the case when a transfer of a dwelling unit takes place free of charge pursuant to the Act on Ownership of Flats. In such a case, the gratuitous nature of the transfer does not reflect an actual free-will decision by the bankrupt, but is called for *ex lege*. The Constitutional Court also reiterated that it is not absolutely bound by the literal wording of statutory provisions, and that there are occasions where it may and indeed must depart from them.

For the reasons enumerated above, the Constitutional Court concluded that the contested provisions were not unconstitutional and therefore rejected the petition on the merits.

Languages:

Czech.



Estonia Supreme Court

Important decisions

Identification: EST-2006-1-001

a) Estonia / **b)** Supreme Court / **c)** En banc / **d)** 12.04.2006 / **e)** 3-3-1-63-05 / **f)** Appeal of Beate and Thomas Bodemann against Decision no. 12421 of the Tallinn City Committee for Return of and Compensation for Unlawfully Expropriated Property / **g)** *Riigi Teataja III (RTI)* (Official Bulletin), 2006, 19, 176 / **h)** <http://www.riigikohus.ee>; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

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

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

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

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

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

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

Keywords of the alphabetical index:

Decision, partial / Judgment, execution, conditions / Restitution in relation to privatisation / Unconstitutionality, declaration / Ownership, reform / Property, unlawfully expropriated, return / Person, resettled / International agreement, return of expropriated property.

Headnotes:

It is primarily up to the executive and the legislator to decide upon the best way of resolving the issues of return, compensation or privatisation as regards property expropriated from the persons who had left Estonia on the basis of an agreement between the Soviet Union and the German state. Whatever decision is reached, further legislation will be needed,

to resolve various practical issues. The General Assembly of the Court cannot usurp parliament's role and decide upon possible solutions and draft the pertinent legal regulations required. It is reasonable to give the legislator time to resolve such issues.

Where it is not clear which law should be applied, the Court may make a partial decision and continue the proceedings once the unconstitutional provision has been amended or declared invalid.

Summary:

There had been a long period of uncertainty as to whether unlawfully expropriated property of persons who resettled under treaties concluded with the German state should be returned. This was found to have violated the general prohibition of arbitrariness and the fundamental right to procedural fairness, and to be contrary to the principle of legal certainty. It had also had an adverse impact on the present occupiers of the property, as their right to take it into private ownership depended on whether those who resettled were entitled to the return of their property.

No steps had been taken by the legislator for a considerable length of time to rectify these problems. Section 7.3 of the Republic of Estonia Principles of Ownership Reform Act (referred to here as "PORA"), which had already been declared unconstitutional, would have to be declared null and void, if parliament failed to resolve the problem within six months.

In 2002, the Tallinn City Committee for Return of and Compensation for Unlawfully Expropriated Property (referred to here as "the City Committee") repealed its decisions of 1993 and 1994, which resulted in the return of a residential house and a plot of land to U. Hamburg, the son of its former owner.

The rationale behind the repeal was that J. Hamburg, the former owner, had left Estonia on the basis of an agreement between the Soviet Union and the German state. Article 7.3 of PORA provides for the return of or compensation for unlawfully expropriated property to persons who left Estonia on the basis of agreements made with the German state only on the basis of an international agreement. No such agreement had been entered into at the time of the decision.

U. Hamburg died in 2001. His successors were B. and T. Bodemann.

Article 7.3 of PORA, which was declared unconstitutional by the General Assembly of the

Supreme Court on 28 October 2002, is pivotal to the case.

In that judgment, the General Assembly argued that Article 7.3 of PORA was unconstitutional because the legislator had failed in its duty to set out clearly the rights of persons who resettled in Germany on the basis of an agreement entered into in 1941 and the rights of the persons occupying the property. Article 14 of the Constitution deals with the responsibility for the guarantee of rights and thus the executive and legislative powers are required to achieve a clear political agreement concerning the return of property both to the resettlers whose property was unlawfully expropriated and to their successors, and to those who occupy the property on the basis of tenancy agreements. The Court declared that Article 7.3 of PORA was in conflict with Articles 13.2 and 14 of the Constitution.

The General Assembly of the Supreme Court did not declare Article 7.3 of PORA invalid in 2002. Instead, it declared it unconstitutional and required that the legislator should amend it so that it conformed to the principle of legal clarity. This would overcome the problem of legal ambiguity. Until the Act was amended, no decision could be taken on the return of or compensation for resettlers' property.

Estonia and Germany had not entered into an international agreement to resolve the issue and the provision had not been amended since the judgment was handed down in 2002.

The General Assembly is still of the opinion that Article 7.3 of PORA is unconstitutional.

The only way to put an end to this unconstitutional situation, which has lasted for years, is to declare Article 7.3 of PORA invalid. This would clarify the legal situation not only of the resettlers but also of the lessees of the unlawfully expropriated residential buildings that had belonged to the former. Applications for the return of or compensation for the property on the part of the resettlers, as well as applications by the lessees of buildings, which had been in the ownership of the resettlers, would now have to be processed.

Under Section 58.3 of the Constitutional Review Court Procedure Act, the Supreme Court may postpone for a maximum of six months the entry into force of a judgment invalidating legislation of general application or a provision of such legislation.

The General Assembly may delay the entry into force of the declaration of invalidity of Article 7.3 of PORA for the following reasons:

It is primarily up to the executive and the legislator to decide upon the best way of resolving the issues of return, compensation or privatisation as regards property expropriated from the persons who had left Estonia on the basis of an agreement between the Soviet Union and the German state. Whatever decision is reached, further legislation will be needed, to resolve various practical issues.

The General Assembly of the Court cannot usurp parliament's role and decide upon possible solutions and draft the pertinent legal regulations required. It is reasonable to give the legislator time to resolve such issues.

The resolution of the appeal in cassation of B. and T. Bodemann will be possible once the General Assembly is clear as to which substantive law must be applied. The Court will accordingly deliver a partial judgment and will resume its hearing of the matter following the amendment or the repeal of Article 7.3 of PORA.

There were two dissenting opinions.

Cross-references:

- 3-4-1-5-02, *Bulletin* 2002/3 [EST-2002-3-007].

Languages:

Estonian, English.



Identification: EST-2006-1-002

a) Estonia / **b)** Supreme Court / **c)** Constitutional Review Chamber / **d)** 11.05.2006 / **e)** 3-4-1-3-06 / **f)** Opinion of the Constitutional Review Chamber of the Supreme Court on the Interpretation of Section 111 of the Constitution / **g)** *Riigi Teataja III (RTI)* (Official Bulletin), 2006, 19, 176 / **h)** <http://www.riigikohus.ee>; CODICES (Estonian, English).

Keywords of the systematic thesaurus:

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

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

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

4.10.4 **Institutions** – Public finances – Currency.

4.10.5 **Institutions** – Public finances – Central bank.

Keywords of the alphabetical index:

Constitution, amendment / European Community, law, application, uniformity, primacy / Central bank, powers, exclusive / Currency, issuance.

Headnotes:

Under Section 2 of the Constitution of Estonia Amendment Act (hereinafter referred to as “Constitutional Amendment Act”), after Estonia's accession to the European Union, in the spheres of exclusive competence of the European Union or shared competence, the Estonian Constitution is applicable only to the extent that it is compatible with European Union law. The legal effect of those provisions of the Constitution which are not compatible with the European Union law is suspended.

Section 111.1 of the Constitution, which bestows exclusive powers on the Estonian Bank to issue national currency, is not compatible with Article 106 EC and will not, therefore, be applicable once Estonia becomes a full member of the economic and monetary union. The powers of the Estonian Bank will then be derived from Article 106 EC.

Consequently the Bank of Estonia shall not have the exclusive right to issue Estonian currency or the right to issue the Estonian kroon once Estonia has gained full membership of the economic and monetary union.

Summary:

I. Several members of parliament submitted to parliament a draft Act amending the Bank of Estonia Act (hereinafter referred to as the “draft Act”). Its aim was to alter the objectives and functions of the Bank of Estonia and the regulations covering the issue of banknotes and coins with a view to enabling the adoption of the euro, the single currency of the European Union, once Estonia becomes a full member of the economic and monetary union.

Under Article 4 of the Accession Act and Article 122.2 EC, Estonia must adopt the single currency. Once it

is a full member of the economic and monetary union, Estonian currency will be withdrawn from circulation, and, pursuant to Article 106.1 EC, the European Central Bank will have the exclusive right to authorise the issue of banknotes within the Community. However, Section 111 of the Constitution gives the Bank of Estonia the sole right to issue Estonian currency, and authorises it to regulate currency circulation and to uphold the stability of the national currency. Section 2 of the Constitutional Amendment Act establishes that with effect from Estonia's accession to the European Union, the Constitution shall be applied, taking account of the rights and obligations arising from the Accession Treaty.

The parliament expressed some doubts as to how the Constitution should be applied in these circumstances but recognised the importance of its correct application in the light of the adoption of the draft Act. It accordingly sought the opinion of the Supreme Court as to whether it would be possible to interpret Section 111 of the Constitution in conjunction with the Constitutional Amendment Act and the European Union law to the effect that:

1. under the conditions of full membership of the economic and monetary union, the Bank of Estonia shall have an exclusive right to issue Estonian currency;
2. under the conditions of full membership of the economic and monetary union the Bank of Estonia shall retain the right to issue the Estonian kroon.

II. The Constitutional Review Chamber of the Supreme Court decided that the petition of the parliament was admissible under Section 7.1 of the Constitutional Review Court Procedure Act, as the interpretation of Section 111.1 of the Constitution was decisive for the adoption of the draft Act, an Act necessary for the fulfilment of an obligation as a member of the European Union.

The Chamber began by clarifying as follows the implications of the Constitution of the Republic of Estonia Amendment Act for the Estonian constitutional order.

The Constitution was amended using the model of constitutional amendment under which amendments to the Constitution are enacted as separate constitutional acts and the provisions of the Constitution are not formally changed. At the same time, the text of the Constitution must always be read with the amendments and only that part of the constitutional text shall be applied, which is not in conflict with the amendments.

Thus, the Constitution must be read together with the Constitutional Amendment Act applying only the part of the Constitution that has not been amended.

As a result of the adoption of the Constitutional Amendment Act, European Union law became one of the grounds for the interpretation and application of the Constitution.

This has amounted to a material amendment of the Constitution in its entirety to the extent that it is not compatible with the European Union law. To determine which part of the Constitution is applicable, it must be interpreted in conjunction with the European Union law, which became binding upon Estonia through the Accession Treaty. In spheres of exclusive competence or shared competence with the European Union, European Union law shall apply where there is conflict with the Estonian legislation, including conflict of the Constitution with the European Union law. The effect of any provisions of the Constitution that are not compatible with European Union law, and thus inapplicable, is suspended.

By virtue of Article 2 of the Constitutional Amendment Act, Article 111 of the Constitution must be construed in conjunction with Article 106 EC.

These provisions cannot be applied simultaneously, and accordingly Article 111 of the Constitution shall not be applied. Article 106 EC shall apply.

Thus, once Estonia becomes a full member of the economic and monetary union, the Bank of Estonia may issue euro banknotes with the authorisation of the European Central Bank and euro coins in the volume prescribed by the European Central Bank, and the euro shall be the sole legal tender within Estonia.

Consequently, the answer of the Constitutional Review Chamber to both of the parliament's questions is in the negative.

There were two dissenting opinions.

Languages:

Estonian, English.



France

Constitutional Council

Important decisions

Identification: FRA-2006-1-001

a) France / **b)** Constitutional Council / **c)** / **d)** 19.01.2006 / **e)** 2005-532 DC / **f)** Act introducing anti-terrorism measures and various provisions on border security and control / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 24.01.2006, 1138 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

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

5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.

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

5.3.36.3 **Fundamental Rights** – Civil and political rights – Inviolability of communications – Electronic communications.

5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Police, administrative control / Police, criminal authority, judicial supervision / Freedom of movement / Terrorism, prevention / Vehicle, automated surveillance system / Vehicle, passenger, photograph / Data, traffic, electronic connection.

Headnotes:

1. The requisitioning, permitted by Section 8 of the Anti-Terrorism Act, of technical connection data deriving from electronic communications, comes under the exclusive responsibility of the executive and constitutes an administrative control measure. Thus it can serve no other purpose than to maintain public order and prevent lawbreaking. Consequently, in specifying that it is meant not only to prevent but also to prosecute acts of terrorism, the legislator has disregarded the principle of separation of powers. These data can already be obtained by the police and

gendarmerie forces in pursuance of the provisions of the Code of Criminal Procedure in the context of criminal investigations to detect offences against criminal law, collect evidence thereof, or track down the culprits.

The requisitioning procedure, instituted under Section 8 of the Anti-Terrorism Act, for technical connection data deriving from electronic communications is hedged with restrictions and precautions that suffice to reconcile respect for individual privacy, which is protected by Article 2 of the Declaration of the Rights of Man and of the Citizen of 1789, and operators' freedom of enterprise, protected by Article 4 of the Declaration of the Rights of Man and of the Citizen of 1789, with the prevention of acts of terrorism, furthered by the procedure in question.

2. Given the aims which the legislator set out to achieve and all the guarantees provided, the procedure for automated collection of data concerning vehicles instituted by Section 8 of the Anti-Terrorism Act is capable of reconciling respect for privacy and maintenance of public order without manifest imbalance.

3. According to Article 6 of the Declaration of the Rights of Man and of the Citizen of 1789 in conjunction with various provisions of the Constitution, it must be possible for the right of amendment appertaining to members of parliament and to the government alike to be fully exercised during the first reading of the draft legislation and private members' bills which each of the two chambers conducts. At that stage of the procedure, the right cannot be limited except by the need for an amendment not to be totally unconnected with the object of the text tabled in the first chamber to which it is referred. Additions or alterations made after the first reading by the members of parliament and by the government must be directly related to a provision still under discussion.

Summary:

The challenged Act "introducing anti-terrorism measures and various provisions on border security and control" appeared as a technical adjunct to the legislation in force (arising from the Act of 9 September 1986 on prevention of terrorism and attacks against State security).

1. The applicants contested Section 6 of the Act permitting duly authorised police and gendarmerie officers to secure the disclosure, by administrative requisition, of certain data designated "traffic-related" from electronic communications operators, suppliers

of on-line services and “cyber-café”, to the exclusion of the actual content of the exchanges. These data could already be consulted by the national police and gendarmerie albeit solely in a judicial context. The novelty was thus to allow, subject to certain precautions, the collection and rapid verification of operational information upstream in the context of a police operation. There arose the problem of the relationship between administrative control for preventing crime, criminal police authority for its prosecution (placed under judicial supervision) and personal freedom.

The applicants contended that the system instituted by Section 6 interfered with individual freedom and therefore could only be a criminal police matter.

The Council firstly recalled that a plain requisition procedure for technical data was unlikely to cause any interference with individual freedom (within the meaning of Article 66 of the Constitution), construed as *habeas corpus*.

Furthermore, it was for the legislator to ensure that prevention of disturbances of public order, essential to the protection of constitutional rights and principles status, was reconciled with the exercise of the constitutionally guaranteed freedoms, protection of privacy among them, forming another component of personal freedom, or the operators' freedom of enterprise, protected respectively by Articles 2 and 4 of the Declaration of the Rights of Man and of the Citizen of 1789. The precautions and limitations prescribed by the legislator were such as to ensure this reconciliation in the instant case.

However, Section 6 was intended not only to prevent but also to prosecute acts of terrorism (whereas the requisitioning machinery already existed, furthermore under the supervision of the judicial authority as prescribed by the Code of Criminal Procedure). This provision therefore infringed the constitutional principle of separation of powers, and so the Council rejected the words “and punish” contained in the impugned provision.

This rejection need not prevent the administrative authority from informing the judicial authority when the operations conducted brought a crime or offence to light.

2. The applicants also contested Section 8 permitting vehicles and their occupants on certain road links to be automatically photographed and the photographs to be provisionally recorded for purposes of collation with the files of stolen or reported vehicles. Such a system was already prescribed by the Act of 18 March 2003 on internal security permitting the

installation, at all suitable points of the territory, particularly in frontier, harbour or airport zones, as well as on major transit routes, of fixed or mobile automated devices for verifying vehicle descriptions, in combination with the national police and gendarmerie record of stolen vehicles.

Section 8 of the contested Act extended the scope of this system to action against terrorism and organised crime, to customs offences of laundering, and to smuggling. It authorised the photographing and recording not only of vehicle registrations as before but also of passengers, and allowed connection with the “Schengen information system”.

The principal complaint concerning respect for privacy was dismissed by the Council, which valued the utility of this apparatus and the guarantees and precautions applied by the legislator for the exercise of the freedoms secured by the Constitution. Noting the limitations imposed as to the purposes of the apparatus, its confidentiality and the data retention period, the Council perceived no manifest imbalance in the reconciliation of respect for privacy with maintenance of public order. The shots of passengers in particular did not constitute a search criterion and were only accessible to the officers controlling the processing in the event of a positive correlation with the stolen vehicles file or the Schengen system. In that event, and then only if criminal or customs proceedings ensued, these shots could be retained no longer than one month according to the express requirements of the Act on data processing and freedoms.

3. Lastly, the applicants considered various provisions introduced by amendment to be out of place in the challenged Act because they were not germane to its object (suppression of terrorism). This was the case, they claimed, with Section 19 concerning trade union representation of the corps of national police officers on the joint administrative commissions.

This provision was indeed unconnected with the other provisions of the initial text according to the Council's case-law on the exercise of the right of amendment, and could only be rejected.

However, this rejection also gave the Council occasion to formulate a recital of principle which raised its constitutional standards with regard to the movement of texts between the houses of parliament. While it should be possible for the right of amendment to operate fully at the first reading, subject to the condition of not being totally unconnected with the initial text, henceforth amendments tabled from the second reading onwards (by members of the

parliament or by the government) would need to be directly related to a provision still under discussion. This rule did not operate in the instant case since Section 19 would have been rejected at all events, but formally established the applicability to second readings of the rule known as the “funnel” (*entonnoir*), already foreshadowed in the rules of procedure of the chambers, and stood as a warning to the legislator for the future. Formerly the restriction of amendments to those directly connected with provisions still under discussion only applied in the final phase after the joint committee, responsible for reaching a compromise if the two chambers disagreed, had met.

Cross-references:

- Decision no. 86-213 DC of 03.09.1986;
- Decision no. 2003-467 DC of 13.03.2003, *Bulletin* 2003/1 [FRA-2003-1-003];
- Decision no. 2004-496 DC of 10.06.2004, *Bulletin* 2004/2 [FRA-2004-2-004];
- Decision no. 2004-501 DC of 05.08.2004, *Bulletin* 2004/2 [FRA-2004-2-008].

Languages:

French.



Identification: FRA-2006-1-002

a) France / **b)** Constitutional Council / **c)** / **d)** 16.03.2006 / **e)** 2006-533 DC / **f)** Act on wage parity between women and men / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 24.03.2006, 4446 / **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.

3.18 **General Principles** – General interest.

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

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

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

Keywords of the alphabetical index:

Law, Trojan horse / Gender, quota, constitutionality / Prescriptive interpretation.

Headnotes:

1. It must be possible for the right of amendment appertaining to members of parliament and to the government alike to be fully exercised during the first reading of the draft legislation and private members' bills by each of the two chambers. At that stage of the procedure, and in accordance with the requirements of clarity and sincerity of parliamentary debate, it cannot be limited except by the rules of admissibility and by the need for an amendment not to be totally unconnected with the object of the text initially tabled. The amendment authorising the National Cinematographic Centre to recruit staff without tenure under contracts of indefinite duration was totally unconnected with a bill which, when tabled in the National Assembly, only comprised measures relating to gender equality at work. It was adopted according to an unconstitutional procedure.

Additions or alterations made to draft legislation and private members' bills after the first reading by the members of parliament and by the government must be directly related to a provision still under discussion. However, this obligation does not apply to amendments intended to ensure compliance with the Constitution, to achieve co-ordination with texts under consideration or to rectify a factual error. The amendment under which holders of an employment contract would be permitted to perform a temporary work assignment in another enterprise, adopted at the second reading, was not directly linked with a provision still under discussion at that stage of the procedure. It was adopted according to an unconstitutional procedure.

2. Although under the terms of the fifth paragraph of Article 3 of the Constitution “The law shall foster equal access for women and men to electoral mandates and elected office”, it transpires from the parliamentary papers that this clause applies solely to elections to political mandates and offices.

Striving for balanced access by women and men to responsibilities other than elected political offices is not contrary to the constitutional requirements arising from Articles 1 and 6 of the Declaration of the Rights of Man and of the Citizen of 1789, paragraph 3 of the Preamble to the Constitution of 1946 and Articles 1 and 3 of the Constitution of 1958. In so doing, however, the consideration of gender cannot be placed before that of abilities and the common good

without infringing these provisions. Therefore it is not permissible under the Constitution for the composition of the managerial or consultative bodies of public or private law entities to be governed by binding rules founded on the gender of individuals.

Of its own motion, the Council declared contrary to the principle of equality before the law the provisions stipulating compliance with specified ratios between women and men on the administrative and supervisory boards of public sector enterprises, in works committees, among staff representatives, and in lists of candidates for the employment tribunals and the joint bodies of the civil service.

Likewise of the Council's own motion, the provisions designed to promote balanced access of women and men to the various branches of vocational training and apprenticeship, by the fact that they invited the regions to take this objective into account when drawing up the regional vocational training plan, were deemed not to infringe the constitutional requirements provided that they did not have the effect of giving gender precedence over abilities.

Summary:

Conceived in order to move French society forward in the field of gender equality at work, the Act on wage parity between women and men not only dealt with the wage question but also sought to break down the material impediments operating to the detriment of women in the world of work (protection against discrimination on the ground of pregnancy, maternity leave and parental leave in particular).

1. The members of parliament bringing the application objected to the legislative procedure followed for the adoption of two provisions. They submitted that Section 30 (supplementing the Film Industry Code by permitting the National Cinematographic Centre to recruit staff without tenure under contracts of indefinite duration) was totally unconnected with the initial object of the bill and constituted a Trojan horse (*cavalier législatif*). In accordance with its consistent practice, the Council was obliged to reject this provision. Also challenged was Section 14 of the Act, forming part of four additional sections introduced at the 2nd reading and according to an improper procedure in not being directly linked with a provision still under discussion. The Council was thus prompted to apply for the first time the recital of principle formulated in its landmark decision of 19 January 2006 (“funnel” rule) and to note the unlawfulness of the procedure for adopting this new provision. For the same reason, it rejected the three other additional sections, examined of its own motion.

2. On the merits, although the application made no criticism in this regard, the Act raised an important constitutional question: whether certain measures of “positive discrimination”, introducing quotas according to gender, were compatible with the principle of equality.

Title III in fact comprised provisions stipulating the observance of hard and fast ratios between women and men in the composition of the administrative and supervisory boards of public establishments, public enterprises and public sector companies, as well as in the administrative and supervisory boards of private sector companies, by providing that the proportion of representatives of each sex must not exceed 80%. This title also required the employees' representatives on the works committee and the staff delegates in private sector companies, as well as the staff representatives in the joint administrative commissions of the public sector, to be elected from lists of candidates “conforming with a tolerance of one unit to the ratio of women and men among the employees electing them”. Five years' grace was allowed for the bodies concerned to bring themselves into line with these stipulations, which simultaneously modified the Commercial Code, the Labour Code and the civil service regulations. Finally, for the next reconstitution of the employment tribunals, the organisations putting up lists of candidates were enjoined to reduce by one-third compared to the previous ballot the disparity between the under-represented gender's level of representation in the lists and its actual percentage of the electorate, “using methods conducive to progression of the percentage of elected officers belonging to the least represented sex”. In accordance with the consistent position on “quotas” and “positive discrimination”, the Constitutional Council, of its own motion, tested the conformity of these provisions to the principle of equality. Article 3 of the Constitution, as amended in 1999 to allow the introduction of parity in the political assemblies, provides that “The law shall foster equal access for women and men to electoral mandates and elected office” but, as the Council observed, only applies to elections to political mandates and offices. The Council relied on Articles 1 and 6 of the Declaration of the Rights of Man and of the Citizen of 1789, the third paragraph of the Preamble to the Constitution of 1946 (“The law shall secure to women, in every sphere, equal rights with men”) and Article 1 of the Constitution, providing that the Republic shall ensure all citizens' equality before the law without distinction as to origin. While striving for balanced access of women and men to responsibilities – other than elected political office – was not contrary to constitutional requirements, it could not, short of infringing them, allow the consideration of gender to

outweigh that of abilities and the common good. By imposing specified ratios between women and men for the composition of the managerial, deliberative or consultative bodies of private or public law entities, the election of staff representatives and the lists of candidates to the industrial relations tribunals and the joint commissions of the civil service, the legislator had infringed the principle of equality before the law. The Council therefore rejected all the provisions of Title III introducing "quotas according to sex", and the implementing provisions inseparable from the former.

Title IV of the Act, unlike the foregoing title, being designed to foster parity in the various branches of vocational training and apprenticeship, did not lay down any hard and fast ratios. Its provisions simply encouraged the regions to take the objective of balanced access to the various branches of vocational training and apprenticeship into account under the regional vocational training plan and in the formulation of the contract on training goals between the State and the regional authorities. They could not have the effect of making the consideration of gender outweigh that of abilities. With that proviso as to their interpretation, the Council deemed them not contrary to the principle of equality, and specifically to the principle of equal access to education proclaimed by the 13th paragraph of the Preamble to the Constitution of 27 October 1946 providing that "The Nation guarantees the equal access of children and adults to education, vocational training and culture".

Cross-references:

- Decision no. 2001-445 DC of 19.06.2001, *Bulletin* 2001/2 [FRA-2001-2-005];
- Decision no. 2001-455 DC of 12.01.2002, *Bulletin* 2002/1 [FRA-2002-1-001];
- Decision no. 2005-532 DC of 19.01.2006, *Bulletin* 2006/1 [FRA-2006-1-001].

Languages:

French.



Identification: FRA-2006-1-003

a) France / **b)** Constitutional Council / **c)** / **d)** 16.03.2006 / **e)** 2006-534 DC / **f)** Act on re-employment and rights and duties of recipients of income support / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 24.03.2006, 4443 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Government, delegated legislation, procedure / Parliament, legislative hiccup / Government order.

Headnotes:

While under Article 38 of the Constitution the government alone may ask the parliament for permission to take measures normally within the legislative sphere by issuing orders, the government has the possibility of doing this by tabling either a bill or an amendment to a text before parliament.

It is not to be inferred either from Article 38 of the Constitution or from any other provision thereof that an amendment authorising the government to take measures normally within the legislative sphere by issuing orders cannot be tabled before the second chamber to which a text is referred, even immediately before the parliament-senate joint commission meets to reconcile their respective positions on the text.

Article 38 of the Constitution requires the government to give the parliament a clear indication, in order to justify its request to issue an order, of the purpose and field of action of the measures which it proposes to take by this means. However, it does not compel the government to inform the parliament of the content of the orders which it will issue by virtue of this empowerment.

Summary:

The Act on re-employment and rights and duties of recipients of income support sought to simplify and to render financially more attractive the re-employment of persons in precarious circumstances.

1. The applicants contested Section 32, arising from a government amendment and empowering the latter to institute by order an occupational conversion contract. Indeed, under the terms of Article 38 of the Constitution, the government may, in order to carry out its programme, ask parliament to authorise it for a limited period to take measures normally within the legislative sphere by issuing orders. The applicants considered the procedure followed unlawful and contended that a government initiative concerning an authorisation to take certain measures by issuing an order must of necessity be in the form of a bill and be debated by both chambers. This amendment had in fact been adopted in the Senate at the single reading before the joint committee met (urgent examination). Yet there was no constitutional provision justifying such a contention even though the applicants thereby fittingly drew attention to the fact that empowerment by amendment under urgent procedure was unsatisfactory from the standpoint not only of representative democracy but also of good legislative practice. Furthermore, while Article 38 of the Constitution required the government to indicate precisely the purpose and field of action of the measures to be taken by order, it did not compel the government to inform the parliament of the content of the orders which it would issue by virtue of this empowerment. In the case in point, the purpose of the authorisation given to the government, namely assisting the re-employment of persons made redundant, and the field of action of the order, were defined with sufficient exactitude to meet the requirements of the Constitution. Lastly, this amendment, intended to promote the re-employment of persons made redundant, was not totally unconnected with the initial object of the bill, concerned with the re-employment of persons in still more serious difficulty – recipients of income support.

2. However, the Council examined of its own motion the legislative procedure followed for the adoption of Section 31, not challenged by the applicants. This section, which related to overtime arrangements in small companies, arose from a parliamentary amendment seeking to redefine the transitional rules laid down by the Act of 19 January 2000 on the negotiated reduction of working time. It unexpectedly overrode an apparatus which had nevertheless been reformed, after thorough discussion, by the Act of 31 March 2005. A fresh illustration of the “legislative hiccup” phenomenon deplored by the President of the Constitutional Council Mr Mazeaud in his address of greetings to the Head of State on 3 January 2005, it was totally unconnected with a text which, when tabled in parliament, solely comprised measures to promote the re-employment of recipients of income support. The Council therefore rejected it of its own motion.

Cross-references:

- Decision no. 76-72 DC of 12.01.1977;
- Decision no. 2005-521 DC of 22.07.2005, *Bulletin* 2005/2 [FRA-2005-2-006].

Languages:

French.



Identification: FRA-2006-1-004

a) France / **b)** Constitutional Council / **c)** / **d)** 30.03.2006 / **e)** 2006-535 DC / **f)** Equal Opportunities Act / **g)** *Journal officiel de la République française – Lois et Décrets* (Official Gazette), 02.04.2006, 4964 / **h)** CODICES (French).

Keywords of the systematic thesaurus:

- 1.3.1 **Constitutional Justice** – Jurisdiction – Scope of review.
- 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.
- 3.4 **General Principles** – Separation of powers.
- 3.18 **General Principles** – General interest.
- 4.5.6.4 **Institutions** – Legislative bodies – Law-making procedure – Right of amendment.
- 5.2.1.2 **Fundamental Rights** – Equality – Scope of application – Employment.
- 5.3.13.20 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Adversarial principle.
- 5.4.3 **Fundamental Rights** – Economic, social and cultural rights – Right to work.
- 5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Employment, contract, first job / Sanction, administrative / Composition under criminal procedure.

Headnotes:

The circumstance that several procedures prescribed by the Constitution were used cumulatively to speed up the examination of a tabled bill is not in itself apt to render unconstitutional the entire legislative procedure that led to its adoption. The combined use of the various provisions of the Senate's rules of procedure to regulate the exercise of the right of amendment cannot have the effect of invalidating the legislative procedure.

It rests with the legislator, vested by Article 34 of the Constitution with competence to determine the fundamental principles of labour law, to lay down rules in accordance with the fifth paragraph of the Preamble to the Constitution of 1946 that will secure the right for every person to obtain employment and the general exercise of that right, where appropriate by endeavouring to remedy insecurity of employment.

No principle or rule with constitutional force prevents the legislator from taking such measures as may assist underprivileged categories of people. Therefore, considering the precariousness of the position of the most poorly qualified young people on the labour market, it was permissible for the legislator to create a new employment contract with the purpose of aiding their occupational integration. The resultant differences in treatment are directly linked with the aim pursued for the common good and are therefore not unconstitutional.

By restrictively specifying the articles of the Labour Code which are not to operate during the first two years of the "first job contract", and by prescribing special rules on its termination, the legislator has defined, with sufficient clarity, the legal rules that govern it and has not exceeded the limits of legislative authority.

Neither the fifth paragraph of the Preamble to the Constitution of 1946 (right to employment) nor any principle or rule with constitutional force are transgressed by the possibility allowed the employer not to give prior notice of the grounds for terminating a "first job contract" during the first two years thereof.

The Constitutional Council does not have general assessment and decision-making powers of the same kind as those of parliament, and so has not to enquire whether the aim which the legislator set out to achieve could be achieved by other means, given that the procedures laid down by the contested Act are not manifestly at variance with the aim pursued.

When asked to make a ruling pursuant to Article 61 of the Constitution, it does not rest with the

Constitutional Council to consider whether a statute complies with the stipulations of an international treaty or agreement (International Labour Convention no. 158 and the European Social Charter), or to determine the compatibility of a statute with the provisions of a Community Directive where its purpose is not to transpose that Directive.

The legislator did not infringe the principle of separation of powers by prescribing, in the Code of Criminal Procedure, that for certain administrative offences damaging to a municipality, the mayor may suggest to the culprit a compromise agreement such as will stay the prosecution, on the understanding that it has not been stated and that the judicial authority responsible for confirming the agreement reached is not bound either by the mayor's offer or by the culprit's acceptance of it. The complaints of violation of the right to a fair hearing and the rights of the defence are unfounded in this case since the compromise agreement presupposes the culprit's free and unequivocal agreement and is not intrinsically enforceable.

Summary:

The Equal Opportunities Act, devised in the wake of the November 2005 urban riots to address the issue of the French "social fracture", was the subject of stormy debates, chiefly concerning the *contrat de première embauche (CPE)* (first job contract). In the end this was to be rescinded shortly after the enactment of the law.

1. The applicants firstly complained of the government's introducing a Section 8 (instituting this contract) by means of an amendment, and of the conditions of passage of the bill which had been examined under an urgent procedure after the government availed itself of the procedure to request a single vote on its own amendments in the National Assembly, in combination with a prior question to the Senate.

The Council recalled that the scope of amendments did not affect the right to move them. Furthermore, while it was true that the National Assembly members' right of amendment had been curtailed, the government's recourse to several procedures prescribed by the Constitution was not in itself apt to render this course of action unconstitutional. With reference to the "general conditions of the debate", the Council dismissed the argument that the amendments were rejected without proper justification. It did not think this circumstance, assuming it to be proven, was of a substantive nature such as would render the procedure void.

2. On the merits, the *CPE* contract instituted by Section 8 was directly modelled on the *contrat nouvelles embauches (CNE)* (“new recruitments contract”) created a few months earlier by government order for companies with not more than twenty employees. Unlike the latter, the *CPE*, instituted for companies with over twenty employees, was strictly for recruiting young people below twenty-six years of age. This new class of employment contract of indefinite duration was intended to remedy the problems of incorporating the least well-trained young people into the labour market. It carried a two-year “job consolidation period” during which both the procedural and the substantive conditions of dismissal were relaxed in that the employer was not bound by the obligation to hold a prior interview and to state the grounds of termination in the letter of dismissal, or by the need to substantiate their “genuine and serious” nature before the Court. By way of compensation, the legislator had provided for special rights in respect of training and access to housing and a specific scheme of benefits in the event of termination, together with facilities for seeking another job. At the end of the two-year period, the *CPE* was converted into an ordinary contract of indefinite duration.

The applicants firstly alleged the violation of the principle of equality and contended that by instituting a contract specific to young people under 26 years of age the Law created discrimination on grounds of age. However, according to an established precedent, this principle was no object to the legislator’s waiving equality for reasons of common benefit directly linked with the purpose of the statute, as had happened in the instant case.

The applicants also submitted that the creation of the *CPE* infringed the right to employment secured by the fifth paragraph of the 1946 Preamble. The Council observed that on the contrary, having regard to the uncertainty of young people’s situation, Section 8 (instituting the *CPE*) tended to fulfil this constitutional requirement. Since it did not have a general power of appraisal and decision of the same kind as parliament’s, it the Constitutional Council had not to enquire whether the aim which the legislator set out to achieve could be achieved by other means, given that the procedures laid down by the contested law were not manifestly at variance with this aim.

The final submission was that the legislator had disregarded international undertakings and Community obligations entered into by France. The applicants considered the “job consolidation period” excessively long at two years having regard to the European Social Charter and ILO Convention no. 158, which require the trial period to be of

reasonable duration. This line of argument was rejected. Indeed, as the Constitutional Council has consistently ruled, it had not to determine the consistency of the statutes with international law.

The question was raised whether a departure from this precedent would be possible in the specific case of transposition of the Community Directives. Indeed, a breach of Community Directive 2000/78/EC was alleged by the applicants. The Council nevertheless held that the measure was not taken in order to transpose this directive, and so any infringement of it by the legislator at all events lay outside the purview of the French Constitutional Court.

3. The application also challenged the powers granted by the legislator to mayors to arrange compromise agreements under criminal procedure.

Section 51 of the contested law inserted into the Code of Criminal Procedure a section authorising the mayor of a municipality having sustained damage from certain administrative offences to suggest to the culprit a compromise agreement such as would stay the prosecution, as long as it had not been stated. When accepted by the culprit, the compromise agreement must be confirmed by the judicial authority.

The applicants contended that the compromise agreement under criminal procedure thereby instituted was contrary to the rules of fair trial, the prerogatives of criminal courts, and the separation of powers. The Council replied that the challenged provisions governed not a judicial but merely a compromise agreement procedure presupposing the free and unequivocal consent of the perpetrator of the acts, with the possible assistance of a lawyer. Even when consented to by the culprit and confirmed by the judicial authority, the compromise agreement had no enforceable character whatsoever. The judicial authority was bound neither by the mayor’s proposal nor by the culprit’s acceptance of it. Thus the complaint of violation of the right to a fair hearing and the rights of the defence was unfounded. In these circumstances, the Council held that the legislator had not infringed either the principle of separation of powers or the constitutional prerogatives of judges.

Cross-references:

- Decision no. 2006-534 DC of 16.03.2006 [FRA-2006-1-003];
- Decision no. 2005-532 DC of 19.01.2006 [FRA-2006-1-001];
- Decision no. 2001-455 DC of 12.01.2002, *Bulletin* 2002/1 [FRA-2002-1-001];

- Decision no. 2001-444 DC of 09.05.2001, *Bulletin* 2001/2 [FRA-2001-2-004];
- Decision no. 2000-433 DC of 27.07.2000, *Bulletin* 2000/2 [FRA-2000-2-011];
- Decision no. 98-401 DC of 10.06.1998, *Bulletin* 1998/2 [FRA-1998-2-004];
- Decision no. 95-370 DC of 30.12.1995, *Bulletin* 1995/3 [FRA-1995-3-012];
- Decision no. 95-360 DC of 02.02.1995, *Bulletin* 1995/1 [FRA-1995-1-005];
- Decision no. 93-329 DC of 13.01.1994, *Bulletin* 1994/1 [FRA-1994-1-001];
- Decision no. 86-207 DC of 25.06.1986 and 26.06.1986;
- Decision no. 85-200 DC of 16.01.1986.

Languages:

French.



Georgia Constitutional Court

Important decisions

Identification: GEO-2006-1-001

a) Georgia / **b)** Constitutional Court / **c)** First Chamber / **d)** 30.11.2005 / **e)** N1/5/323 / **f)** Citizens of Georgia – Giorgi Vacharadze, Arthur Kazarovi, Levan Chkheidze, Giorgi Berishvili, Shorena Oskopeli and Nino Archvadze v. Parliament of Georgia / **g)** *Adamiani da Konstitutsia* (Official Gazette) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

Association, membership, obligatory / Bar, membership, obligatory / Lawyer, bar, membership, obligatory.

Headnotes:

Article 26.1 of the Constitution does not include the Bar Association of Georgia, as it is a public legal association and is based therefore on the principle of obligatory membership. Article 26.1 implicitly applies only to legal entities of private law, the main characteristic feature of which is the principle of voluntary decision to unite. Such an approach is reflected in the case law of the European Court of Human Rights. In a number of decisions, a person may be obliged to join certain organisations, as these are not considered to be associations (based on the voluntary membership principle) implied in Article 11 ECHR.

Summary:

I. The subject of the dispute is whether or not the following provisions of the “Law of Georgia on the

Bar” of 20 June 2001 (hereinafter the “Law on the Bar”) are contrary to Article 26.1 of the Constitution:

- a. the words “and is a member of the Bar Association of Georgia” in Article 1.2 and
- b. the words “of public law” in Article 20.1.

The claimants state that they have graduated from law schools of various Georgian colleges and universities and are currently working as attorneys. They are representatives of a free profession, however, they are forced to become members of the Bar Association of Georgia (which has the status of a legal entity of public law) due to the threat of restriction on their right to employment based on the disputed provisions of the Law on the Bar. In this respect, the claimants point out that, according to Article 26.1 of the Constitution, “Everyone shall have the right to create and to join public associations...”. Therefore, in the claimants’ opinion, the disputed provisions restrict the freedom of association because unless they join the Bar Association, they are deprived of the right to exercise advocacy, i.e. a possibility to earn their living.

The claimants allege that they are deprived of the right to independently create an alternative association of attorneys, the authority of which would be recognised by the state. In respect of the freedom of association, the claimants referred to Article 11 ECHR, Article 22 of the International Covenant on Civil and Political Rights, Article 20 of the Universal Declaration of Human Rights and paragraphs 23-24 of the Basic Principles on the Role of Lawyers.

The representatives of the respondent – the Parliament of Georgia – did not admit the claim. In their opinion, the disputed provisions do not contradict Article 26.1 of the Constitution. An attorney is a person exercising a free profession who is subject only to the law and norms of professional ethics, of observing the rights of clients and, at the same time, serving the public interest. In the respondent’s opinion, Article 26.1 of the Constitution should not be interpreted to mean that the state is not entitled to confer, by a legislative act, the status of legal entity of both private and public law to relevant organisations. The requirement of obligatory membership in an association having the status of a legal entity of public law envisaged by the Law of on the Bar does not violate, in any way, the right guaranteed by Article 26.1 of the Constitution. As regards the cases considered by the European Court of Human Rights, the representatives of the respondent point out that a clause obliging a person to become a member of an association created on the basis of a special law adopted by the state power is “a concept of public law, and its priority is

protection of public interests rather than the interests of its members”. The above does not violate the right to create public associations guaranteed by the European Convention on Human Rights.

The representatives of the respondent allege that the Bar Association of Georgia is not a public association but a legal entity of public law created by law, which carries out public functions. Therefore, the principle of the free will of private associations cannot be applied to it. The right of the state to create the Bar Association of Georgia as a legal entity of public law is based on Article 7 of the Constitution. In the respondent’s opinion, in some cases, this right becomes an obligation. By creating the Bar Association, the state intended to protect universal human rights and freedoms. Taking into account the essence and importance of advocacy, it has a public role in the Georgian legal system, which is confirmed by the fact that the rights and interests of the person defended by an attorney are regulated on the level of the Constitution and international norms.

Considering all of the above, the representatives of the respondent requested the Court to reject the constitutional claim on the basis that it is unfounded.

II. The Court cannot support the opinions of the claimants regarding the unconstitutionality of the disputed norms of the Law on the Bar.

The Court does not support the opinion that although the Bar Association of Georgia is a legal entity of public law, it is still a public association of citizens despite its legal and organisational form.

The legal nature of the Bar Association and its legal status are defined by the Law on the Bar, which is currently in force. According to Article 20.1 of this Law, “The Bar Association of Georgia is a legal entity of public law based on the membership principle”. Despite the opinion of the claimants, the above status of the Bar Association cannot be changed by the Law on Public Associations of Citizens of 1995, which was adopted before the Constitution and which is invalid now, and even less so by the “Regulations of the Georgian Soviet Socialist Republic on the Bar”.

As regards “public association”, the Civil Code of Georgia defines organisational legal forms. In such an association, unlike legal entities of public law, private common interests prevail, which may include social, creative, cultural and other fields. A legal entity of private law has the right to carry out any activities that are not prohibited by law (notwithstanding whether a specific activity is specified in its regulations). However, a legal entity of public law is

only authorized to carry out activities specified in a law or its founding document.

The name “Bar Association of Georgia” contains the word “association”, according to the explanation given by the European Court of Human Rights, this word implies a voluntary unification in order to pursue a common goal (*Young, James and Webster v. United Kingdom*), *Special Bulletin Leading Cases ECHR* [ECH-1981-S-002]. The Court supports the expert witness’s opinion that “Name and title does always define the essence”. Therefore, the Bar Association of Georgia should neither be identified as an association (union), as provided by Article 30 of the Civil Code of Georgia, nor as associations as provided by the International Pacts referred to by the claimant. The Bar Association could just as well have been called Chamber of Attorneys, Collegium of Attorneys, etc.

Therefore, the Bar Association of Georgia is not a public association, but a legal entity of public law created by law.

Since the Bar Association of Georgia is a legal entity of public law, the voluntary membership principle of private associations is not applied to it. Membership of the Association is required in order to obtain the status of attorney. The public legal status of the Bar Association of Georgia and the relevant principle of obligatory membership are unacceptable for the claimants, however, they could not provide reasonable legal arguments that the relevant association should be private. In the opinion of the Court, there are data confirming that a bar association based on the principle of obligatory membership in the form of a legal entity of public law is admissible and acceptable.

All of the above gives a strong basis to state that, as a result of the consideration of the case on the merits, the assertion made by the claimants of the violation by the disputed provisions of the constitutional right to create and join public associations is not confirmed. The state is entitled to create, in accordance with the Constitution, an association of attorneys in the form of a legal entity of public law with an obligatory membership requirement and the condition of absence of strict state control over its activities, which is most important.

Furthermore, in the opinion of the Court, the above-mentioned fact does not exclude a legitimate possibility that in the future, if it becomes necessary, the state may form a bar association based on other organisational legal grounds, taking into account both the Georgian and international practice with relevant

legislative regulations, within the limits set out by Article 26.1 of the Constitution.

Considering all of the above, in a judgment of 30 November 2005, the Constitutional Claim no. 323 brought by the citizens of Georgia – *Giorgi Vacharadze, Arthur Kazarovi, Levan Chkheidze, Giorgi Berishvili, Shorena Oskopeli and Nino Archvadze v. Parliament of Georgia* on the constitutionality of the following provisions of the Law on Bar in relation to Article 26.1 of the Constitution:

- a. the words “and is a member of the Bar Association of Georgia” in Article 1.2 and
- b. the words “of public law” in Article 20.1

was rejected.

Languages:

English.



Germany

Federal Constitutional Court

Important decisions

Identification: GER-2006-1-001

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 19.04.2005 / **e)** 1 BvR 1644/00 and 1 BvR 188/03 / **f)** Withdrawal of the compulsory portion / **g)** *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 112, 332 / **h)** *Neue Juristische Wochenschrift* 2005, 1651; *Zeitschrift für das gesamte Familienrecht* 2005, 872; *Erbfolge, Erbrecht, Erbfolgebesteuerung, Unternehmensnachfolge* 2005, 162; *Zeitschrift für Erbrecht und Vermögensnachfolge* 2005, 301; *Juristenzeitung* 2005, 1001; *Zeitschrift für die Notarpraxis* 2005, 460; *Deutsche Notar-Zeitschrift* 2006, 60; CODICES (German).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Succession, compulsory portion, withdrawal / Succession, compulsory portion, unworthiness to receive / Succession, will, freedom to make.

Headnotes:

1. The minimum monetary share, or compulsory portion, of a testator's children in his estate is in principle inalienable and it is not means-tested. It is guaranteed by the right to inheritance enshrined in Article 14.1 sentence 1 in conjunction with Article 6.1 of the Basic Law.

2. Articles 2303.1, 2333 nos. 1 and 2 and 2345.2 and 2339.1 of the Civil Code deal respectively with the right of a testator's children to the minimum share as well as reasons why it might be withdrawn or somebody might be deemed as unfit to receive it. These provisions are all compatible with the Basic Law.

Summary:

I. Under § 2303.1 of the Civil Code, a testator's child who is excluded from succession by the most recent will can demand a minimum share from the heir. The testator can only deprive a child of this share if there is a reason for doing so. Such circumstances could exist if a child attempts to kill the testator or if he is guilty of intentional physical mistreatment of the testator (see § 2333 nos. 1 and 2 of the Civil Code). Furthermore, someone entitled to the minimum share might lose his claim after the death of the testator by means of a challenge (see § 2345.2, § 2339.1). One reason for a challenge could be that the person entitled to the minimum share intentionally and unlawfully killed or tried to kill the testator.

Proceedings 1 BvR 1644/00:

A testator had named one of her two sons as sole heir. She lived with her other son (the plaintiff in the proceedings being considered here) who suffered from a schizophrenic psychosis. In the years before the testator's death, the plaintiff carried out a series of serious physical assaults on her. One month before her death, the testator deprived the plaintiff of the compulsory portion due to the mistreatment he had meted out. In February 1994, the plaintiff killed the testator, out of fear and fury over his imminent committal to a psychiatric hospital. The Regional Court, in proceedings on preventive detention, ordered the plaintiff, who was unable to form criminal intent over the killing, to be detained in a psychiatric hospital.

The plaintiff, represented by his custodian, asserted his right to a minimum financial share in the estate against the testator's other son (referred to as the complainant) who lodged the complaint. The Regional Court and the Higher Regional Court found in favour of the plaintiff as he was unable to form criminal intent and so should not have been deprived of his share. In his complaint, the complainant challenged the judgments of the Regional Court and the Higher Regional Court, and, indirectly, provisions of the Civil Code, in particular §§ 2303, 2333 nos. 1 and 2, 2339.1 no. 1 and 2345.2. He argued that there had been an infringement of his fundamental rights to inheritance and property, deriving from Article 14.1 of the Basic Law and of the right to protection of the family under Article 6.1 of the Basic Law.

Proceedings 1 BvR 188/03:

In the years before the testator's death, conflicts had arisen between the testator, who suffered from several serious illnesses, and his son (the plaintiff in the proceedings being considered here) over the

testator's contact with his grandchild. The testator withdrew the minimum share from the plaintiff, alleging that he had refused him access to his grandchild despite knowing he was gravely ill. After the testator's death, the plaintiff launched proceedings to assert his claim to his share and he requested information on the amount of the estate from the complainant and heiress. The Regional Court and the Berlin Court of Appeal regarded the withdrawal of the minimum share as ineffective.

In her constitutional complaint, the complainant objected to Regional Court's and Berlin Appeal Court's judgments. She argued that her rights to inheritance and property, under Article 14.1, had been breached, as well as the principle of equality under Article 3.1 and her right to a hearing in Court under Article 103.1 of the Basic Law.

II. The constitutional complainant in proceedings 1 BvR 1644/00 was successful to the extent that it challenged the judicial rulings. To the extent that it complained, indirectly, about children's rights to a minimum share, reasons for withdrawing it and reasons for unfitness to receive it, it was held to be unfounded. The constitutional complaint in proceedings 1 BvR 188/03 was held to be unfounded.

The Court's reasoning was essentially as follows:

The right of a testator's children to share in the estate lies at the very heart of the German law of inheritance and is enshrined in sentence 1 of Article 14.1 of the Basic Law. This right is in principle inalienable and it is not means-tested.

The right to a minimum share is an expression of the family solidarity which exists, fundamentally and indissolubly, between a testator and his children. Article 6.1 of the Basic Law protects this relationship as a life-long bond, where both parents and children are entitled and indeed obliged to assume responsibility for each other. The obligation to care for each other justifies ensuring that a child has the right to a minimum share of the assets of the deceased parent even after the testator's death. Particularly in cases where the testator and his children are estranged, the right to a minimum share restricts the freedom of testamentary disposition.

The right to a minimum share complies with the constitutional requirements within the framework of § 2303.1 of the Civil Code. The testator's children are guaranteed a suitable participation in the estate in the shape of a monetary claim. The testator, for his part, is left with enough scope to implement his own wishes as to the way his assets should be distributed after death.

The reasons for withdrawing the minimum share contained in § 2333 nos. 1 and 2 of the Civil Code are also compatible with the Basic Law. A child could only be denied their share in the case of extraordinarily grievous misconduct towards the testator. Only then would it be unreasonable for the testator to have to accept participation in the estate by the child. The statute describes the misconduct that would be necessary in a sufficiently clear manner.

However, as concerns the application of § 2333 no. 1 of the Civil Code, the court rulings which are the subject of the constitutional complaint 1 BvR 1644/00 do not make adequate provision for the pervasive effect of the fundamental right of the freedom of testamentary disposition. An expert report was given in the criminal court proceedings, which showed that although the plaintiff was unable to form criminal intent in the criminal law sense, he was nonetheless able to discern that he had done something wrong. This should have triggered an examination in the initial proceedings as to whether, in the earlier mistreatment of the testator, the plaintiff might in fact have acted with intent and had committed the offence of trying to kill her under § 2333 no. 1 of the Civil Code.

The decisions in 1 BvR 188/03 do not violate the complainant's fundamental rights. Here, the withdrawal of the compulsory portion was based on exactly the type of family conflict that gives rise to disinheritance, and this is the very type of circumstance for which the right to a minimum share is designed. There was nothing to indicate that the non-constitutional courts had disregarded the constitutional guarantee of the freedom of testamentary disposition or the principles of fair trial and of a hearing in court.

Languages:

German.



Identification: GER-2006-1-002

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 06.12.2005 / **e)** 1 BvL 3/03 / **f)** / **g)** / **h)** *Zeitschrift für das gesamte Familienrecht* 2006, 182; *Streit* 2006, 17; *Das Standesamt* 2006, 102; CODICES (German).

Keywords of the systematic thesaurus:

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

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.

Keywords of the alphabetical index:

Transsexuality, homosexual orientation / Sexual orientation / Transsexuality, name, change / Name, deprivation / Transsexuality, marriage, conclusion.

Headnotes:

§ 7.1 item 3 of the Transsexuals Act violates the right of personality protected by Article 2.1 of the Basic Law in conjunction with Article 1.1 of the Basic Law which protects human dignity. This case concerns the right of a homosexually-orientated transsexual to use a name, as well as his or her right to protection of his or her intimate sphere, in circumstances where he or she cannot enter into a legally protected partnership without losing the changed forename which corresponds to his or her perceived gender.

Summary:

I. The complainant belongs to the male gender, and is transsexual. His forename was changed to a female forename in accordance with the Act on Forename Changes and Determination of Gender Affiliation in Special Cases (referred to here as the Transsexuals Act). He did not undergo a sex-change operation. After he had married the woman in April 2002 with whom – from his point of view – he has a same-sex relationship, the registrar entered in the births record the fact that the complainant once again bore his male forename, in accordance with § 7.1 item 3 of the Transsexuals Act. The complainant's court action for the rectification of the birth record was rejected by the Local Court. In response to his immediate complaint, the Regional Court suspended the proceedings and requested a decision from the Federal Constitutional Court as to whether § 7.1 item 3 of the Transsexuals Act complied with the Basic Law.

Transsexuality describes the state of a person who has a physical gender which does not correspond to his or her emotional and psychological state. The Transsexuals Act was adopted in 1981 to accommodate the special circumstances of transsexuals. It gives them two options. Once two experts, appointed by the Court, have confirmed their transsexuality, they may change their forename to a

forename of the other gender. No sex change is necessary for this. In spite of the forename change, the transsexual is still considered to belong to his or her original biological gender. In order to be legally regarded as belonging to the other gender, the person concerned must have undergone a sex change operation. Only then is it possible for them to be legally recognised as belonging to the other gender.

Scientific studies demonstrate that transsexuals can also have homosexual tendencies. Since his or her civil status is not changed by virtue of a simple change of forename, a homosexual transsexual who has not undergone a sex change has no possibility other than marriage to legally protect his or her relationship. Under § 7.1 item 3 of the Transsexuals Act, he or she will then lose their changed forename, since the legislator assumed that in such circumstances, the transsexual feels that he or she belongs once more to his or her original gender. He or she may not enter a civil partnership as this is contingent on the conclusion of a contract between two people of the same sex.

II. The Federal Constitutional Court concluded that § 7.1 item 3 of the Transsexuals Act is not compatible with the Basic Law. The provision violates the right of a homosexually orientated transsexual to use a name, as well as his or her right to protection of his or her intimate sphere. The Federal Constitutional Court gave the following grounds for its decision:

The right to personality and the protection of human dignity are enshrined in Articles 2.1 and 1.1 of the Basic Law. They afford protection to a person's forename firstly, as a means of the person's discovery of his or her identity and of development of his or her own individuality, and, secondly, as an expression of his or her perceived or assumed sexual identity. The right to one's forename, which is the result of the name-bearer's own search for a sexual identity, may be encroached upon only where there are particularly substantial public interests.

§ 7.1 item 3 of the Transsexuals Act encroaches on this protected right to bear a forename acquired under the preconditions of § 1 of the Transsexuals Act, which expresses the perceived sexual affiliation of the name-bearer. Forename deprivation also prejudices the name-bearer in his or her intimate sexual area, as protected by basic rights. By virtue of the loss of the name and the obligation to bear the previous forename again, it becomes obvious that the sexual identity of the name-bearer contradicts the name which he or she is to bear, which expresses a different gender.

The name-bearer cannot be presumed to consent to this encroachment on the right to bear a forename and on the intimate sphere, especially because the person concerned has no possibility other than marriage to legally safeguard his or her relationship. Entry into a civil partnership is barred to him or her as this is contingent on the conclusion of a contract between two people of the same sex (see Civil Partnerships Act).

The encroachment cannot be justified by assuming that upon marriage the transsexual shows that he or she belongs once more to the gender stated in his or her birth record, so that the forename deprivation effected by virtue of § 7.1 item 3 of the Transsexuals Act merely restores the rediscovered gender and previous name. The legislator has in the past justified forename deprivation by this assumption. Modern sexual science has proved that a large proportion of man-to-woman transsexuals have homosexual tendencies, irrespective of whether they have undergone sex-change operations. It is therefore not possible to deduce a person's perceived gender from their sexual orientation.

Deprivation of the forename as enacted by § 7.1 item 3 of the Transsexuals Act pursues the legitimate objective of avoiding giving the impression that same-sex partners may enter into marriage.

However, the encroachment on the right of a transsexual to use a name protected by Article 2.1 in conjunction with Article 1.1 of the Basic Law resulting from § 7.1 item 3 of the Transsexuals Act, as well as on his or her right to protection of his or her intimate sphere in conjunction between the provisions of the Transsexuals Act and the law on civil status and the provisions of the law on marriage, as well as with those of the Civil Partnerships Act, is not acceptable for the person concerned. As long as the right does not result in the possibility of contracting a legally protected partnership to a transsexual with homosexual orientation who has not undergone a sex change without loss of the forename which corresponds to his or her perceived gender, the loss of forename upon conclusion of marriage by virtue of § 7.1 item 3 of the Transsexuals Act is unconstitutional.

The constitutional violation does not result in individual provisions of the Transsexuals Act becoming null and void. However, § 7.1 item 3 of the Transsexuals Act is inapplicable until such time as a new statutory provision becomes applicable. The legislator has several options in regard to this new provision.

The provision contained in § 7.1 item 3 of the Transsexuals Act could be rescinded and not replaced. This may not be attractive to Parliament as it could create the false impression that two persons of the same sex could enter into marriage. The law on civil status could be amended in such a way that a transsexual who has not undergone a sex change and who has been recognised in accordance with the Transsexuals Act after examination by the court is legally attributed to the gender to which he or she perceives himself or herself to belong, so that he or she can enter into a civil partnership in order to lend legal security to a relationship if he or she is homosexual. Alternatively, the legislator could make it possible for homosexually-orientated transsexuals to enter a civil partnership by making appropriate amendments to the Civil Partnerships Act.

Languages:

German.



Identification: GER-2006-1-003

a) Germany / b) Federal Constitutional Court / c) Second Panel / d) 18.01.2006 / e) 2 BvR 2194/99 / f) / g) / h) *Zeitschrift für Steuern und Recht* 2006, R221; *Deutsches Steuerrecht* 2006, 555; *Wertpapier-Mitteilungen* 2006, 648; *Der Betrieb* 2006, 756; *Die Information für Steuerberater und Wirtschaftsprüfer* 2006, 287; *Neue Juristische Wochenschrift* 2006, 1191; *Deutsches Verwaltungsblatt* 2006, 569; *Europäische Grundrechte Zeitschrift* 2006, 183; CODICES (German).

Keywords of the systematic thesaurus:

1.6.3.1 **Constitutional Justice** – Effects – Effect *erga omnes* – *Stare decisis*.
 3.16 **General Principles** – Proportionality.
 5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
 5.3.42 **Fundamental Rights** – Civil and political rights – Rights in respect of taxation.

Keywords of the alphabetical index:

Tax, amount / Tax, splitting principle / Tax, burden, ceiling.

Headnotes:

A constitutionally binding ceiling cannot be derived from the order of the Second Panel of the Federal Constitutional Court of 22 June 1995 (2 BvL 37/91). Neither is it possible to derive a general binding taxation ceiling approximate to sharing in equal halves ("the splitting principle") from the fundamental right to property enshrined in Article 14.1 of the Basic Law.

Summary:

I. The complainant owned a business. In 1994, he and his wife were assessed for income tax. On the basis of a taxable income of DM 622,878, the tax office set the income tax at DM 260,262. The complainant's trade tax liability as set by the municipality was DM 112,836. The couple lodged an objection to the 1994 income tax notice. They argued that the income and trade tax violated the "splitting principle" delivered by the Second Panel of the Federal Constitutional Court by order of 22 June 1995 (2 BvL 37/91), since the total fiscal burden on income was higher than 50 per cent. The action with which, in essence, they applied for a reduction of the income tax to DM 187,731 was unsuccessful before the local Finance Court and the Federal Finance Court.

The complainant alleged in his constitutional complaint that the Federal Finance Court judgment violated his fundamental rights to protection of ownership under Article 14 of the Basic Law as well as the principle of the rule of law and guarantee of recourse to a court under Article 19.4 of the Basic Law, and Article 2.1 in conjunction with Article 20.3 of the Basic Law.

II. The Federal Constitutional Court rejected the constitutional complaint as unfounded, for the following reasons:

The Federal Finance Court did not breach Article 2.1 in conjunction with Article 20.3 or Article 19.4 of the Basic Law because of prejudicing the complainant through non-compliance with a binding ruling handed down by a Panel of the Federal Constitutional Court. The Federal Finance Court correctly presumed that no binding constitutional ceiling for the overall income and trade tax burden could be derived from the order of the Second Panel of the Federal Constitutional Court of 22 June 1995. The order was not concerned with a constitutional ceiling for the overall income and trade tax burden, but rather with the ceiling on the overall burden imposed on assets by a property tax which is levied in addition to income tax. The impact of the resulting burden is not necessarily comparable

with the impact of the burden arising from income and trade tax.

Moreover, the findings of the Federal Constitutional Court in its order of 22 June 1995 [GER-1995-2-022] do not have a binding effect in accordance with Article 31.1 of the Federal Constitutional Court Act concerning the splitting principle.

The total burden from income and trade tax does not violate the complainant's fundamental right to property under Article 14.1 of the Basic Law. The tax burden is covered by the protection of the guarantee of ownership. However, the acquisition of additional property within the meaning of Article 14 of the Basic Law within a taxation period is a basic prerequisite for the levying of tax in accordance with both the Income Tax Act and the Trade Tax Act. The taxpayer must pay because and insofar as his or her ability to pay is increased by acquiring property.

Access to property is however constitutionally justified. The fundamental right of ownership does not permit one to derive any generally binding, absolute ceiling on the burden approximate to sharing in equal halves ("splitting principle"). The wording of sentence 2 of Article 14.2 of the Basic Law (regarding property: "Its use should also serve the public interest.") cannot be interpreted as a strict, essential principle of sharing in equal halves between the owner and the state which is applicable regardless of the time and the situation. Rather, the freedom of discretion open to the legislator when drafting fiscal legislation and limits on tax is restricted by the general principles of proportionality. A major consideration here is that, in relation to income tax, the intensity of the tax burden to be evaluated is not determined solely by the level of the tax rate, but also by the relationship between the tax rate and the basis for assessment. The broader the basis for assessment, perhaps as a result of the abolition of indirect fiscal subsidies or by cutting deductions, the more onerous is the impact of the same tax rate for the taxpayer.

It is also important to bear in mind that the taxation of higher incomes is to be proportionate in comparison with the taxation of lower incomes. If the legislator decides to introduce progressive tax rates, there is nothing inherently wrong with imposing a high burden on high incomes, insofar as the taxpayer concerned is left with a high, freely disposable income after deduction of the tax burden. Even if no quantitatively precise general ceiling on taxation can be derived from the prohibition of excessiveness, the fiscal burden on higher incomes may not necessarily be that high in a standard case that economic success is fundamentally impaired and therefore no longer

appropriate. There is nothing to suggest in the current case that a constitutional ceiling on an acceptable burden by income and trade tax was reached. Moreover, under the current structure of income and trade tax law relating to high incomes, an excessive tax burden – and a violation of the guarantee of ownership – cannot be discerned.

Cross-references:

- Ruling of the Second Panel of the Federal Constitutional Court of 22.06.1995; *Entscheidungen des Bundesverfassungsgerichts* (Official Digest), 93, 121 [GER-1995-2-022].

Languages:

German.



Identification: GER-2006-1-004

a) Germany / b) Federal Constitutional Court / c) First Panel / d) 15.02.2006 / e) 1 BvR 357/05 / f) / g) / h) *Neue Juristische Wochenschrift* 2006, 751; *Deutsches Verwaltungsblatt* 2006, 433; *Europäische Grundrechte Zeitschrift* 2006, 83; *Juristenzeitung* 2006, 408; CODICES (German).

Keywords of the systematic thesaurus:

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

4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.

5.1.4 **Fundamental Rights** – General questions – Emergency situations.

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

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

Keywords of the alphabetical index:

Terrorism, combating / Aviation, security / Army, employment / Aircraft, shooting down.

Headnotes:

Under sentence 2 of Article 35.2 of the Basic Law and sentence 1 of Article 35.3 of the Basic Law, the Federation may issue regulations setting out procedures for the deployment of the armed forces in cases of natural disaster and especially serious accidents and the role of the *Länder* (states) in such circumstances. The concept of an “especially serious accident” also embraces situations where a disaster is imminent.

The above provisions of the Basic Law do not authorise the Federation to send armed forces on mission with military weapons for the control of natural disasters and in the case of especially serious accidents.

§ 14.3 of the Aviation Security Act 2005 authorises the armed forces to shoot down by direct use of armed force an aircraft that is intended to be used against human lives. This is incompatible with the right to life under sentence 1 of Article 2.2 of the Basic Law coupled with the guarantee of human dignity under Article 1.1 of the Basic Law to the extent that it affects people on board the aircraft who are not participants in the crime.

Summary:

I. If, on account of a major aerial incident, it can be assumed that an “especially serious accident” within the meaning of sentence 2 of Article 35.2 of the Basic Law or Article 35.3 of the Basic Law is imminent, the armed forces can, pursuant to § 13.1 of the Aviation Security Act, support the police forces of the *Länder* in the air space to prevent such an accident to the extent that this is required for effectively counteracting it. If there is a regional emergency situation pursuant to Article 35.2 of the Basic Law, the decision about such deployment shall be taken by the Federal Minister of Defence upon request of the *Land* affected. In the case of an interregional emergency situation pursuant to Article 35.3 of the Basic Law, the decision shall be taken by the Federal Government in agreement with the *Länder* affected. If a decision of the Federal Government cannot be achieved in time, the Minister of Defence or whichever member of the Federal Government is authorised to represent him, shall take the decision in agreement with the Federal Minister of the Interior.

Pursuant to § 15.1 of the Aviation Security Act, operations intended to prevent the occurrence of an especially serious accident within the meaning of § 14.1 and 14.3 of the Act may only be taken if the aircraft in question has previously been investigated

by the armed forces in the air space and attempts at warning and diverting it have proved unsuccessful. If this prerequisite has been met, § 14.1 of the Aviation Security Act authorises the armed forces to force the aircraft off its course, force it down, threaten to use armed force, or fire warning shots. The choice of method will be governed by the principle of proportionality. Under § 14.3 of the Act, the direct use of armed force against the aircraft is permissible only if the occurrence of an especially serious accident cannot be prevented by the measures outlined above. This only applies where it has to be assumed that the aircraft is to be used as a weapon against human lives, and where the direct use of armed force is the only way of avoiding this imminent danger. Sentence 1 of § 14.4 of the Aviation Security Act bestows exclusive competence for ordering this measure upon the Federal Minister of Defence, or whichever member of the Federal Government is authorised to represent him.

The complainants argued in their complaint that § 14.3 of the Aviation Security Act violated their fundamental rights to life and dignity, under Articles 1.1 of the Basic Law and sentence 1 of Article 2.2 in conjunction with Article 19.2.

II. The Constitutional Court held that § 14.3 of the Aviation Security Act is incompatible with the Basic Law and hence void.

The Federation lacks the legislative competence to issue § 14.3 of the Aviation Security Act. Sentence 2 of Article 35.2 of the Basic Law and sentence 1 of Article 35.3 of the Basic Law do directly authorise the Federation to issue regulations governing the deployment of the armed forces for the control of natural disasters and in the case of especially grave accidents in cooperation with the *Länder* affected.

However, an operation involving the direct use of armed force against an aircraft is not covered by sentence 2 of Article 35.2 of the Basic Law. This provision does not allow an operational mission of the armed forces with military weapons for the control of natural disasters or in the case of especially serious accidents.

§ 14.3 of the Aviation Security Act does not comply with sentence 1 of Article 35.3 of the Basic Law either. It only explicitly authorises the Federal Government to order the deployment of the armed forces in the case of an interregional emergency situation. The regulations in the Aviation Security Act provide, however, that the Minister of Defence, in agreement with the Federal Minister of the Interior, shall take this decision if a decision by the Federal Government is not possible in time. Because there will probably only be a

short time available, individual government ministers will stand in for the Federal Government on a regular basis for decisions on the deployment of the armed forces in interregional emergency situations. The boundaries of sentence 1 of Article 35.3 of the Basic Law have been overstepped because in the case of an interregional emergency situation, a mission of the armed forces with military weapons is not allowed under the Constitution.

§ 14.3 of the Aviation Security Act is not compatible with the right to life and human dignity either, to the extent that the use of armed force affects people on board the aircraft who are not participants in the crime.

The passengers and crew members who are caught up in this situation can no longer exert any form of independent control over their own destinies. When the state resorts to the measures provided by § 14.3 of the Aviation Security Act, it treats them as mere objects of its rescue operation for the protection of others, deprived of their right to life and dignity to save the lives of others. In addition, it cannot be expected that at the point when the decision is made to launch this type of operation, there will always be a complete picture of the factual situation and that a correct assessment of the situation can be made.

From the point of view of Article 1.1 of the Basic Law (the guarantee of human dignity) it is absolutely inconceivable to intentionally kill people in such a helpless situation on the basis of statutory authorisation. It is unrealistic to assume that someone boarding an aircraft as a crew member or passenger will consent to its being shot down, and thus to their own death, should the aircraft become involved in an aerial incident. To explain it away by saying that these people are doomed in any case cannot detract from the fact that killing innocent people in the situation described above is an infringement of their right to dignity. Human life and human dignity enjoy the same constitutional protection regardless of the duration of the physical existence of the individual human being. § 14.3 of the Aviation Security Act also cannot be justified by invoking the state's duty to protect those who are the intended targets of the aircraft which has been seized as a weapon. The state's obligation to protect can only be fulfilled by means which comply with the Constitution.

§ 14.3 of the Aviation Security Act complies with the Basic Law to the extent that direct use of armed force is aimed at an unmanned aircraft or exclusively at those intending to use the aircraft as a weapon. The attacker is a subject so the consequences of the conduct he has undertaken are attributed to him personally, and he is responsible for the events that

he set in motion. Nonetheless, the regulation is void in this respect because the Federation lacks legislative competence.

Languages:

German.



Identification: GER-2006-1-005

a) Germany / **b)** Federal Constitutional Court / **c)** First Panel / **d)** 28.03.2006 / **e)** 1 BvR 1054/01 / **f)** / **g)** / **h)** *Wertpapier-Mitteilungen* 2006, 833; *Neue Juristische Wochenschrift* 2006, 1261; *Wettbewerb in Recht und Praxis* 2006, 562; *Europäische Grundrechte Zeitschrift* 2006, 189; CODICES (German).

Keywords of the systematic thesaurus:

3.18 **General Principles** – General interest.

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

Keywords of the alphabetical index:

Betting, sports / Gambling / Betting, monopoly / Gaming, addiction / Betting, addiction.

Headnotes:

A state monopoly on sports betting is only compatible with the fundamental right of occupational freedom enshrined in Article 12.1 of the Basic Law if its main focus is combating the dangers of addiction.

Summary:

I. Unauthorised public games of chance are a criminal offence under § 284 of the Criminal Code. Bets at public performance tests for horses are permissible under the Racing Betting and Lottery Act as amended on 24 August 2002, but no other circumstances exist under federal law where permission may be granted exempting a person from criminal liability under § 284.1 of the Criminal Code.

Under *Land* legislation, the *Länder* permit lotteries and betting to be organised by the state or by state-

controlled companies. In Bavaria, this was done by the Act on Lotteries and Bets Organised by the Free State of Bavaria of 29 April 1999. Under Article 2 of the State Lottery Act, the Free State of Bavaria organises games of chance in the form of lotteries and bets. Their nature, form and scope are determined by the State Ministry of Finance; they are operated by the State Lottery Administration. With the Ministry's consent, the State Lottery Administration may assign the operation of games of chance to a legal person under private law, provided that the Free State of Bavaria is the sole member and the legal person is subject to the control of the ministry.

The complainant is authorised under the Racing Betting and Lottery Act to run a betting office in Munich. As a bookmaker, she takes and places bets at public performance tests for horses. In July 1997, she applied to the Munich city authority to register an extension of her business enabling her to arrange sports bets with betting businesses in the rest of the EU. The city authority consulted the Bavarian State Ministry of the Interior and refused permission, referring to the comprehensive prohibition on public games of chance, and the attendant sanctions, in § 284 of the Criminal Code.

The complainant issued legal proceedings which were unsuccessful before the Administrative Court, the Higher Administrative Court and the Federal Administrative Court. In her constitutional complaint against the decisions, she alleged that her occupational freedom, as guaranteed under Article 12.1 of the Basic Law, had been breached.

II. The constitutional complaint is well-founded to the extent that it challenges the Bavarian State Lottery Act.

In its present form, the state monopoly for sports betting in Bavaria is incompatible with the fundamental right of occupational freedom. It is only reasonable to prevent commercial betting by private betting shops if the existing betting monopoly serves to avoid gaming addiction and problematic gaming behaviour, in practice and not simply on paper. However, the State Lottery Act contains no substantive provisions or structural safeguards to this effect.

The state betting monopoly is based on legitimate goals in the public interest, including the eradication of addiction to gambling and betting, protecting gamblers against fraudulent schemes by bookmakers and stamping out misleading advertising. The public revenue interests of the state do not, per se, justify the creation of a betting monopoly. However, skimming off funds from games of chance for

purposes of public interest is justified only as a means to combat addiction and as a consequence of a state monopoly system. The statutory creation of a state betting monopoly is a suitable means to combat the dangers associated with betting. There is nothing intrinsically wrong with the legislator's assumption that opening up the market would lead to a substantial expansion of betting and to an increase in addiction-influenced behaviour. The legislator was also entitled to assume that a betting monopoly was necessary and that it would be simpler to control a betting monopoly, with betting made available under the auspices of the state and with the goal in mind of combating addiction and problematic gaming behaviour, than to monitor private betting shops.

The state betting monopoly in Bavaria, in its current form, represents a disproportionate encroachment on occupational freedom. It is not properly guaranteed that the purpose of state betting is to combat addiction and compulsive gambling, and there is a possibility that the state's public revenue interest might prevail over this purpose. The State Lottery Act is to a large extent made up of provisions on competence and organisation. The administrative law deficiency is not rectified by the Lottery Treaty, which was ratified by all the *Länder*.

Indeed, at present, the organisation of the state betting system in Bavaria clearly pursues public-revenue goals. The marketing is not actively focussed upon combating the dangers of addiction. Instead, there seems to be financially effective marketing of a recreational pursuit which is basically unobjectionable. The State Lottery Administration keeps information on gambling addiction, prevention and possibilities of help and counselling available without actively trying to prevent it. The Bavarian state betting monopoly also results in the Free State of Bavaria being the only organisation allowed to place bets.

The legal position challenged is not necessarily null and void, despite the incompatibility described above. The legislature is, however, constitutionally obliged to amend the legislation on sports betting, exercising its discretion under legal policy. For betting arrangements to be brought into line with the Basic Law, the betting monopoly needs a complete overhaul to ensure that it really does serve to combat addiction. Alternatively, private betting shops, with careful monitoring and under properly drafted legislation could be allowed to engage in the activity. If parliament wishes the state to retain a betting monopoly, then this must strictly serve the interests of combating betting addiction. The legislation would need to contain guidance as to the nature and design of sports betting and requirements for the restriction

of its marketing. Any advertisements for betting must only contain information and clarification about the possibilities of betting, otherwise it could be an invitation to bet.

In order to avert the dangers of addiction, the state needs to do more than simply providing information on addiction. The channels of distribution must be selected and established in such a way that gamblers are protected as well as children and young people. Suitable regulatory arrangements must also be put in place and the regulators must be sufficiently distant from the public-revenue interests of the state so that these requirements are complied with. A reform of the law in this area could either be carried out by the federal legislature or by the Land legislature.

The reform should be complete by 31 December 2007. Until then, the present legal situation will apply. The commercial organisation of betting by private betting shops and the arranging of bets which are not organised by the Free State of Bavaria will still be prohibited under the regulatory law. It is up to the criminal courts to decide whether, in the transitional period, there should be criminal liability under § 284 of the Criminal Code. Use should be made of the transitional period to target the existing betting monopoly strictly at the combating of betting addiction.

The administrative court decisions challenged by the constitutional complaint are not to be overturned under § 95.2 of the Federal Constitutional Court Act. Although the State Lottery Act has been found to be incompatible with Article 12.1 of the Basic Law, the decisions should stand because the State Lottery Act remains on the statute book until the law has been reformed as suggested above. The constitutional complaint is therefore unsuccessful insofar as it challenges these decisions.

Languages:

German.



Hungary

Constitutional Court

Statistical data

1 January 2006 – 30 April 2006

Number of decisions:

- Decisions by the plenary Court published in the Official Gazette: 10
- Decisions by chambers published in the Official Gazette: 2
- Number of other decisions by the Plenary Court: 40
- Number of other decisions by chambers: 10
- Number of other procedural orders: 50

Total number of decisions: 112

Important decisions

Identification: HUN-2006-1-001

a) Hungary / b) Constitutional Court / c) / d) 24.04.2006 / e) 12/2006 / f) / g) *Magyar Közlöny* (Official Gazette), 2006/48 / h).

Keywords of the systematic thesaurus:

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

4.5.4.1 **Institutions** – Legislative bodies – Organisation – Rules of procedure.

4.5.11 **Institutions** – Legislative bodies – Status of members of legislative bodies.

Keywords of the alphabetical index:

Parliament, member, privilege, free speech / Parliament, time frame for speech / Parliament, rules of procedure.

Headnotes:

A limit on the right of members of parliament to speak may be justified on the grounds of the efficient running of parliamentary business. The time frame for

speeches can be designated by Standing Orders of Parliament.

Summary:

I. A petition was lodged regarding the legality of the Standing Orders of the Hungarian Parliament, and requesting a declaration that an omission was unconstitutional. The Constitutional Court examined the constitutionality of provisions relating to the duration of sittings and the time frames for parliamentary speeches. The petitioner challenged the constitutionality of Decision 46/1994 of the Hungarian Parliament on Standing Orders of the Hungarian Parliament because it did not designate a precise time frame for speeches by individual members of parliament.

Under the disputed provision in the Standing Orders, the House Committee makes a proposal for the time frame for speeches, and parliament takes a simple majority decision. There is no debate. The petitioner also cast doubt over the constitutionality of provisions of the Standing Order relating to the work of Committees, which entitled the Committee to allot the same time frame for speeches to different groups of members.

The petitioner submitted that the right to protest of members of parliament follows from the principle of exercising the sovereignty of the people, the so-called parliamentary right to speak. The regulations governing this right are an important guarantee, as the constitutional functions of parliament cannot be carried out without the members' right to speak. Article 24.4 of the Constitution, under which parliament establishes its procedural rules and orders of debate, refers to a majority of two thirds of the votes of the members of parliament present. Since several provisions of the Standing Orders contain regulations which fetter the right to speak, it could be argued that a two thirds majority vote is needed to decide upon the forms the time frames should take.

II. The Constitutional Court began with an analysis of Hungarian legal history in the field of public law, and various foreign Standing Orders. All Standing Orders contain restrictions on the time for speeches, although the practical arrangements vary considerably. The historical survey and the international comparison show that the regulation of time frames for speeches is based on the need to create a balance between the rights of members of parliament, and the need for the work of parliament to run smoothly. The Court noted that members of parliament can only carry out their constitutional duties properly if they can speak in parliamentary sessions and in committees, and if they have sufficient time to present their views.

The free speech privilege of members of parliament is linked to the freedom of expression declared in Article 61 of the Constitution. This is a fundamental democratic requirement for a democratic state under the rule of law, and the State is under a duty to protect this right.

The Court proceeded to examine the provisions of the Standing Orders in point. It found that there were no normative standpoints for the definition of the time frames for particular speeches of members of parliament relating to the orders of the day of sittings. On the basis of the proposal of the House Committee, parliament decides upon the time limits for speeches by simple majority. Thus it is the prevailing parliamentary majority which defines the time frame for speeches. The Constitutional Court noted that the Standing Orders make no provision for minorities. The protection of parliamentary minorities is important as a guarantee, and so the method of setting time frames for speeches by individual members of parliament is not a straightforward formal question.

The Constitutional Court stated that the legislator had created an unconstitutional situation, by neglecting to regulate the system which guarantees the right to speak of every member of parliament.

The Constitutional Court turned down the petitioner's request for the repeal of the relevant provisions of the Standing Orders, as they could be used to create rules which would in fact protect members' rights. The Court stressed that restrictions on the right of members of parliament to speak can be justified by the need for parliament to operate efficiently and in this regard limits on the times of speeches can be set.

Chief Justice Mihály Bihari gave a dissenting opinion. In his view, the petition should have been rejected, as there were no grounds for stating that unconstitutionality could be manifested in omission. Justice Péter Paczolay concurred in this opinion.

They believed that the starting point for the examination of the petition should have been whether the protection of the right to speak of members of parliament came directly from any particular provision of the Constitution. They drew a distinction between members' right to speak, which means the right to participate in parliamentary debates, and parliamentary freedom of speech. In their view, the direct constitutional protection of the right to speak of members of parliament could not derive from the freedom of speech.

The two justices did not agree with the majority opinion which pointed to the lack of minority protection in the provisions of the Standing Orders

relating to the right to speak. Members of the parliamentary party in power and opposition members both faced restrictions on their right to speak. Therefore the question of protecting minorities could not be raised. They took the view that two conditions must be fulfilled if the restriction on the right to speak is to be in line with constitutional requirements. It must be general and all groups of members of parliament must be able to present their views in debates. The Standing Orders fulfilled both conditions. Parliament has great freedom in the creation of Standing Orders. Only a direct and serious breach of the Constitution could justify interference in this process by the Constitutional Court. As a result of this great freedom it is parliament that defines to what extent its operation should be defined in Standing Orders, not every small detail needs to be covered.

Languages:

Hungarian.



Israel

Supreme Court

Important decisions

Identification: ISR-2006-1-001

a) Israel / **b)** High Court of Justice (Supreme Court) / **c)** Panel / **d)** 15.09.2005 / **e)** H.C. 7957/04 / **f)** Mara'abe et al. v. The Prime Minister of Israel et al. / **g)** to be published in the Official Digest / **h).**

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
- 3.17 **General Principles** – Weighing of interests.
- 4.7.6 **Institutions** – Judicial bodies – Relations with bodies of international jurisdiction.
- 5.1.1 **Fundamental Rights** – General questions – Entitlement to rights.
- 5.3 **Fundamental Rights** – Civil and political rights.
- 5.3.6 **Fundamental Rights** – Civil and political rights – Freedom of movement.
- 5.4 **Fundamental Rights** – Economic, social and cultural rights.

Keywords of the alphabetical index:

Security fence / Military commander, authority / Belligerent occupation / Military, consideration / Security, consideration / International Court of Justice, scope of authority / International humanitarian law / Geneva Convention.

Headnotes:

An occupying country has authority under international law to maintain public order and safety in the occupied territories. That authority also extends also to persons who are not “protected persons” within the meaning of the Fourth Geneva Convention.

When undertaking military operations that will impinge upon the human rights of residents of the occupied territories, the occupying authority must balance security and military considerations against the human rights of resident populations, according to international and domestic law.

The Supreme Court and the International Court of Justice (hereinafter “ICJ”) hold similar views about the relevant legal framework, but disagree as to its implementation due to factual differences in the information available to them.

Summary:

The military commander ordered the building of a separation fence around the Israeli town of Alfei Menashe, which is located in Samaria. The fence also enclosed five Palestinian towns. The High Court had to determine whether the Advisory Opinion of the International Court of Justice (hereinafter “ICJ”) meant that the military commander had no authority to build a separation fence within the Green Line, the 1948 armistice line. Having ruled that the ICJ opinion did not prevent the military commander from authorising the separation fence, it was asked to determine whether this particular part of the fence satisfied the standards set in the *Beit Sourik* case, in which the High Court declared that the military commander’s actions would be subject to a three-part proportionality test. The petitioners claimed that the fence abrogated their security, lives, rights of property, movement, and freedom of occupation, and other rights recognised under Israeli law.

The territories of Judea and Samaria are held by Israel in belligerent occupation. The three sources of applicable law are the Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (referred to here as “the Hague Regulations”), the humanitarian parts of IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 (referred to here as “the Fourth Geneva Convention”) which Israel has accepted, and the basic principles of Israeli administrative law. The Court had already determined in *Beit Sourik* that the military commander was authorized to build a separation fence provided that the only goal of the fence was the military goal of security. This is consistent with Regulations 43 and 52 of the Hague Regulations and § 53 of the Fourth Geneva Convention. Because the fence is part of Israel’s combat activity, it falls within the ambit of Regulation 23.g of the Hague Regulations as well. Although the settlers living in Samaria are not “protected persons” under the Fourth Geneva Convention, the military commander’s authority to “ensure public order and safety” covers all persons present in the territory. The question of the legality of the settlers’ presence in the West Bank is irrelevant to this issue, and the Court declined to address it. The military commander must balance security and military considerations against the best interests of the local Arab population, whose human rights are protected by Regulation 46 of the Hague Regulations

and § 27 of the Fourth Geneva Convention. The balancing is to be carried out with reference to the principle of proportionality, based on the following tests:

1. a reasonable connection between purpose and means;
2. employment of the least harmful means; and
3. narrow proportionality, or an appropriate balance between the damage caused to the individual and the benefit derived by society.

The High Court declared that the ICJ and the Supreme Court had adopted very similar approaches. Both courts agree that the occupation is belligerent, that annexation is prohibited, and that Regulations 46 and 52 of the Hague Regulations and §53 of the Fourth Geneva Convention apply. Ultimately, the ICJ declared that the fence was illegal because the evidence presented did not provide sufficient information to convince it of the military necessity of the fence. The High Court's examination of the ICJ opinion revealed that while the ICJ had ample information about the humanitarian impact of the fence, it had virtually no information about the counter-vailing security considerations. Furthermore, the evidence that was before the ICJ was flawed in ways that exaggerated the impact of the fence on Arab life. The High Court, on the other hand, benefited from an adversarial process that ensures that much more complete information is before it. Whilst the Court gives full appropriate weight to the norms of international law as developed and interpreted by the ICJ, it does not accept the ICJ's blanket condemnation of the fence. It will continue to examine each contested part of the fence, to determine whether it represents a proportional balance between security and military needs and the rights of the local population.

The High Court accepted the respondents' arguments that because the decision to erect the fence was a security consideration, it fell within the authority of the military commander. Because the fence separates terrorists and Israelis, both in Israel and outside, it satisfies the rational connection test of proportionality. However, the Court found that the respondents had not satisfied the second test of proportionality, that of the least harmful means. The Court ordered respondents to reconsider, within a reasonable time span, whether a different path for the security fence at Alfei Menashe would afford effective protection for the Israeli residents of Alfei Menashe without having such a great impact on the rights of the Arab residents of the area.

Cross-references:

- H.C. 2056/04, *Beit Sourik Village Council v. The Government of Israel* 58(5) P.D. 807;
- H.C. 1661/05, *The Gaza Coast Regional Council v. The Knesset et al.* (as yet unpublished).

Languages:

Hebrew, English (translation by the Court).



Italy

Constitutional Court

Important decisions

Identification: ITA-2006-1-001

a) Italy / b) Constitutional Court / c) / d) 23.01.2006 / e) 22/2006 / f) / g) *Gazzetta Ufficiale, Prima Serie Speciale* (Official Gazette), 01.02.2006 / h).

Keywords of the systematic thesaurus:

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

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

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:

Mobbing, prevention.

Headnotes:

The contested Act does not go beyond the limits of the competence recognised by the Court to the Regions when it ruled that they may adopt regulations containing support measures to study, prevent and curb mobbing.

Summary:

The President of the Council of Ministers raised the question of the constitutional legitimacy of Act no. 26 of the Region Abruzzo of 11 August 2004 concerning mobbing prevention and counteraction, with reference to Sections 117.2.g, 117.2.l, 117.3 and 118.1 of the Constitution.

According to the applicant, the Act violates the exclusive legislative competence of the State in relation to the civil system and the administrative organisation of the State.

The Court ruled that the Act in question, which presupposes the existence of behaviour which leads

to mobbing and does not provide either a general definition or examples of such a phenomenon, does not represent a “blank” provision to be filled in by subsequent administrative provisions.

On the contrary, the Act no.26 refers to all the elements that can be inferred from the already existing State provisions concerning matters affected by this complex phenomenon.

The objection made by the applicant that the provisions setting up reference and counselling centres at the local health facilities of the Region is not founded either. The tasks of these centres mainly relate to detection and assessment of the consequences of harassing acts and behaviour on the workers' health, as well as to the identification of measures to support workers and their families. It is therefore reasonable to staff these centres with personnel of the health sector, in consistency with the nature of the said tasks.

Languages:

Italian.



Japan

Supreme Court

Important decisions

Identification: JPN-2006-1-001

a) Japan / **b)** Supreme Court / **c)** Grand Bench / **d)** 14.09.2005 / **e)** (o) (Gyo-Tsu), 82/2001 / **f)** Judgment on the right to vote of Japanese citizens residing abroad / **g)** *Minshu* (Official Collection of the decisions of the Supreme Court of Japan on civil cases), 59-7-2087 / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.3.1 **General Principles** – Democracy – Representative democracy.
 4.9.3 **Institutions** – Elections and instruments of direct democracy – Electoral system.
 4.9.7.1 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Electoral rolls.
 5.2.1.4 **Fundamental Rights** – Equality – Scope of application – Elections.
 5.3.41.1 **Fundamental Rights** – Civil and political rights – Electoral rights – Right to vote.

Keywords of the alphabetical index:

Election, vote, citizen residing abroad.

Headnotes:

Precluding Japanese citizens residing abroad from voting at all in national elections is in breach of the constitutional right to vote under Articles 15.1, 15.3, 43.1 and 44 of the Constitution.

Summary:

1. The appellants, Japanese citizens residing abroad, contend that the Public Offices Election Law, which completely or partly precludes Japanese citizens residing abroad from voting in national elections, is in violation of Articles 14.1, 15.1, 15.3, 43 and 44 of the Constitution.

The second and first instance courts dismissed all suits concerning the right to vote of Japanese citizens

residing abroad, on the grounds that none of them could be considered as a legal controversy under Article 3.1 of the Law on Courts and that this was not an exceptional case where the failure by *Diet* members to establish an overseas voting system should be deemed illegal. However, the Supreme Court overturned the judgment in part. The majority ruling by the Court was as follows:

2. Articles 15.1, 15.3, 43.1 and 44 of the Constitution guarantee the right to take part in national administration by voting in national elections as an inalienable right, and, to achieve this goal, it guarantees equal opportunity to vote. Therefore, it is impermissible in principle to restrict the right to vote or the exercise of the right to vote. Any such restrictions can only be imposed if they are unavoidable. Such unavoidable grounds would only exist where it would be almost impossible or extremely difficult to allow the exercise of the right to vote whilst maintaining fairness in elections.

Firstly, under the Public Offices Election Law before the partial amendment in 1998 (the “Amendment”), Japanese citizens residing abroad were not listed on the electoral roll and thus could not vote. In the past, there may have been difficulties in setting up an infrastructure to enable Japanese citizens residing abroad to vote, such as providing Japanese diplomatic establishments abroad with adequate human and material resources. However, the Cabinet had already put forward the Amendment Bill in 1984, with a view to establishing an overseas voting system applicable to all national elections, on the assumption that it should be possible to overcome such obstacles. It cannot therefore be argued that there were unavoidable grounds preventing the *Diet* from establishing an overseas voting system for more than ten years since the amendment bill was quashed.

Secondly, the Amendment of the Public Offices Election Law established an overseas voting system, which allows Japanese citizens residing abroad to exercise the right to vote in national elections. However, it was also stipulated that, for the time being, Japanese citizens residing abroad were allowed to vote only in national elections under the proportional representation system and not those held under the constituency system. The rationale behind this partial restriction was that it was difficult to provide Japanese citizens residing abroad with correct information on individual candidates, and the proportional representation system was simpler to administer. It was viewed as the first step towards establishing an overseas voting system. However, in view of the repeated use of the overseas voting system and remarkable progress in global communication technology since the Amendment,

there is no longer any difficulty in providing Japanese citizens residing abroad with correct information on individual candidates. Therefore, it cannot be said that there will be unavoidable grounds precluding Japanese citizens residing abroad from voting in national elections under the constituency system, at least at the time of the first national election to be held after this judgment is handed down.

Consequently, the Public Offices Election Law before the Amendment was in violation of Articles 15.1, 15.3, 43.1 and 44 of the Constitution and the same law after the Amendment will be in violation of the same articles of the Constitution at the time of the first national election after this judgment, because it completely or partly precludes Japanese citizens residing abroad from voting.

Languages:

Japanese, English (translated by the Court).



Latvia Constitutional Court

Important decisions

Identification: LAT-2006-1-001

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 06.02.2006 / **e)** 2005-17-01 / **f)** On the Compliance of the Words “to Mail Letters”, included in Section 74 (the First Part) of the Latvian Penalty Execution Code with Articles 89, 92 and 104 of the Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), 24(3392), 09.02.2006 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

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

2.3.8 **Sources of Constitutional Law** – Techniques of review – Systematic interpretation.

5.1.1.4.3 **Fundamental Rights** – General questions – Entitlement to rights – Natural persons – Prisoners.

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

5.3.37 **Fundamental Rights** – Civil and political rights – Right of petition.

Keywords of the alphabetical index:

Prisoner, letter, prohibition.

Headnotes:

The words “to mail letters”, in the first part of Section 74 of the Latvian Penalty Execution Code forbid convicted persons, placed in penalty or in disciplinary solitary confinement cells, to mail letters to private persons, but do not restrict their rights to correspond with courts and other State and local authority institutions.

Summary:

I. Section 70 of the Latvian Penalty Execution Code (hereinafter referred to as “the Code”) allows for the following methods of punishment for convicted

persons who commit serious or repeated offences whilst in detention:

1. if they are serving their sentence in prison, they may be placed in a solitary confinement cell for up to fifteen days and nights;
2. if they are detained in a penitentiary for minors, they may be placed in a disciplinary confinement cell for up to ten days and nights.

Section 74 of the Code regulates the regime of punishment and disciplinary solitary confinement (hereinafter referred to as "solitary confinement"). Under the first part of the section:

"Convicted persons placed in penalty or disciplinary solitary confinement cells are deprived of the right of meeting others, receiving parcels and printed material, buying food, mailing letters and playing games; smoking is also forbidden."

The claim challenged the phrase "mailing letters" (hereinafter referred to as "the impugned norm"). The claimant – the State Human Rights Bureau – argued that the prohibition on mailing letters, included in the first part of Section 74 of the Code, was out of line with Articles 89, 92 and 104 of the Constitution for the following reasons.

The impugned norm forbids a convicted person, placed in solitary confinement, to mail letters, including applications to the Court and appellate claims. This results in a restriction on the right of a convicted person to communicate with the Court. Article 104 of the Constitution confers the right to address submissions to State or local government institutions and to receive a proper response. The impugned norm contravenes Article 104 of the Constitution. It is also in conflict with Article 89 of the Constitution, which obliges the state to protect citizens' fundamental rights in the most efficient way. Finally, if they are not allowed to mail letters, then this denies somebody placed in solitary confinement the right to protest against such a disciplinary penalty to higher authorities.

II. Citing Judgment no. 2002-04-03 of 22 October 2002, the Constitutional Court emphasised that the only permissible restrictions on the rights of a convicted person are those aimed at guaranteeing that punishments are carried out and the regime under which this is done.

Referring to Judgment no. 2002-06-02 of 4 February 2003, the Court reiterated that interpretation of legal norms in a purely grammatical way cannot be

regarded as sufficient. Other methods of interpretation should also be used.

If one interpreted the impugned norm on a purely grammatical basis, one might conclude that the first part of Section 74 of the Code prohibits the mailing of letters addressed not only to private persons but also those addressed to courts and other state and local government institutions. The norm should be analysed by reading it both in conjunction with Sections 49 and 50 of the Code and with other legal norms.

The Court concluded that the term "letter" in the Code is aimed at the private correspondence of convicted persons, rather than letters addressed to courts and other State and local government institutions. Other terms – "proposal", "submission", "complaint" and "request" – are used to describe correspondence addressed to those institutions. Therefore the words "to mail letters", in the first part of Section 74 forbid the convicted person to mail letters to private persons, but do not restrict correspondence with courts and other State and local authority institutions.

The Court stressed that the term "state institutions" in Section 50 of the Code should be interpreted to include state and local authority institutions. As a result, the impugned norm does not forbid convicted persons to mail proposals, submissions and complaints to State and local authority institutions and thus it does not restrict fundamental rights, as set out in Articles 92 and 104 of the Constitution.

The Court also held that the impugned norm does not prevent a convicted person from disputing punishments inflicted on him whilst in custody and that it does not restrict the rights to efficient protection of fundamental rights, which follow from Article 89 of the Constitution.

The words "to mail letters" in the first part of Section 74 of the Latvian Penalty Execution Code were held to be in conformity with Articles 89, 92 and 104 of the Constitution.

The term "letters" in Section 74 is to be interpreted strictly as "letters to private persons".

Cross-references:

- Case no. 2002-04-03 of 22.10.2002, *Bulletin* 2002/3 [LAT-2002-3-008];
- Case no. 2002-06-02 of 04.02.2003;
- Case no. 04-03(98) of 10.06.1998, *Bulletin* 1998/2 [LAT-1998-2-004].

Languages:

Latvian, English (translation by the Court).

*Identification:* LAT-2006-1-002

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 08.03.2006 / **e)** 2005-16-01 / **f)** On the Conformity of Section 13 of 20 December 2004 Law “Amendments to the Law On Residential Tenancy” with Sections 1, 91 and 105 of the Latvian Constitution / **g)** *Latvijas Vestnesis* (Official Gazette), 40(3408), 09.03.2006 / **h)** CODICES (Latvian, English).

Keywords of the systematic thesaurus:

1.6.5.5 **Constitutional Justice** – Effects – Temporal effect – Postponement of temporal effect.

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

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

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

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

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

Keywords of the alphabetical index:

Denationalisation, building / Tenancy, rental payment, maximum.

Headnotes:

In a democratic state the principle of legitimate trust (trust in law) does not preclude the implementation of extensive and vital reforms. However, a reform with an unlimited time span may contradict this principle. In carrying out the reform, the State has a duty to bring about a reasonable conclusion. Rent, determined under administrative procedure, would be substituted by a lasting solution, adapted to the conditions of a market economy, which would balance the interests of both pre-reform tenants and property owners.

Summary:

I. Denationalisation and the return of buildings to their lawful owners after the renewal of the national independence of Latvia were carried out under the property reform. The legislation governing this reform also covered the relationship between the owners of the properties and those who had occupied the properties before the reform, hereinafter referred to as “pre reform tenants”. Previous provisions within the Tenancy Law set out a maximum rental payment covering the period to 31 December 2004.

Parliament passed the legislation containing the impugned norm on 20 December 2004 and it took effect on 1 January 2005. Several amendments were made to paragraph 4 of the Transitional Provisions of the Tenancy Law. A maximum rental period was also set out, covering the period up to 31 December 2007.

The petitioners – who owned several denationalised buildings – claimed that the impugned norm breached their fundamental rights, determined by Articles 1, 91 and 105 of the Constitution. They requested that it be declared null and void from the moment of its adoption. They also pointed out that the impugned norm came into effect only two days after it had been passed, which resulted in a gross violation of the principle of trust in law. The owners were given no opportunity of adapting to the sudden changes.

II. The Constitutional Court pointed out that in bringing about property reform, for example, when denationalising and returning buildings to their lawful owners, the legislator must observe the rules of a state governed by law. One problem which the petitioners have with the amendments to the legislation is that it was adopted more than ten years after the expiry of the time for submission of applications for restoration of buildings by owners of the buildings.

The Court reiterated that property rights also include the right to derive benefit from ownership, *inter alia* through rental. This not only ensures the maintenance of the respective property but also brings profit to the owner.

The Court observed that the impugned norm restricts owners’ rights to demand rental payments from the pre-reform tenants. The rent would cover reasonable maintenance expenses and be substantiated by calculations, the correctness and validity of which the owner could prove in court. As a result, the owners have to cover the expenses from other resources. At the same time, the impugned norm prevents owners from gaining a reasonable profit from renting their

property. It therefore restricts the rights of owners of properties which have been denationalised and returned to them, such rights being set out in Article 105 of the Constitution.

The Court stated that the right to property is not absolute. Firstly, property shall serve public interests. Secondly, the right to a property can be restricted if the restrictions are determined by law, have a legitimate aim and are proportionate.

When the legislator is determining rental rights, he must not only take into consideration constitutional property rights, but also the requirement to utilise the property in a socially fair way.

The Court found that the legitimate aim of the impugned norm is the protection of poor and needy pre-reform tenants where there is a shortage of reasonably-priced accommodation. On the whole, this norm is appropriate for reaching the legitimate aim. The problem with it is that it does not link the maximum amount of rental payment with the financial position of the tenants. It offers the possibility of low rent not only to the poor and needy but also to those who might be in a better financial position than the owner of the property which has been denationalised. The aim set out above cannot therefore justify the restrictions on rental payments for all pre-reform tenants.

The Court acknowledged the duty of the State to safeguard the welfare of its residents. However, it took the view that there were other ways of achieving this, and not just by the onerous regulation of tenancy rights, although a short-term interference in tenancy law might be justifiable. It concluded that the restrictions on the rights of property owners were not proportionate to the public benefit gained from the restrictions.

In a democratic state the principle of legitimate trust (trust in law) does not preclude extensive and vital reforms. A reform with an unlimited time span might contravene this principle. In achieving the reform, the State was obliged to bring it to a reasonable conclusion, under which rent, determined under administrative procedure, would be substituted by a lasting solution, adapted to the conditions of a market economy and which would balance the interests of both pre-reform tenants and the property owners.

The Court declared the impugned norm to be incompatible with Articles 1 and 105 of the Constitution and invalid with effect from 1 January 2007.

Cross-references:

Earlier decisions of the Court:

- Case no. 2001-12-01, *Bulletin* 2002/1 [LAT-2002-1-004];
- Case no. 2002-01-03;
- Case no. 2002-04-03, *Bulletin* 2002/3 [LAT-2002-3-008];
- Case no. 2002-12-01, *Bulletin* 2003/1 [LAT-2003-1-004];
- Case no. 2003-04-01 of 27.06.2003, *Bulletin* 2003/2 [LAT-2003-2-008];
- Case no. 2004-10-01, *Bulletin* 2005/1 [LAT-2005-1-001];
- Case no. 2005-12-0103.

Judgments of other constitutional courts:

- Republic of Estonia Supreme Court, Case no. 3-4-1-20-04 of 02.12.2004;
- German Federal Constitutional Court Judgment (*BVerfGE* 37, 132);
- Constitutional Court of the Czech Republic, Case no. IV.US 524/03 of 23.09.2004, *Bulletin* 2004/3 [CZE-2004-3-015];
- Constitutional Tribunal of Poland, Case no. K48/01 of 02.10.2002, *Bulletin* 2002/3 [POL-2002-3-031];
- Constitutional Tribunal of Poland, Case no. K 4/05 of 19.04.2005.

European Court of Human Rights:

- *Marckx v. Belgium*, 13.06.1979, Series A, no. 31, p. 23, § 5; *Special Bulletin ECHR* [ECH-1979-S-002].
- *Mellacher and others v. Austria*, 23.11.1989;
- *Velosa Barreto v. Portugal*, 21.11.1995; *Bulletin* 1995/3 [ECH-1995-3-020];
- *Scollo v. Italy*, 28.09.1995, *Bulletin* 1995/3 [ECH-1995-3-018];
- *Immobiliare Saffi v. Italy*, 28.07.1999, *Bulletin* 1999/2 [ECH-1999-2-007];
- *Broniowski v. Poland* [2004];
- *Hutten-Czapska v. Poland* [2005].

Languages:

Latvian, English (translation by the Court).



Liechtenstein

State Council

Important decisions

Identification: LIE-2006-1-001

a) Liechtenstein / **b)** State Council / **c)** / **d)** 06.02.2006 / **e)** StGH 2005/12 / **f)** / **g)** / **h)**.

Keywords of the systematic thesaurus:

- 3.16 **General Principles** – Proportionality.
 3.17 **General Principles** – Weighing of interests.
 5.3.17 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.
 5.3.39 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Real estate, damage / Damage, compensation / Search of home / Search, proportionality / Damage, duty to avoid.

Headnotes:

Damage to property caused when state security forces conduct a search of a person's home constitutes a violation of the right to peaceful enjoyment of private property guaranteed by Article 34 of the Constitution and Article 1 Protocol 1 ECHR.

A restriction of this right must comply with the principle of proportionality since it constitutes an interference with a fundamental freedom. The condition of proportionality is not fulfilled where there was another equally appropriate but less violent means of attaining the desired objective. The hoped-for outcome must also be reasonably proportional to the resulting denial of freedom.

In order to assess whether there has been a disproportionate interference with fundamental freedoms, account must be taken not just of the very search of the person's home but of all the preparatory measures taken by the security forces.

Significant material damage caused by a search of a person's home does not in itself constitute a disproportionate interference with the right to peaceful enjoyment of property.

Breaking of entrance doors and forcing of several internal doors in the context of a search constitute, when considered overall and in the light of the considerable ensuing damage, a disproportionate interference with the right to peaceful enjoyment of property where, as in this case, other less violent means of entry, of a more or at least equally appropriate nature, were available, such as climbing through a window, telephoning the landlord to obtain a set of keys, attempting to obtain keys by other means before conducting the search, without giving away that it was to take place, or more careful consideration of information on the access possibilities gathered during the period of several weeks for which the property had been watched.

The question is also whether the aim of the security forces' overall conduct in this matter – which was the preservation of evidence in a criminal investigation – was reasonably proportional to the search's consequences for the property-owner's right to peaceful enjoyment of his or her property.

Summary:

During a search of a house occupied by a tenant, conducted by the security forces in connection with a criminal investigation, damage in an amount of CHF 95,000 was caused through the violent breaking of several doors. An action for damages against the authorities brought by the owner of the house was dismissed at last instance before the ordinary courts.

The State Council allowed a constitutional appeal against this decision on the ground that the right to peaceful enjoyment of property had been violated.

Languages:

German.



Lithuania

Constitutional Court

Important decisions

Identification: LTU-2006-1-001

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 16.01.2006 / **e)** 7/03-41/03-40/04-46/04-5/05-7/05-17/05 / **f)** On the private accusation / **g)** *Valstybės Žinios* (Official Gazette), 7-254, 19.01.2006 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

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

5.2 **Fundamental Rights** – Equality.

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

5.3.13.7 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right to participate in the administration of justice.

5.3.13.19 **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:

Equality, in criminal procedure / Private accusation / Charge, truth, objective, obligation to establish.

Headnotes:

Under the general constitutional model of criminal procedure, pre-trial investigation and the pursuing of charges on behalf of the state in criminal cases are different stages in criminal procedure. During the pre-trial investigation, information is collected and assessed, to determine whether the investigation should continue, whether the criminal case should then be referred to court and whether there could be a fair trial.

The fact that a general model for criminal procedure is enshrined within the Constitution does not rule out

the possibility of the regulation of criminal procedure, so that in certain cases pre-trial investigation or prosecution does not take place. There is scope within the Constitution for legislative consolidation of certain types of criminal procedural rules. These differ slightly from the general constitutional model for criminal procedure, but their establishment must be constitutionally grounded.

Summary:

I. Four petitioners – the Second Vilnius City, the Third Vilnius City, the Panevėžys City and the Šiauliai District courts – lodged seven petitions. They sought a ruling as to the compliance with the Constitution of certain provisions of the Code of Criminal Procedure (referred to here as “the CCP”) which sets out the procedure for private prosecution. The provisions are as follows.

Article 407 provides that criminal cases can only commence upon receipt of a complaint by the injured party and that pre-trial investigation does not take place in these cases.

Article 408.1 establishes that an injured party pursues his claim through the court system.

Article 412.2 sets out the requirements for complaints filed as private prosecutions. There was a suggestion that this contravenes the principle of equality in Article 29.1 of the Constitution.

Article 412.3 allows the Court to dismiss a claim that does not satisfy the necessary requirements. The suggestion was made that this contravenes Articles 29.1 and 30.1 of the Constitution (the right to apply to the Court).

II. The Constitutional Court observed that a general model of criminal procedure is set out in the Constitution, which presupposes that pre-trial investigation and consideration of the criminal case in court are different stages of criminal procedure. The model of criminal procedure entrenched in the CCP is virtually in line with the constitutional model of criminal procedure to the extent that two different stages are envisaged – pre-trial investigation and consideration of the criminal case in court.

The Constitutional Court emphasised that the legislator, when dealing with criminal procedure is not permitted under the Constitution to consolidate the regulations in such a way as to rule out the possibility of any performance of pre-trial investigation or separate procedural actions in order to discover the perpetrator of the criminal deed or the way in which they committed it. If these procedures could not take

place, there would be a breach of the duty to protect individuals and society as a whole from crime as well as a breach of the right to proper legal process.

The Constitutional Court held that the constitutional principle of equal rights and the general model of criminal procedure enshrined in the Constitution do not prevent varying legal regulations being drawn up in respect of certain categories of people in different situations. Under the Constitution, certain procedures may be consolidated within the legislation which differ from the general constitutional model of criminal procedure. These are to be treated as exceptions to the general constitutional criminal procedure and their establishment must be constitutionally grounded.

The Constitutional Court noted that sometimes cases are rejected due to a deficiency in the paperwork which can be put right by the complainant. Sometimes, they are rejected due to a deficiency which can only be rectified by pre-trial investigation or separate procedural actions. The person affected by the criminal deed specified in Article 407 of the CCP is not prevented in either situation from pursuing his violated rights or legitimate interests in court. If he can remove the deficiency himself, he may apply again to the Court under the procedure for private prosecutions. If he cannot remove it, then he can apply to the prosecutor.

Courts are bound by a constitutional obligation to establish objective truth and to arrive at a fair resolution of matters before them. If the Court believes that without pre-trial investigation or certain procedural actions, which are impossible to perform in court, it will not be able to arrive at the truth or to resolve a case fairly (the information before it might, for example, be insufficient or contradictory), then it must have the powers to decide that the above procedures should be conducted and certain instructions be given to various parties. Such instructions from the Court will have binding effect on all those to whom they are addressed.

The Constitutional Court held that such powers must be established within the legislation for courts of general jurisdiction at all instances and for all specialised courts. Such powers would be constitutionally grounded. It also follows from the constitutional concept of administration of justice that courts must solve cases only by strict adherence to procedural and other requirements, established by laws, without acting *ultra vires* or exceeding their authority. Certain powers of the Court relating to criminal procedure derive from the necessity to protect individual rights and legitimate interests and from the role the Court plays in ensuring state security and protecting individuals and society as a whole from the impact of crime. In criminal procedure,

the Court must act impartially, objectively assessing the evidence surrounding the commission of a criminal deed, and making fair decisions as to the culpability of somebody accused of committing a criminal act.

When establishing the objective truth and the culpability of the accused, the Court has to play an active role in procedural matters. The limits of each criminal case have to be defined and parties to the proceedings must not be allowed to exceed their powers. The Court must be equally fair to all parties involved.

The Constitutional Court noted that under the norms and principles entrenched in the Constitution, (including the right of an individual to a public and fair hearing of his case by an independent and impartial court), a court cannot simply passively observe the cases before it, and that the administration of justice cannot depend only upon the material submitted to the Court. The Court, in seeking to investigate all circumstances of the case objectively and comprehensively and to establish the truth, has power either to perform procedural actions in its own right or to commission certain officials, including prosecutors, to perform corresponding actions.

The Constitutional Court ruled that the above provisions of the CCP were not contrary to the Constitution.

The Constitutional Court also investigated the compliance with the Constitution of certain other provisions of the CCP were in compliance with the Constitution, and ruled that they did comply with it. The Court, however, dismissed that part of the case regarding the compliance of Article 410 of the CCP with the Constitution.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2006-1-002

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 26.01.2006 / **e)** 44/03 / **f)** On the Law on Petitions / **g)** *Valstybės Žinios* (Official Gazette), 11-410, 28.01.2006 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

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

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

5.3.37 **Fundamental Rights** – Civil and political rights – Right of petition.

Keywords of the alphabetical index:

Petition, appealing against decisions refusing to accept the petition.

Headnotes:

Under the Constitution, the legislator has some discretion in establishing the right of petition by law. He may not, however, deny the essence of the petition itself, or impose artificial or unjustified restrictions on the implementation of this constitutional right.

Summary:

I. The Vilnius Regional Administrative Court submitted a petition to the Constitutional Court requesting an assessment of the compliance of certain provisions of the Law on Petitions with the Constitution. The Vilnius Court suggested that under Article 10 of the Law on Petitions, it is possible to lodge a complaint about a decision by the Petitions Commission not to recognise an application as a petition. Complaints may also be lodged against decisions refusing to accept a petition for consideration respectively to the Lithuanian Parliament, the Government Chancellor or the municipal council. The decisions of these bodies to refuse to grant the appeal are final and not subject to appeal (Article 10.4 of the Law on Petitions). Decisions by the parliament, the Chancellor and the municipal council as to the granting of the demands and proposals put forward in the petitions shall also be final and not subject to appeal. The Vilnius Court argued that Articles 10 and 16 of the Law on Petitions contravene the constitutional right of the person to apply to court (Article 30.1 of the Constitution), as well as the constitutional right of citizens to appeal against decisions by State institutions or their officials (Article 33.2 of the Constitution). The provisions may also restrict the procedure for implementing the right of petition by citizens (Article 33.3 of the Constitution).

It is clear from Article 33.3 of the Constitution that the legislator must regulate petitions precisely in the legislation, setting out, for example, the grounds on which it is possible to submit a petition, the institutions to whom it may be submitted, formal

requirements for petitions, the rules governing application and the procedure for adopting decisions refusing to accept petitions and for appealing against such decisions.

II. The Constitutional Court noted that under Article 10.4 of the Law on Petitions, decisions by the parliament or the municipal council to refuse to grant complaints against decisions by the petitions commission not to recognize an application as a petition or to refuse to accept the petition for consideration shall be final and shall not be subject to appeal. As a result, there is no scope for appeal against decisions by the parliament or municipal councils even where, in the petitioner's opinion, these decisions have not been made in line with the Law on Petitions or other laws. This results in a restriction of the implementation of the constitutional rights of a person to appeal to court regarding a breach of his constitutional rights as well as the right of citizens to lodge complaints about decisions by state institutions. The citizen's constitutional right of petition is also restricted.

The Constitutional Court held that the provision "the decision to refuse to grant a complaint shall be final and not subject to appeal" of Article 10.4 of the Law on Petitions is in conflict with Articles 30.1, 33.2 and 33.3 of the Constitution, to the extent that it prevents recourse to court by somebody who considers decisions have been made which are out of line with the Law on Petitions.

Article 10.1.2 of the Law on Petitions also came under scrutiny. It provides that a decision by the Government Petitions Commission not to recognize an application as a petition and to refuse to accept a petition for consideration may be appealed to the Government Chancellor. Article 10.4 states that the Government Chancellor's decision is final and not subject to appeal. The Constitutional Court ruled that the provisions are in conflict with Article 95.1 of the Constitution and with the constitutional principle of a state under the rule of law. Under Article 95.1 of the Constitution, the government shall resolve the affairs of state governance at its sittings by adopting resolutions. In the context of the constitutional justice case at issue, it should be noted that the fact that decisions by the Petitions Commission, which has been set up by the government and is responsible and accountable to it, stems from Article 95.1 of the Constitution, construed in the context of various constitutional provisions, entrenching the constitutional status of the government, and the constitutional principle of a state under the rule of law. Decisions by the Petitions Commission may not be amended or annulled by any government official but only by the government itself (or courts and other jurisdictional institutions under

their competence). Article 10.1.2 of the Law on Petitions empowers the Government Chancellor to make decisions in the course of consideration of the complaints on the decisions of the Government Petitions Commission not to recognise the application as a petition as well as on its decisions to refuse to accept a petition for consideration. This results in interference with the powers of the government.

The Constitutional Court also recognised that Article 16 of the Law on Petitions is not contrary to the Constitution. Under this provision, decisions by the parliament or the municipal council shall be final and not subject to appeal only in the cases where the parliament or the municipal council considers a petition and takes a decision as to the granting of the demands and proposals put forward in the petition. After such a decision has been made, the constitutional right of petition of the citizen has been implemented.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2006-1-003

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 14.03.2006 / **e)** 17/02-24/02-06/03-22/04 / **f)** On the limitation of the rights of ownership in protected territories and in forest land / **g)** *Valstybės Žinios* (Official Gazette), 30-1050, 16.03.2006 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.2 **Fundamental Rights** – Equality.
 5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
 5.5.1 **Fundamental Rights** – Collective rights – Right to the environment.

Keywords of the alphabetical index:

Forest, property, limitations and prohibitions / Land, protected territories.

Headnotes:

The state's duty to protect the environment, areas of outstanding natural beauty and individual geological features is enshrined in the Constitution and in particular Article 54 of the Constitution.

Areas of great value to the nation will vary considerably. Special features within the legal regime will apply to them. There will also be different methods of protection for them and variations in the limitations and prohibitions on activities which take place there. The types of activities which may be limited or restricted include economic and building activities. This will also apply to the states and municipalities under the control of neighbouring areas. Limitations and prohibitions may also be imposed on the owners and users of plots of private land, forests, and parks and to water authorities.

Summary:

I. The Supreme Administrative Court, the Moletai District Local Court and the Svencionys District Local Court asked the Constitutional Court to assess whether certain provisions of the Law on Protected Territories, the Forestry Law, and the Law on Land were in compliance with the Constitution. They requested an assessment of the compliance of certain provisions of the Law on Protected Territories and the Law on Land Reform with the Constitutional Law on Entities, Procedure, Terms and Conditions and Restrictions of the Acquisition into Ownership of Land Plots (referred to here as the Constitutional Law). In addition, they asked for a scrutiny of the compliance of certain provisions of the Regulation for Construction on Private Land approved by Lithuania Government Resolution no. 1608 "On Approving the Regulation for Construction on Private Land" of 22 December 1995 (referred to here as the Regulation) with the Constitution, the Forestry Law and the Law on Land.

The petitioners argued that the provisions of the Law on Protected Territories and the Law on Land Reform impose greater limits upon the individual right of ownership than those imposed by the Constitutional Law since under these laws it is not possible to acquire land designated to other categories as well. The provision of the Forestry Law which allows the Government or the Ministry of Environment to regulate the use of forest resources in protected territories arguably results in a limitation on the right of ownership by sub-statutory act. Yet Article 23.2 of the Constitution clearly states that ownership rights shall be protected by laws. Besides, the limitations within the disputed provisions of the Law on Protected Territories, the Forestry Law and the

Regulation are applied only when the tract of private land in question is contained within state sanctuaries and state parks. As a result, the owners of such tracts of land are treated differently from those who own land outside state sanctuaries and state parks.

II. The Constitutional Court observed that the state is under a constitutional obligation to protect the natural environment and the features within it and to regulate the use of natural resources. It is entitled to enact legal regulations under which the use of the natural environment is restricted and certain parties are under an obligation to act in a particular manner or to abstain from certain actions.

The Constitutional Court ruled that Article 4.3 of the Forestry Law, which prohibits the dividing up of private forest estates if the estate then becomes smaller than five hectares is not contrary to the Constitution. This prohibition is aimed at ensuring that forests are not divided into very small parcels of ownership. There are many duties and technical requirements involved in forest management and if there are too many owners, preconditions might be created to change the natural landscape and resources of the forest and the natural environment and forest landscape could be impoverished and depleted as a result.

Article 18.11 of the Law on Land was also held to be constitutionally compliant. This article prevents tracts of land in private ownership within state sanctuaries and state parks from being sold off in part, leased, mortgaged or disposed of by way of gift, except in cases where boundaries of adjacent premises of owners are changed. The rationale behind this article is that there should not be too many small parcels of land within state sanctuaries and state parks belonging to different owners. This again could create preconditions to change the natural landscape and natural resources in the localities in question, and result in the impoverishment and depletion of the natural environment in general.

The Constitutional Court also noted that all the other disputed statutory provisions complied with the Constitution and the constitutional law respectively.

The provision "The construction of buildings in forestry land is permitted when such buildings are needed for forestry activities" in item 2 of the Regulation for Construction on Private Land approved by Lithuanian Government Resolution no. 1608 "On Approving the Regulation for Construction on Private Land" of 22 December 1995 was also examined. The Constitutional Court noted that it allows for the construction not only of facilities for the storage of timber but other buildings too. It is therefore in conflict

with the Constitution as well as with Lithuanian Forestry Law and Lithuanian Land Law.

Languages:

Lithuanian, English (translation by the Court).



Identification: LTU-2006-1-004

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 30.03.2006 / **e)** 14/03 / **f)** On acquisition of agricultural land / **g)** *Valstybės Žinios* (Official Gazette), 37-1319, 04.04.2006 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

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

5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Agriculture, land plots, size / Competition, between natural and legal person / Person, natural, discrimination / Land, property, maximum size.

Headnotes:

In formulating legislation related to land and its use, the legislator may introduce various conditions, limitations, and prohibitions. These will vary according to the category of property. Any such limitations and prohibitions must be constitutionally grounded, and will apply to all natural and legal persons, whether they own the property, rent it, or possess other rights over it.

However, the Constitution does not permit legal regulations which could result in unequal economic conditions for existing or potential business entities, and which could hamper business development, freedom of economic activity and business activity which is of benefit to society as a whole.

Summary:

I. Several members of the Lithuanian Parliament requested an assessment by the Constitutional Court as to the compliance with the Constitution of several provisions of the Provisional Law on the Acquisition of Agricultural Land. According to these provisions, natural persons may acquire agricultural land that does not exceed 300 hectares and legal persons may acquire agricultural land which does not exceed 2000 ha were not in conflict with the Constitution. The petitioners observed out that this resulted, for no objective reason, in different maximum sizes of plots of agricultural land being available for purchase by natural persons, agricultural companies and legal persons. They suggested that this meant discrimination against individuals, which is contrary to Article 29 of the Constitution, under which all persons shall be equal before the law, courts, and other state institutions and officials. It also resulted in differing competition conditions for different categories of persons, which is contrary to the requirement for fair competition enshrined in Article 46 of the Constitution. Opportunities for individuals to choose a desirable form of business were also curtailed, and this runs against Article 48.1 of the Constitution.

II. The Constitutional Court observed that the legislator may regulate, by law, the maximum size of plots of land which can be acquired by right of ownership. However, in determining the maximum size of plot for agricultural land and plots of land designated for different purposes, the norms and principles of the Constitution must be respected. The Constitution does not permit legal regulations which could result in unequal economic conditions for existing or potential business entities, and which could hamper business development, freedom of economic activity and business activity which is of benefit to society as a whole.

The Constitutional Court went on to state that the maximum size of plots of agricultural land must be determined by the character of agricultural land and the public interest sought. Criteria should not be used which have no constitutional basis. This could include a stipulation that anybody buying the land should either farm the land themselves or live close to it, which would force them to choose certain farming methods.

The Court also ruled that there is no justification for the requirement that natural persons can acquire agricultural land of a maximum size of 300 hectares, while legal persons may acquire much larger parcels of land, to a maximum size of 2000 hectares. This confers an unfair advantage on legal persons and results in a limitation of the ability of natural persons

to compete. There is also a disproportionate restriction on freedom of business activity.

Accordingly, the disputed provisions of the Provisional Law on the Acquisition of Agricultural Land, to the extent that they permit natural persons to acquire up to 300 hectares and legal persons 2000 hectares, were held to be in conflict with the Constitution.

The Constitutional Court noted that the Constitution does not prohibit restrictions in legislation on the acquisition of minimum sizes of agricultural plots of land.

Languages:

Lithuanian, English (translation by the Court).

*Identification:* LTU-2006-1-005

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 04.04.2006 / **e)** 24/05-04/06 / **f)** On the compliance of the Statute of the Parliament of the Republic of Lithuania with the Constitution of the Republic of Lithuania / **g)** *Valstybės Žinios* (Official Gazette), 38-1349, 06.04.2006 / **h)** CODICES (English, Lithuanian).

Keywords of the systematic thesaurus:

3.3.3 **General Principles** – Democracy – Pluralist democracy.

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

4.5.2.2 **Institutions** – Legislative bodies – Powers – Powers of enquiry.

4.5.4.4 **Institutions** – Legislative bodies – Organisation – Committees.

4.5.11 **Institutions** – Legislative bodies – Status of members of legislative bodies.

Keywords of the alphabetical index:

Enquiry, parliamentary / Parliament, member, mandate, free / Parliament, investigation commission, establishment.

Headnotes:

The Constitution does not allow for the drawing up of an exhaustive list of questions, for the investigation of which the parliament may form provisional investigation commissions. Parliament, as the representative of the nation and an institution which carries out other roles besides that of law making, may pass laws and other legal acts regulating very varied social relations. It can also form provisional investigation commissions with a view to the investigation of a wide variety of activities within the state and society as a whole.

Parliament does not have the power, under the Constitution, to form provisional investigation commissions, which could result in an interference with the powers of other state and municipal institutions provided for in the Constitution and other legislation.

Summary:

I. The parliament and a group of its members asked the Constitutional Court to determine the constitutional compliance of Article 73.3 of the Statute of the parliament (*Seimas*). The provision states, "If a group of at least one quarter of the members of the parliament submits a written demand to form a provisional control or investigation commission, the parliament must form such a commission at its next available sitting." The petitioners suggested that this might contravene the principle of a free mandate of a member of parliament as set out in Article 59.4 of the Constitution and the principle of a state under the rule of law, as set out in the Preamble of the Constitution.

The petitioners suggested that parliament, under Article 73.3 of the Statute of the parliament (*Seimas*), is obliged to form a provisional control or investigation commission, if at least one quarter of the Members of Parliament requests it in writing to do so. This derogates from the usual procedure for setting up commissions in that in this case Parliament is obliged to form one. Usually, such commissions are formed by parliamentary resolution. If an initiative of a parliamentary minority (a group of not less than one quarter of the members) becomes obligatory to the parliament, small political groups, by comparison to larger groups, find themselves in a better situation when the functions of parliament are carried out.

II. The Constitutional Court held that the Constitution envisages the formation of provisional investigation commissions only for important state matters. The powers of parliamentary provisional investigation commissions are related to the constitutional purpose and functions of parliament. From the constitutional

principle of separation of powers and other provisions of the Constitution, the conclusion must be drawn that parliament has no powers to form provisional investigation commissions, which could result in an interference with the powers of other state and municipal institutions provided for in the Constitution and other legislation. A parliamentary provisional investigation commission cannot, for example, take over the constitutional powers of courts or otherwise interfere with the implementation of the constitutional competence of courts. It must also respect the independence of the judiciary and the court system in the administration of justice. Neither must it administer justice itself; a parliamentary provisional investigation commission may not assume the constitutional powers of prosecutors or otherwise interfere with the constitutional competence of prosecutors. The independence of the prosecutor must be respected, in arranging pre-trial investigation and pursuing charges on behalf of the state in criminal cases.

The Constitutional Court held that a parliamentary provisional investigation commission is an entity formed by parliament as a whole, not by one particular part, sub-unit, or group of members. The powers of a parliamentary provisional investigation commission may stem only from an act of the parliament as the representation of the Nation – the expression of the will of parliament, not that of a certain sub-unit or group of members. Accordingly, only Parliament is empowered to decide whether to form a provisional investigation commission on certain issues. Only parliament can establish its composition and tasks.

The Constitutional Court also noted that every decision by parliament as to whether or not to form a provisional investigation commission is susceptible to challenge at the Constitutional Court, as to the decision's compliance with legal acts of higher power, first and foremost the Constitution.

The Constitutional Court stressed that the provisions in question empower parliament both to resolve to form provisional investigation commissions and to resolve not to form them. The Constitutional Court concluded that Article 73.3 of the Statute of the parliament is not in conflict with the Constitution.

Languages:

Lithuanian, English (translation by the Court).



Moldova

Constitutional Court

Important decisions

Identification: MDA-2006-1-001

a) Moldova / **b)** Constitutional Court / **c)** Plenary / **d)** 28.02.2006 / **e)** 5 / **f)** Review of constitutionality of Articles 3.13 and 68.10-13 of Law no. 199-XIV of 18 November 1998 on movables property market amended and completed by Law no. 55-XVI of 28 April 2005 / **g)** *Monitorul Oficial al Republicii Moldova* (Official Gazette) / **h)** CODICES (Romanian, Russian).

Keywords of the systematic thesaurus:

- 3.4 **General Principles** – Separation of powers.
- 3.18 **General Principles** – General interest.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2 **Fundamental Rights** – Equality.
- 5.3.39 **Fundamental Rights** – Civil and political rights – Right to property.
- 5.4.8 **Fundamental Rights** – Economic, social and cultural rights – Freedom of contract.

Keywords of the alphabetical index:

Private property, protection / Contract, sale / Contract, standard / Contract, parties, autonomy.

Headnotes:

According to Article 127.1 and 127.2 of the Constitution, the State protects property and guarantees everybody the right to possess property as long as that form of property does not conflict with the interests of society.

The Constitution allows the legislator to introduce a number of limits by law, in concrete cases. These limits should however correspond to norms of international law unanimously recognised and be necessary for the interests of national security, territorial integrity, economical well-being of the country, public order to prevent major disorders and offences, to protect the rights, freedoms and dignity of other people, to prevent the divulgation of confidential

information and to guarantee the authority and impartiality of justice.

The parliament, as the supreme legislative body, has no right to intervene in contractual relations. It can regulate the means to terminate contracts, but cannot order the termination of a contract, because termination of a contract can occur only on the basis of a decision of a court of law.

Summary:

Parliament adopted, on 18 November 1998, Law no. 199-XIV on movable property market, which sets out the relations that follow the issuance and circulation of stocks and shares on the state territory, and establishes the general provisions concerning the activity on the movable property market, the protective measures of investors' interests and the responsibility for the violation of legislation on the movable property market.

Parliament adopted, on 28 April 2005, Law no. 55-XVI for the amendment and completion of Law no. 199-XIV of 18 November 1998.

A member of parliament challenged the constitutionality of Article 3.13 of Law no. 199-XIV (which defines the notion of contract-type – the model contract elaborated by the National Commission for the main services for participants in the movable property market). The conditions of this contract are binding on contracting parties and cannot be completed with conditions that are contrary to established norms. Article 68.10-13 of Law no. 199-XIV amended by Article 1.2 of Law no. 55-XVI has been also challenged on the ground that they are contrary to provisions of the Constitution, the Civil Code, the Universal Declaration of Human Rights and the European Convention on Human Rights and Fundamental Freedoms, because the rights on movable property have been limited to the National Commission advantage. By investing the National Commission with the right to intervene in contractual relations and to impose its unlimited and unpredictable will in order to exercise the right on movable property, the Parliament has violated the constitutional principle of the separation of powers.

The State ensures this activity's juridical regulation controls and supervises it, and imposes on contractors a list of obligations by establishing fundamental principles on property and economic activities, based on property relations. These obligations are established by the legislation of the Republic of Moldova.

Article 3 of Law no. 192-XIV of 12 November 1998 on the National Commission of Movable Property defines the object of the National Commission's activity.

Parliament authorised through Article 3.13 of Law no. 199-XIV, this Commission (organ of the public administration that deals with the administration of personal property market) to elaborate and approve a model contract for the main services for participants in the movable property market.

The reports on the fiduciary administration are regulated by civil legislation, namely by Chapter XIV of the Civil Code.

The Court ruled that the provisions of Article 68.11 and 68.13 of Law no. 199-XIV are contra to constitutional provisions of the Civil Code and to Article 17 of the Universal Declaration of Human Rights.

The Court considers, however, constitutional the provisions of Articles 68.10-12 and 3.13 of Law no. 199-XIV.

Languages:

Romanian, Russian.



Monaco Supreme Court

Important decisions

Identification: MON-2006-1-001

a) Monaco / **b)** Supreme Court / **c)** / **d)** 16.01.2006 / **e)** TS 2005-07, 08, 09 and 10 / **f)** Application to set aside Law no. 1291 of 21 December 2004 amending Law no. 1235 of 28 December 2000 on rental conditions pertaining to residential premises built prior to 1 September 1947 / **g)** *Journal de Monaco* (Official Gazette), 27.01.2006 / **h)**.

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.

Keywords of the alphabetical index:

Housing, right to reoccupy, limitation / Penalty, exclusive application to offender, principle.

Headnotes:

The provision of criminal sanctions on account of the conduct of a person on whose behalf a property owner has exercised his or her right to repossess his or her property is contrary to the principle that punishment should be applied to the offender only and not to other persons.

Summary:

The Supreme Court, ruling on a matter referred to it by several consortia of property owners, held that the bulk of the provisions of Law no. 1235 of 28 December 2000 on rental conditions pertaining to residential premises built prior to 1 September 1947 setting up a protected sector, did not violate the rights and freedoms guaranteed by Part III of the Constitution, with regard in particular to the right to property, the principle of equality, the principle that offences and punishments shall be strictly defined by law, the principle of the non-retroactive nature of criminal laws, the right to respect for private and family life.

Nonetheless, the Court held that certain limitations placed on a property owner's right to reoccupy his or her property constituted excessive interference with the right to property and that there was no rule or principle ranking as constitutional law justifying such interference. In addition, it held that the provision of criminal sanctions on account of the conduct of the person on whose behalf the property owner had exercised his or her right to reoccupy his or her property contravened the principle that punishment should be applied solely to the offender and not to other persons.

Languages:

French.



Netherlands Supreme Court

Important decisions

Identification: NED-2006-1-001

a) Netherlands / b) Supreme Court / c) First Chamber / d) 02.09.2005 / e) C04/073HR / f) / g) / h) *Rechtspraak van de Week* 2005, 94; CODICES (Dutch).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
3.18 **General Principles** – General interest.
5.3.22 **Fundamental Rights** – Civil and political rights – Freedom of the written press.

Keywords of the alphabetical index:

Search and seizure / Media, journalist, information, source / Media, journalist, source, disclosure, proportionality.

Headnotes:

The State is obliged to show that a search of a journalist's home or office for the purpose of seizure is justified under Article 10.2 ECHR by "an overriding requirement in the public interest".

Summary:

I. Having obtained a court warrant, criminal justice officials conducted a search at the offices of a magazine for the purpose of seizure. The operation was prompted by a press release from that magazine reporting a letter received by the editors in which responsibility was claimed for three bombings. The items seized included computers, subscriber lists, various materials used by the editorial staff and personal information about editors.

The publisher, the editor and a subscriber to the magazine brought a civil action for damages. They argued that the State had violated their freedom of expression and freedom to gather news under Article 10 ECHR, which in their view included the right to receive information freely and the right of

journalists to protect their sources. The Court of Appeal had dismissed the appeal, ruling that the need to find the bombers, in the public interest, was sufficiently great to justify the violation of freedom of expression. The petition to the Supreme Court stated that the Court of Appeal's judgment was based on an incorrect assignment of the burden of proof and, furthermore, that the judgment had failed to recognise that the need to find the bombers would only have served as justification if the search in question could have prevented a new bombing.

II. The Supreme Court held that freedom of expression, as described in Article 10 ECHR, includes the right to gather news freely. A violation of the right to gather news freely – which includes a journalist's interest in protecting his or her sources – may be justified under Article 10.2 ECHR if the conditions set out in that provision are met. Firstly, the violation must have a basis in national law and the relevant provisions of national law must have a certain degree of precision. Secondly, the violation must serve one of the purposes mentioned in Article 10.2 ECHR. Thirdly, the violation must be a necessary means of achieving this purpose in a democratic society. This touches on the principles of subsidiarity and proportionality. Against this background, one must determine whether the violation was a necessary means of serving the relevant interest and hence whether there were no other, less objectionable means available that would also have made it possible to serve this interest adequately.

In the context of a criminal investigation, another factor that must be considered is whether the violation of the right to gather news freely is reasonably proportional to the importance of establishing the truth. The seriousness of the crimes under investigation will have a bearing on this determination. A search of a journalist's home or office with or without a warrant for the purpose of seizing material, which search could pose a threat to the right to gather news freely, is by nature a drastic measure – more drastic than, for instance, an order to produce the information in question. This is partly because such a search could provide access to other information in the journalist's possession, information that may be protected by Article 10 ECHR. Even if no actual seizure takes place, such a measure is an impermissible breach of the rights protected by Article 10 ECHR, unless it is justified by “an overriding requirement in the public interest” (see Recommendation no. R (2000) 7 of the Committee of Ministers to the Member States on the Right of Journalists not to disclose their Sources of Information).

It follows that, if the State is sued in tort for a violation of Article 10 ECHR, it is the responsibility of the State – which, in the present case, is perfectly capable of showing that no less drastic a measure would have been adequate – to argue, on the basis of facts, that the violation was necessary and, if required, provide evidence to that end. As part of this obligation to furnish facts and provide evidence, the conduct of the search (with or without a warrant) must be shown to have been consistent with the requirements of proportionality and subsidiarity.

It is not so that, in the present case, the principles of proportionality could only have been deemed to be respected if the search had prevented a new bombing. It should be added, however, that, in determining whether, in the present case, the interests at stake are so weighty that they justify violating the freedom of expression, one must take into account not only the seriousness of the criminal offences to be prevented and the severity of the threat to public safety, but also the plausibility of the risk that criminal acts will take place and the threat to public security: the more concrete the threat, the more readily the violation may be deemed necessary.

Languages:

Dutch.



Identification: NED-2006-1-002

a) Netherlands / **b)** Supreme Court / **c)** Second Chamber / **d)** 25.10.2005 / **e)** 03412/04 / **f)** / **g)** / **h)** *Nieuwsbrief Strafrecht* 2005, 441; CODICES (Dutch).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Advertising, restriction / Commercial speech, protection.

Headnotes:

Posters for cultural events for which admission must be paid constitute advertising, which is not covered by Article 7.1 of the Constitution (freedom of expression).

Summary:

I. The Leeuwarden Court of Appeal had found that the defendant had put up posters in the municipality of Groningen on part of an immovable property visible from the road, namely a pillar intended for notices.

It was suggested that the Court of Appeal was wrong in discounting Article 56.2.d of Groningen's 1994 General Municipal Bye-Laws as a basis for discharge from prosecution.

The relevant parts of this article read:

Pasting and placarding

1. The following actions are prohibited on the road and on parts of any immovable property visible from the road:

(...)

b. pasting or otherwise putting up, or causing to be pasted or otherwise put up, a placard or other document, picture or notice;

(...)

2. The prohibition in paragraph 1 does not apply if:

(...)

d. use is made of objects designated for the posting of notices by the municipal executive, which are to be used solely for expressions of opinion that do not constitute advertising.

(...)

During the hearing before the Court of Appeal, the defendant contended that the posters in question publicised cultural events, such as exhibitions, theatrical performances, and various other shows, and hence represented an invitation from individuals and organisations that wished to express opinions or ideas through the medium of their cultural events. For this reason, the advertising in question should be construed as public service advertising rather than commercial advertising within the meaning of Article 7 of the Constitution.

Article 7 of the Constitution reads:

1. No one shall require prior permission to publish thoughts or opinions through the press, without prejudice to the responsibility of every person under the law.

2. (...)

3. No one shall be required to submit thoughts or opinions for prior approval in order to disseminate them by means other than those mentioned in the preceding paragraphs, without prejudice to the responsibility of every person under the law. The holding of performances open to persons younger than sixteen years of age may be regulated by Act of Parliament in order to protect good morals.

4. The preceding paragraphs do not apply to commercial advertising.

Having reviewed the police report, the Court of Appeal established that the defendant had put up a poster on the pillar bearing the words "progressive dance" and that the defendant posted almost exclusively commercial advertising, for a company that was contracted to do so by various other companies. Admission was charged for nearly all of these events. Partly in view of the phrase "progressive dance" on the poster, the Court of Appeal concluded that it had not been convincingly demonstrated that the special grounds for exemption from criminal liability applied.

II. The Supreme Court held that the reasoning of the Court of Appeal implied that posters for cultural events for which admission must be paid constitute advertising within the meaning of Article 56.2.d of Groningen's 1994 APV. In the Supreme Court's view, this judgment did not reflect an incorrect interpretation of the law.

Languages:

Dutch.



Norway

Supreme Court

Important decisions

Identification: NOR-2006-1-001

a) Norway / **b)** Supreme Court / **c)** Plenary / **d)** 10.03.2006 / **e)** 2005/1227 / **f)** / **g)** *Norsk retstidende* (Official Gazette) / **h)** CODICES (Norwegian).

Keywords of the systematic thesaurus:

5.2 **Fundamental Rights** – Equality.

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.

Keywords of the alphabetical index:

VAT, retroactive effect.

Headnotes:

A new transaction tax can only be imposed on a past transaction where strong considerations of public policy exist. The legislator – in order to avoid tax and excise motivated adjustments – has a certain amount of freedom to decide that a statutory provision should enter into force from an earlier date than the date of adoption.

Summary:

I. A statutory amendment that entered into force on 1 July 2001 imposed VAT on driving lessons. On 12 October 2001, Arve's Driving School entered into a contract for the purchase of a new car to be used in giving driving lessons. The purchase price was paid on 29 October 2001 and the car was delivered on 28 November 2001. Arve's Driving School made a deduction in its VAT account for the input VAT. By a statutory amendment of 21 December 2001, no. 113, driving lessons became exempt again from VAT. The amendment came into force on 1 January 2002. However, pursuant to a transitional provision in Part V subsection 2 of the amending statute, driving schools that had deducted input VAT on vehicles purchased between 1 July 2001 and 1 January 2002 were

obliged to repay a proportional part of the VAT. The Oslo County Revenue Office ruled that Arve's Driving School must repay 35/36 of the VAT that it had deducted. The issue in the case was whether the Oslo County Revenue Office's decision was invalid on the grounds that the transitional provision pursuant to which it was made was in violation of the prohibition against retroactive legislation in Article 97 of the Constitution.

II. The Supreme Court found that the statutory amendment was retroactive and prejudicial to Arve's Driving School. However, the Supreme Court was divided in its views on whether the retroaction violated the Constitution.

The majority – eleven judges – held that a new transaction tax can only be imposed on a past transaction where strong considerations of public policy exist. The same applies to the setting aside of a deduction for VAT that has been properly carried out. There was no room for an assessment based on an overall consideration of all of the circumstances where only clearly unreasonable and unjustifiable retroactions were forbidden. The purpose of the transitional arrangement was to avoid undesirable tax adjustments and the distortion of competition. The majority held that these considerations were not weighty enough to justify retroactive legislation in the present case.

The majority also held that the legislator – in order to avoid tax and excise motivated adjustments – had a certain amount of freedom to decide that a statutory provision should enter into force from an earlier date than the date of adoption, for instance from the date the draft legislation was presented to parliament. Driving schools had been given a forewarning – through the Sem Declaration (which described the political platform of the Bondevik II coalition government) and the legislative process – that driving schools would again become exempt from tax. However, this was not sufficient to protect the statutory amendment against the application of Article 97 of the Constitution. The majority held that the provision in the statute that required repayment of the deduction was in breach of Article 97 of the Constitution. The decision of the Oslo County Revenue Office was invalid and must be quashed.

A minority of four justices held that it is not possible to draw a sharp distinction between transaction taxes and ordinary capital and income tax, and that the mere classification of a tax as a transaction tax does not necessarily mean that there must be weighty considerations of public policy to justify the retroactive application of legislation. The reasons for the transitional provisions in the present case were

important considerations, such as the avoidance of undesirable tax adjustments and to ensure that driving schools were treated equally. The transitional rule ensured that the deduction applied to the extent that the acquired vehicle was used in a business that was subject to VAT. Those businesses that purchased vehicles in the second half of 2001 would obtain an incidental benefit if they were entitled to a deduction to which they would not have been entitled if they had purchased the vehicle either shortly before or shortly afterwards.

An order for the proportional repayment of deducted tax was not among the core of transaction taxes for which there is an absolute prohibition against retroactive legislation, or where strong considerations of public policy must exist to justify it. The minority was therefore of the view that the order was not in breach of Article 97 of the Constitution.

Languages:

Norwegian, English (translated by the Court).



Poland

Constitutional Tribunal

Statistical data

1 January 2006 – 30 April 2006

Number of decisions taken:

- Final judgments: 29
- Cases discontinued: 25 (13 in full, 12 in part)
When delivering a final judgment, the Tribunal may partially discontinue the case within a given scope. A case may also be discontinued in part by a separate procedural decision.

Decisions by procedure:

- Abstract review *ex post facto*: 11 judgments, 8 cases discontinued (4 in full, 4 in part)
- Preliminary review (Initiated by the President of the Republic of Poland on the basis of Article 122.3 of the Constitution: 1 judgment, 1 case discontinued (0 in full, 1 in part)
- Questions of law referred by a court: 6 judgments, 4 cases discontinued (2 in full and 2 in part)
- Constitutional complaints: 12 judgments, 13 cases discontinued (7 in full and 6 in part)

Important decisions

Identification: POL-2006-1-001

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 12.12.2005 / **e)** K 32/04 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2005, no. 250, item 2116; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 11A, item 132 / **h)** Summaries of selected judicial decisions of the Constitutional Tribunal of the Republic of Poland (summary in English, http://www.trybunal.gov.pl/eng/summaries/wstep_gb.htm); CODICES (Polish).

Keywords of the systematic thesaurus:

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

3.16 **General Principles** – Proportionality.

- 3.19 **General Principles** – Margin of appreciation.
 3.22 **General Principles** – Prohibition of arbitrariness.
 4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.1 **Fundamental Rights** – Civil and political rights – Right to dignity.
 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
 5.3.13.8 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Right of access to the file.
 5.3.25.1 **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.
 5.3.35 **Fundamental Rights** – Civil and political rights – Inviolability of the home.
 5.3.36 **Fundamental Rights** – Civil and political rights – Inviolability of communications.

Keywords of the alphabetical index:

Police, surveillance, limits.

Headnotes:

Police surveillance activities are by their very nature secretive, carried out without the subject's knowledge and under conditions that provide the police with a wide margin of discretion. There is limited external control and limited guarantees of the rights of those who are the subject of the surveillance. These activities would be ineffective if they had to be made transparent. Such activity by the police is indispensable in a modern State, which is responsible for ensuring the safety of its citizens against terrorism and crime. Nevertheless, it should be accompanied by appropriate substantial guarantees, with clearly defined limits on interference with privacy as well as procedural guarantees such as the obligation to report the surveillance undertaken and to legitimise it by reference to an external agency; the obligation to notify the subject about the surveillance and what was found in a very limited way and from a certain point in time. Control mechanisms should also be in place in case of abuse on the part of the organisation controlling the surveillance.

Under Article 31.3 of the Constitution, regulations must answer the test of proportionality. They must be capable of bringing about the results intended, they must be indispensable for the protection of the public interest with which they are connected; and the

results must be in proportion to the burdens they place on the citizen.

All constitutional rights and freedoms of individuals stem from human dignity (Article 30 of the Constitution). In the case of privacy, this relationship is of a specific nature. The protection of dignity requires the respect of purely private life; so that individuals are not forced into the company of others and do not have to share with others their experiences or intimate details.

Different areas of privacy exist, with differing levels of necessity for interference. For example, the respect for the privacy of the home places greater limits on the interference of the authority using wiretapping than the protection of the privacy of correspondence.

Provisions limiting rights and freedoms should be formulated clearly and precisely, in order to avoid excessive discretion when determining, in practice, the *ratione personae* and *ratione materiae* of such limits.

Summary:

I. Under the Police Act 1990 (hereinafter: "the Act"), police surveillance is conducted secretly and is based on the use of means such as wiretapping or control of correspondence and mail. Surveillance may be carried out for the purpose of the detection or prevention of the commission of certain criminal offences, the identification of perpetrators, as well as the obtaining and preservation of evidence. The basis for surveillance is, in principle, the issue of a decision by an appropriate regional court.

The Commissioner for Citizens' Rights alleged before the Constitutional Tribunal that certain provisions of the Act (see below) infringe numerous constitutional provisions relating to citizens' informational autonomy.

The Tribunal ruled that: Article 19.4 of the Act provides for the possibility of abandoning the destruction of materials collected in the process of surveillance conducted without the consent of a court. This does not comply with Articles 31.3 and 51.4 of the Constitution, which respectively provide for proportionality and the right to demand correction or deletion of incorrect or incomplete information acquired by illegal means. It is not inconsistent with Article 7 of the Constitution (functioning of public authority organs on the basis and within the limits of the law).

Article 19.16 of the Act prevents the subject from being informed about the surveillance while it is taking place. Insofar as this envisages the suspect and their defence counsel being informed about the surveillance once it has come to an end, this conforms to Articles 31.3 and 45.1 of the Constitution (right to a fair trial), Article 49 of the Constitution (privacy of communication) and Article 77.2 of the Constitution (recourse to the courts to vindicate infringed rights and freedoms cannot be barred).

There is no requirement within Article 19.18 of the Act to obtain the consent of a court to conduct surveillance when the sender or recipient has expressed consent for the transfer of this information. This does not conform to Articles 31.3 and 49 of the Constitution.

Article 20.2 of the Act allows the police to collect a very wide variety of information about those they suspect may have committed criminal offences. This does not conform to Articles 31.3 and 51.2 of the Constitution (prohibition on collecting unnecessary information about citizens) since it does not precisely specify the circumstances under which information may legitimately be collected about the suspected perpetrator of an offence neither does it specify an exhaustive list of the type of information which may be collected.

Article 20.17 of the Act deals with information collected for the purpose of investigating a criminal offence after a suspect has been acquitted or charges against him have been dropped. This is in line with Articles 31.3 and 51.2 of the Constitution.

Materials collected without the consent of a court represent a legal resource, directly the court does give its consent (pursuant to Article 19.4 of the Act). This can be used in the proceedings and the accusation cannot be made that advantage has been taken of "fruits of a poisonous tree". Nonetheless, subsequent consent may not be sufficient to justify the infringement of Article 51.4 of the Constitution. A statute may not influence the scope of a constitutional notion, especially when this has a negative impact on an individual's rights.

Article 19.16 of the Act does not exclude the possibility of divulging information about the surveillance when it has come to an end and no indictment has been lodged. The applicant here is challenging an interpretation which can be made of the challenged norm and arguably an unconstitutional conjecture. However, it has not been proved that this interpretation is carried out in general practice.

External control of surveillance activities can only be a safeguard of individual rights and freedoms if the

controlling organ is independent and impartial. The difficulty is that in the situation described in Article 19.18 of the Act, consent to conduct these activities is granted by somebody with a personal interest in the surveillance activities (the recipient or sender of the information transfer). The consent in question represents a justification of encroachment upon the personal sphere of the person expressing it (*volenti non fit iniuria*). Using it to justify encroaching upon the private sphere of a third party constitutes a misunderstanding.

If somebody is acquitted or charges against him are dropped, data collected about him may contain data which could be of use to the police in their investigation of other people. Article 20.17 of the Act refers to information collected legally, with the consent of the court. The possibility of retaining this information does not include so-called sensitive information – disclosing race, ethnicity, political views, religious or philosophical beliefs, religious allegiance, political or union membership, or information related to health, addictions, or sexual practices.

A distinction has to be drawn between the absence of obstacles to making materials available upon the subject's request – which is ensured by the legislation presently in force – and the obligation to inform a person subject to surveillance about such a control. The existence of the latter duty is desirable but it is not up to the Constitutional Tribunal to fill a legislative lacuna.

Cross-references:

Decisions of the Constitutional Tribunal of the Republic of Poland:

- Judgment K 11/94 of 26.04.1995, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1995, no. 1, item 12;
- Judgment K 9/95 of 31.01.1996, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1996, no. 1, item 2; *Bulletin* 1996/1 [POL-1996-1-002];
- Judgment K 33/99 of 03.10.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 6, item 188, *Bulletin* 2000/3 [POL-2000-3-020];
- Judgment K 22/01 of 24.10.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 7, item 216;
- Judgment K 41/01 of 30.09.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 5A, item 61; *Bulletin* 2002/3 [POL-2002-3-030];
- Judgment P 6/02 of 10.12.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 7A, item 91; *Bulletin* 2003/1 [POL-2003-1-009];

- Judgment SK 17/02 of 11.12.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 7A, item 98;
- Judgment SK 12/03 of 09.06.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 6A, item 51; *Bulletin* 2003/3 [POL-2003-3-024];
- Judgment P 3/03 of 28.10.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 8A, item 82;
- Judgment K 45/02 of 20.04.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 4A, item 30;
- Judgment K 4/04 of 20.06.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 6A, item 64;
- Judgment K 31/04 of 26.10.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 9A, item 103; *Bulletin* 2005/3 [POL-2005-3-010];
- Procedural decision K 32/04 of 23.11.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 10A, item 126;
- Procedural decision S 2/06 of 25.01.2006, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 1A, item 13.

Judgments of the European Court of Human Rights:

- *Klass and Others v. Germany*, Judgment 5029/71 of 06.09.1978, Publications of the Court, Series A, no. 28;
- *Malone v. the United Kingdom*, Judgment 8691/79 of 02.08.1984, Publications of the Court, Series A, no. 82; *Special Edition Leading Cases ECHR* [ECH-1984-S-007];
- *Kruslin v. France*, Judgment 11801/85 of 24.04.1990, Publications of the Court, Series A, no. 176-A; *Special Edition Leading Cases ECHR* [ECH-1990-S-001];
- *Huvig v. France*, Judgment 11105/85 of 24.04.1990, Publications of the Court, Series A, no. 175-B;
- *A v. France*, Judgment 14838/89 of 23.11.1993, Publications of the Court, Series A, no. 277-B;
- *Friedl v. Austria*, Judgment 15225/89 of 31.01.1995, Publications of the Court, Series A, no. 305-B;
- *Rotaru v. Romania*, Judgment 28341/95 of 04.05.2000, *Reports of Judgments and Decisions* 2000-V;
- *Doerga v. the Netherlands*, Judgment 50210/99 of 27.04.2004.

Languages:

Polish, English (summary).



Identification: POL-2006-1-002

a) Poland / b) Constitutional Tribunal / c) / d) 16.01.2006 / e) SK 30/05 / f) / g) *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2006, no. 15, item 118; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 1A, item 2 / h) Summaries of selected judicial decisions of the Constitutional Tribunal of the Republic of Poland (summary in English, http://www.trybunal.gov.pl/eng/summaries/wstep_gb.htm); CODICES (Polish).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.10 **General Principles** – Certainty of the law.
- 3.12 **General Principles** – Clarity and precision of legal provisions.
- 4.7.7 **Institutions** – Judicial bodies – Supreme court.
- 5.3.13.4 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Double degree of jurisdiction.
- 5.3.13.9 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Public hearings.
- 5.3.13.18 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Reasoning.

Keywords of the alphabetical index:

Cassation, procedure, guarantees / Court, decision, reasoning, purpose.

Headnotes:

The Constitution does not guarantee the right to have a case heard at three instances (Article 176.1 of the Constitution). The constitutional right to court (Article 45.1 of the Constitution) does not encompass a “right to cassation”. Cassation constitutes an additional and not essential procedure for appealing against judicial decisions of the second instance court. Where the legislator has created the institution of cassation, however, principles of procedural justice and correct legislation stemming from Article 2 of the Constitution (rule of law) must be respected. The constitutional standard of a fair trial therefore applies not only to proceedings at first and second instance but also to extraordinary proceedings.

Under the principle of trust, as derived from Article 2 of the Constitution (rule of law), an individual is entitled to expect from the authorities clarity, transparency and respect for principles guaranteeing the protection of human rights.

The essence of procedural justice can be summarised as follows: the possibility to be heard; disclosing the motives for a decision in such a way that the court's reasoning can readily be followed (even where there is no right of appeal against that decision) and ensuring predictability for parties to the proceedings by introducing sufficient coherence and internal logic to the procedures to which they are subjected.

Providing the reasoning for a judicial decision – the decisive component of the right to a fair trial – fulfils several significant functions: it acts as a control mechanism on the court which must demonstrate that its decision is substantially and formally correct and corresponds to the requirements of justice; it documents arguments in favour of the decision; it is the basis of review by courts of higher instance; it encourages individual approval for judicial decision; it fosters a feeling of social trust and democratic control over the administration of justice; and it enforces legal certainty.

The prohibition on formulating unclear and imprecise provisions, stemming from the rule of law principle (Article 2 of the Constitution), does not prevent the legislator from using ambiguous expressions. Use of such ambiguous language does not necessarily result in a finding of unconstitutionality. There are circumstances where the only practical solution in drafting a legal norm is to use ambiguous language. However, the meaning of such terms in concrete situations may not be determined arbitrarily. Particular procedural guarantees must be in place, to ensure transparency and to enable the court applying the law to provide the ambiguous expression with specific content. There must also be scope for review of this application. Examples are accessibility of reasoning for the parties to the case, either through the public nature of proceedings or through the disclosure of motives for the decision.

Summary:

Cassation and the re-opening of proceedings are described as “extraordinary appellate measures” namely procedures used to appeal against court decisions that are already final. This distinguishes cassation from ordinary appellate measures, where a court of second instance reviews the decision of a first instance court. The cassation procedure is limited to reviewing the conformity with the law of the court

decision under appeal. The Supreme Court, as a cassation court, is not entitled to assess the correctness of factual findings adopted as the basis of the judicial decision under review, neither may it adjudicate on the merits of the case. In principle, where the Supreme Court finds that a judicial decision is incompatible with the law, it quashes this decision and either orders a retrial by the appropriate court or discontinues the proceedings. If the Supreme Court finds no lack of conformity with the law, it dismisses the cassation.

In principle, the cassation is considered with the parties' participation (Article 535.1 of the Criminal Procedure Code) and the judgment concluding such considerations should be accompanied by written reasoning. The provision challenged in the present case (Article 535.2 of the Criminal Procedure Code) envisages an exception to the above rule, concerning situations where the Supreme Court finds the cassation “evidently groundless”. The Supreme Court may in such a case pronounce a judgment dismissing the cassation in a sitting without the parties' participation, unless the cassation has been lodged by the Prosecutor General or Commissioner for Citizens' Rights. Dismissal of an “evidently groundless” cassation does not require the provision of written reasoning.

The judgment in point was delivered following a constitutional complaint lodged by an individual and supported by the Commissioner for Citizens' Rights pursuant to Article 51 of the Constitutional Tribunal Act 1997.

The challenged provision does not conform to Articles 2 of the Constitution (rule of law), Article 31.3 of the Constitution (proportionality) and Article 45.1 of the Constitution (right to a fair trial). It is not inconsistent with Article 77 of the Constitution (right to compensation for damage caused by a public authority organ and prohibition on barring recourse to the courts in order to vindicate infringed rights and freedoms).

The position of the Supreme Court within the system of legal protection and, in particular, the final character of its decisions (no possibility of appeal against them) does not render superfluous the requirement to provide the reasoning for decisions of this Court. Firstly, the reasoning has significant influence on the formation of practice and legal standards. Secondly, judicial decisions of the Supreme Court may constitute the basis for complaints lodged to the European Court of Human Rights, Human Rights Committee, or – in the event of an unconstitutional legal basis – to the Constitutional Tribunal. Thirdly, the legitimising function of a court reasoning is significant both

individually (as regards parties to the proceedings) and generally (public opinion). Communicating court decisions accompanied by reasoning facilitates approval thereof and fosters social trust in the judiciary. Fourthly, as around 80% of all cassations in criminal cases are evidently groundless, an indication of the reasons for such groundlessness is of interest for the administration of justice as it may lead to an understanding as to why certain cassations are groundless.

The use of the expression “evidently groundless cassation” does not per se exceed the limits of regulatory discretion. Objections have been raised to the low level of procedural requirements surrounding the use of this expression. Three factors must be present in a single trial to exclude the court’s informational obligation of the court. They are: secrecy of the proceedings; using the ambiguous term “evident groundlessness”; and the absence of an obligation to provide reasoning.

Cross-references:

- Resolution W 2/91 of 06.11.1991, *Orzecznictwo Trybunału Konstytucyjnego 1986-1995* (Official Digest), no. III, p. 121;
- Judgment K 11/99 of 15.09.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 6, item 116;
- Judgment K 21/99 of 10.05.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 4, item 109; *Bulletin 2000/2* [POL-2000-2-013];
- Judgment P 8/00 of 04.10.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 6, item 189; *Bulletin 2000/3* [POL-2000-3-021];
- Judgment SK 5/99 of 17.10.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 7, item 254; *Bulletin 2000/3* [POL-2000-3-023];
- Procedural decision Ts 58/01 of 10.08.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 6, item 207;
- Procedural decision SK 10/01 of 24.10.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 7, item 225;
- Judgment K 33/00 of 30.10.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 7, item 217; *Bulletin 2001/1* [POL-2001-1-005];
- Judgment SK 27/01 of 11.12.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 7A, item 93; *Bulletin 2003/1* [POL-2003-1-010];
- Judgment K 2/02 of 28.01.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy*

(Official Digest), 2003, no. 1A, item 4; *Bulletin 2003/2* [POL-2003-2-013];

- Judgment K 43/02 of 03.06.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 6A, item 49;
- Judgment K 14/03 of 07.01.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 1A, item 1;
- Judgment P 4/04 of 07.09.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 8A, item 81;
- Judgment SK 23/02 of 06.10.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 9A, item 89;
- Judgment SK 26/02 of 31.03.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 3A, item 29;
- Procedural decision SK 48/04 of 11.04.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 4A, item 45;
- Judgment SK 13/05 of 12.09.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 8A, item 91;
- Judgment K 4/06 of 23.03.2006, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 3A, item 32; *Bulletin 2006/1* [POL-2006-1-006];
- Judgment P 18/05 of 08.05.2006.

Languages:

Polish, English (summary).



Identification: POL-2006-1-003

a) Poland / b) Constitutional Tribunal / c) / d) 18.01.2006 / e) K 21/05 / f) / g) *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2006, no. 17, item 141; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 1A, item 4 / h) Summaries of selected judicial decisions of the Constitutional Tribunal of the Republic of Poland (summary in English, http://www.trybunal.gov.pl/eng/summaries/wstep_gb.htm); CODICES (Polish).

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.

3.3.3 **General Principles** – Democracy – Pluralist democracy.

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

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

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

5.3.28 **Fundamental Rights** – Civil and political rights – Freedom of assembly.

Keywords of the alphabetical index:

Assembly, function, democratic / Assembly, approval / Public morals / Fundamental right, essence, regulation.

Headnotes:

The goal of freedom of assembly, as guaranteed in Article 57 of the Constitution, is not only to ensure individual autonomy and self-realisation, but also to protect social communication processes, essential for the functioning of a democratic society. Freedom of assembly is a precondition for democracy and a necessary component thereof, as well as a prerequisite for enjoying other human rights and freedoms connected with public life. Assemblies are the principal element of democratic public opinion, as they allow the influence of political process through criticism and protest. By protecting minority groups, freedom of assembly increases legitimacy and acceptance for decisions taken by representative bodies and the administrative/executive structure subordinate to them. The stabilising function of assemblies for the political and social order is particularly important for the representation mechanism. It consists of a public presentation of the sources, causes and essence of dissatisfaction, submitting them for analysis, as well as an expression of criticism, or negation, of the operative legal or social order. As an early warning mechanism, indicating to representative bodies and public opinion potential and already existing sources of tension, as well as limitations of the integration mechanisms and effects, assemblies allow for timely adjustments in policy.

Public authorities are under an obligation to guarantee the enjoyment of freedom of assembly, irrespective of the political views of those in power. Freedom of assembly is a constitutional value and not one which is defined by the democratically legitimised political majority in power at a certain point in time.

The moral views of those in power are not synonymous with “public morals” as a justification for limiting freedom of assembly within the meaning of Article 31.3 of the Constitution (conditions permitting the imposition of limitations on constitutional rights and freedoms).

Public authorities must ensure the protection of groups organising demonstrations and taking part in them, regardless of the degree of controversy of the views and opinions which might be expressed at the demonstration, provided that no laws have been broken.

The risk of a violent counter-demonstration, or the potential for aggressive extremists joining the assembly, may not lead to the withdrawal of the right to organise a peaceful demonstration, even where there may be a genuine threat to the public order by events remaining beyond control of the organisers of the demonstration, and public authorities fail to undertake effective action aimed at guaranteeing the enjoyment of freedom with respect to the planned demonstration.

The legislator does not have the discretion to regulate the essence of a particular constitutional value, depending on circumstances that are not of fundamental significance from the constitutional point of view (an example might be rules for the use of public roads).

Summary:

The Constitutional tribunal was asked to rule on certain provisions of the Road Traffic Act 1997 (hereinafter known as “the 1997 Act”). They dealt with the organisation of a demonstration which could cause delays or changes in road traffic. Article 65 provides that “Athletic competitions, rallies, races, assemblies and other events hindering traffic or requiring the use of a road in a particular manner, are allowed to take place, subject to the condition that safety and order have been ensured during the event, and permission for the organisation thereof has been obtained”). The granting of such permission is conditional upon the organiser carrying out the obligations specified in detail in Article 65a.2 and 65.3 (in particular, preparing a project on traffic organisation in consultation with the Police).

The present proceedings were launched by the Commissioner for Citizens’ Rights who argued that the above provisions infringed the freedom of assembly. He drew particular attention to the fact that there is no requirement to obtain permission for processions, pilgrimages and other events of a religious nature (Article 65h.1).

The Tribunal ruled that that part of Article 65 of the 1997 Act encompassing the term “assemblies” did not conform to Article 57 of the Constitution (freedom of assembly).

The practical application of the 1997 Act transforms the essence of freedom of assembly into the right to assemble, regulated by decisions by a public administration body acting on the basis of provisions allowing for excessive discretion in such decisions. This is at odds with the Constitution.

The Assemblies Act 1990 requires prior notification of an organ of the commune (in other words the basic unit of local self-government) as the sole precondition for holding a lawful public demonstration. This corresponds with the model of implementing the constitutional freedom of assembly in a democratic State governed by the rule of law. This type of regulation carries with it the need to consider different values, as well as the need to weigh various arguments, and constitutes the essence and the scope of interference by public authorities in the mechanism of the enjoyment of the right to assembly.

Article 65 of the 1997 Act places different types of events on the same level, even though they are not of the same constitutional nature, for instance political demonstrations and athletic competitions, rallies, races and similar events. These are politically neutral by nature.

In Article 65h of the 1997 Act the legislator excluded the application of Articles 65-65g with respect to processions, pilgrimages and other events of a religious nature, as well as funeral processions taking place on roads in accordance with local customs. This indicates that the legislator correctly noticed the difference between such situations and, for example, sporting events. However, it is unjustified to treat demonstrations differently, when the significant common feature they share with events of a religious nature is their constitutional rank. No grounds were found for differentiating between the statutory regulation of enjoyment of the constitutional freedom of conscience and religion (Article 53.1 and 53.2) and the enjoyment of the constitutional freedom to organise peaceful assemblies (Article 57).

Supplementary information:

According to Article 1.2 of the Assemblies Act 1990 an assembly consists of at least 15 persons convened for the purpose of joint debates or for the purpose of jointly expressing a position.

The constitutional challenge in the present case was submitted at a time when local authorities sometimes refused to grant permission to hold assemblies due to failure to fulfil the requirements derived from the challenged regulation (a notable example being the “Equality Parade” in Warsaw – a demonstration regarding the situation of homosexuals).

Cross-references:

Decisions of the Constitutional Tribunal of the Republic of Poland:

- Judgment K 34/99 of 28.06.2000, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 2000, no. 5, item 142; *Bulletin* 2000/2 [POL-2000-2-018].

Judgments and decisions of the European Court of Human Rights:

- *Rassemblement Jurassien and Unité Jurassienne v. Switzerland*, Decision 8191/78 of 10.10.1979, D.R. 17, p. 108;
- *G. v. Germany*, Decision 13079/87 of 06.03.1987;
- *Ärzte für das Leben v. Austria*, Judgment 10126/82 of 21.06.1988, Publications of the Court, Series A, no. 139;
- *United Communist Party of Turkey and Others v. Turkey*, Judgment 133/1996/752/951 of 30.01.1998, *Reports of Judgments and Decisions*, no. 1998-I; *Bulletin* 1998/1 [ECH-1998-1-001];
- *Yesilgoz v. Turkey*, Judgment 45454/99 of 20.09.2005;
- *United Macedonia Organisation Ilinden – PIRIN and Others v. Bulgaria*, Judgment 59489/00 of 20.10.2005;
- *Ivanov and Others v. Bulgaria*, Judgment 46336/99 of 24.11.2005.

Languages:

Polish, English (summary).



Identification: POL-2006-1-004

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 18.01.2006 / **e)** Ts 196/04 / **f)** / **g)** / **h)** Summaries of selected judicial decisions of the Constitutional Tribunal of the Republic of Poland (summary in English, http://www.trybunal.gov.pl/eng/summaries/wstep_gb.htm); CODICES (Polish).

Keywords of the systematic thesaurus:

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

1.5.4.7 **Constitutional Justice** – Decisions – Types – Interim measures.

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

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

Keywords of the alphabetical index:

Execution, stay.

Headnotes:

The carrying out of a three month custodial sentence constitutes grave and detrimental consequences within the meaning of Article 50.1 of the Constitutional Tribunal Act 1997 (hereinafter: “the CT Act”), allowing for the stay or suspended execution of judicial decisions.

Summary:

Andrzej M., the editor-in-chief of a regional weekly newspaper, was sentenced by the District Court to three months imprisonment for defamation of the press spokesman of a certain commune through mass media. Andrzej M. lodged a constitutional complaint to the Constitutional Tribunal (on the basis of Article 79.1 of the Constitution) alleging that the legal basis for judgment in his case, Article 212.2 of the Criminal Code, infringes constitutional and international guarantees of the freedom of expression (Articles 14 and 54 of the Constitution and Article 10.2 ECHR) and the principle of proportionality (Article 31.3 of the Constitution).

During the preliminary consideration of the constitutional complaint (a procedure envisaged in Article 36, read in conjunction with Article 49 of the CT Act), a Tribunal judge refused to proceed further with the complaint, because of its manifest unfoundedness (procedural decision of 15 March 2005). One of the reasons for this decision was that the conscious

publication of false information falls outside the scope of freedom of expression. Andrzej M. challenged this procedural decision (this is permitted by Article 36.4, read in conjunction with Article 49 of the CT Act). The challenge was upheld by a 3-judge panel of the Tribunal (by procedural decision of 17 January 2006). This led to admission of the constitutional complaint for further consideration, and the case was referred for a hearing on its merits.

The District Court decision ordering the custodial sentence to be served was made on 16 January 2006 (one day before the Constitutional Tribunal issued the aforementioned procedural decision, upholding the challenge). The complainant arrived at the custodial institution to begin his sentence.

On the basis of Article 50.1 of the CT Act, the Tribunal ordered a stay of execution of the District Court’s decision imposing a three month custodial sentence until such time as proceedings before the Tribunal, initiated on the basis of Andrzej M.’s constitutional complaint, were concluded.

The procedural decision in the present case was issued *ex officio* by the Tribunal.

Supplementary information:

Pursuant to Article 50.1 of the CT Act, where execution of a judicial decision, delivered in proceedings concerning which a constitutional complaint was lodged, could have “irreversible and highly detrimental consequences” for the complainant, the Tribunal may issue an interim procedural decision regarding the stay or suspended execution of such a judicial decision. The Tribunal will reverse such a procedural decision where the reasons for which it was issued no longer exist (Article 50.3 of the CT Act).

Languages:

Polish, English (summary).



Identification: POL-2006-1-005

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 20.02.2006 / **e)** K 9/05 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2006, no. 34, item 242; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 2A, item 17 / **h)** Summaries of selected judicial decisions of the Constitutional Tribunal of the Republic of Poland (summary in English, http://www.trybunal.gov.pl/eng/summaries/wstep_gb.htm); CODICES (Polish).

Keywords of the systematic thesaurus:

2.1.1.3 **Sources of Constitutional Law** – Categories – Written rules – Community law.

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

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

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

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

4.9.7.1 **Institutions** – Elections and instruments of direct democracy – Preliminary procedures – Electoral rolls.

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

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

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:

Election, local / European Union, citizen, election, local, participation.

Headnotes:

Under Article 16.1 of the Constitution, the right to vote and to stand for election in local authority elections is contingent upon the condition of belonging to the self-governing community. Such a community is formed, under the law, by the inhabitants of the basic territorial division units. Permanent residence within the territory of the particular unit of local self-government is therefore the main prerequisite for belonging to the community in question.

Article 62.1 of the Constitution grants the right to participate in elections and to vote for representatives to local authorities to Polish citizens who attained the age of eighteen no later than the date of the election. There is an exhaustive catalogue of exclusions within Article 62.2 relating to persons who have been, on the basis of a final court judgment, incapacitated or deprived of public or electoral rights. The Constitution does not authorise the legislator to introduce any additional statutory exclusions in this regard.

The second sentence of Article 169.2 of the Constitution authorises the legislator to determine only the principles and procedures for holding elections and the requirements for their validity. This provision does not authorise a statutory determination of the group of persons vested with the electoral rights in question.

Electoral rights of EU citizens who are not Polish nationals and who do not reside permanently within the territory of any specific commune in Poland are not expressly envisaged in the Polish Constitution. Such rights are, however, a consequence of Poland's obligations stemming from its EU membership.

Summary:

I. Elections to local self-government units at every level – including communes, districts and regions – are held on the basis of the Electoral Law for Commune, District and Region Councils Act 1998 (hereinafter referred to as “Local Electoral Law”). The right to vote and the right to stand as a candidate in elections to a local self-government unit are vested in principle in Polish citizens who have reached the age of 18 by polling day and who reside permanently within the territory covered by the activities of the unit. Possession of electoral rights in elections to commune councils is also a condition for participation in direct elections of Heads of Communes Mayors and Presidents of Cities – namely the executive organs of communes, elected by direct universal suffrage (Article 3 of the Direct Elections of Heads of Communes, Mayors and Presidents of Towns Act 2002). The right to stand as a candidate is, however, vested only in persons who have reached the age of 25.

According to the first challenged provision (Article 6.1 of the Local Electoral Law), the enjoyment of right to vote, and in consequence – pursuant to Article 7.1 of the same Act – also of the right to stand as a candidate in local elections, was made conditional upon being entered, not later than 12 months prior to the day of vote, in the so-called permanent register of voters (or electoral roll) maintained in the respective commune. A person who failed to obtain the respective registration by that deadline was not permitted to vote, or to stand as candidate, in local elections.

The Polish Parliament, in fulfilling duties stemming from European Community law (see, in particular, Article 19.1 EC and the Council Directive of 19 December 1994, 94/80/EC), granted EU citizens who have reached the age of 18, but who are not Polish citizens, the right to vote and to stand as a candidate in elections to commune councils. However, the right to stand as a candidate was not vested in EU citizens deprived of the right to stand as a candidate in elections in their home Member State. Moreover, EU citizens have the right to vote in elections of Heads of Communes, Mayors and Presidents of Cities (see above). The right to stand as a candidate in these elections is, however, reserved for Polish citizens. Enjoyment of electoral rights has been made conditional – similarly as in the case of Polish citizens – upon being entered, not later than 12 months prior to the day of vote, on the electoral roll (Article 6a.1 of the Local Electoral Law, this being the second provision challenged in the present case, read in conjunction with Article 7.1 of the same Act).

The constitutional review in the present case was initiated by the Commissioner for Citizens' Rights.

II. The Tribunal ruled that: Article 6.1, read in conjunction with Articles 5.1 and 7.1 of the Local Electoral Law, insofar as it deprives Polish citizens entered in the permanent register of voters during a period of less than 12 months prior to the day of vote of the right to vote and to stand as a candidate in elections to commune councils and in elections of Heads of Communes, Mayors and Presidents of Cities, does not conform to constitutional Article 31.3 of the Constitution (proportionality), Article 32.1 of the Constitution (equality), Article 62 of the Constitution (right of Polish citizens to vote for representatives to local self-government bodies) and the first sentence of Article 169.2 of the Constitution (principle of universal suffrage in local elections), read in conjunction with Article 16.1 of the Constitution (status of self-governing communities). It impinges on Article 52.1 of the Constitution (freedom of movement and the choice of place of residence and sojourn within the territory of Poland).

Article 6a.1, read in conjunction with Article 7.1 of the aforementioned Act, insofar as it deprives EU citizens not holding Polish nationality entered in the electoral roll during a period of less than 12 months prior to the day of vote of the right to vote in elections to commune councils, does not conform to the first sentence of Article 169.2 of the Constitution, read in conjunction with Article 16.1 of the Constitution and impinges on Article 52.1 of the Constitution.

The differentiation of citizens with regard to the exercise of their electoral rights in elections to organs

of local self-government, despite the fulfilment of the requirement of belonging to the self-governing local community (of residing within the territory of the respective local self-government unit), infringes the principle of equality (Article 32.1 of the Constitution) since it is based on an irrelevant formal criterion, consisting of being entered in the register of voters no later than 12 months before the day of vote.

Directive 94/80/EC allows member states to make the electoral rights of EU citizens not holding the nationality of a respective Member State conditional upon residing within the territory of that State over a determined period of time. The challenged Article 6a.1 of the Local Electoral Law does not, however, refer to this criterion. It establishes a strictly formal condition of being entered in the permanent register of voters within a specified time frame. That is incompatible with Article 19.1 EC.

In light of the principle of equal treatment of EU citizens and Polish citizens in the context of Article 19.1 EC, the assessment of conformity of the provision indicated in point 1 of the ruling (concerning Polish citizens) with Article 169.2 of the Constitution applies to the provision indicated in point 2 of the ruling (concerning other EU citizens).

Electoral rights in elections to local self-government organs vested in EU citizens not holding Polish nationality, who reside in Poland and are members of local communities, are not their constitutional rights. Therefore, Article 31.3 of the Constitution, concerning limitations of freedoms and rights regulated in the Constitution, does not apply to them. For the same reasons, it is impermissible to directly apply the constitutional principle of equal treatment (Article 32 of the Constitution) to Polish citizens and to persons not holding Polish nationality.

Supplementary information:

The Constitutional Tribunal, when adjudicating upon the constitutionality of Poland's membership in the EU (Judgment of 11 May 2005, K 18/04 [POL-2005-1-006]), responded to constitutional doubts over the admissibility of participation by EU citizens not holding Polish nationality in local elections within the territory of Poland. The Tribunal ruled that the aforementioned Article 19.1 EC does not violate Article 1 of the Constitution (common good) and Article 62.1 of the Constitution (see above).

Languages:

Polish, English (summary).



Identification: POL-2006-1-006

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 23.03.2006 / **e)** K 4/06 / **f)** / **g)** *Dziennik Ustaw Rzeczypospolitej Polskiej* (Official Gazette), 2006, no. 51, item 377; *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 3A, item 32 / **h)** Summaries of selected judicial decisions of the Constitutional Tribunal of the Republic of Poland (summary in English, http://www.trybunal.gov.pl/eng/summaries/wstep_gb.htm); CODICES (Polish).

Keywords of the systematic thesaurus:

- 3.4 **General Principles** – Separation of powers.
- 3.9 **General Principles** – Rule of law.
- 3.11 **General Principles** – Vested and/or acquired rights.
- 3.12 **General Principles** – Clarity and precision of legal provisions.
- 3.13 **General Principles** – Legality.
- 3.16 **General Principles** – Proportionality.
- 3.22 **General Principles** – Prohibition of arbitrariness.
- 4.4.1 **Institutions** – Head of State – Powers.
- 4.4.1.2 **Institutions** – Head of State – Powers – Relations with the executive powers.
- 4.5.6 **Institutions** – Legislative bodies – Law-making procedure.
- 4.13 **Institutions** – Independent administrative authorities.
- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2.1 **Fundamental Rights** – Equality – Scope of application.
- 5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.
- 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.
- 5.3.39 **Fundamental Rights** – Civil and political rights – Right to property.

Keywords of the alphabetical index:

Media, broadcasting / *Vacatio legis* / President, countersigning / Constitutional organ, functioning, continuity, principle / Legislation, correct, principle.

Headnotes:

Speed of legislation is not necessarily unconstitutional. The pluralistic nature of parliament must always be respected, for instance by verifying whether parliamentary proceedings deprived any particular group of deputies or senators of the possibility of presenting their views in successive phases of the legislative procedure. There may be a correlation to examine, between the pace of legislation and the quality of a statute.

The principle of specificity of legal provisions, which stems from the rule of law clause (Article 2 of the Constitution), does not prevent the legislator from applying ambiguous concepts, provided that it is possible to determine their content. The meaning of such concepts in specific situations may not, however, be determined arbitrarily. Instead, special procedural guarantees are needed which assure transparency and control over the process of interpretation.

Freedom of expression (Articles 14 and 54.1 of the Constitution) is one of the foundations of democratic society, a requirement for its development and for individual self-fulfilment. It is not limited to information and views that are received favourably or which are perceived as harmless or neutral. The role of journalists is to disseminate information and ideas about matters that are the subject of public interest and that are of public significance. Freedom may be restricted under the principle of proportionality (Article 31.3 of the Constitution). Any restrictions can only be introduced by statute.

The Prime Minister's countersignature is, in principle, a condition for the validity of Official Acts issued by the President of the Republic (Article 144.2 of the Constitution). It results in the Prime Minister assuming responsibility before parliament for an act of the President, who is not in fact accountable to Parliament. Article 144.3 of the Constitution contains around thirty presidential prerogatives, which are powers to issue certain Official Acts without the requirement of countersignature. The list is an exhaustive one; it may not be broadened by statute.

The principle of continuity of the functioning of constitutional organs is fundamental to any constitutional system. If the operations of any state organ are curtailed, there must be express grounds for this in constitutional provisions.

The right to hold office, position or mandate within state institutions does not constitute an "acquired right", within the meaning of the principle of protecting acquired rights, stemming from the rule of law clause in Article 2 of the Constitution.

Different treatment of entities with specific common features does not automatically violate Article 32 of the Constitution (equality and non-discrimination), provided that there exists a justified criterion for such differentiation. In particular, the following issues should be resolved: firstly, whether the differentiation rationally relates to the aim and contents of a given legal solution; secondly, whether the weight of the interest which is to be protected by the differentiation remains in appropriate proportion to the weight of interests which will be infringed due to that differentiation; thirdly, whether the criterion of differentiation is proportionate to other constitutional values.

Summary:

Under Article 213 of the Constitution and the Broadcasting Act 1992, the National Broadcasting Council (or "the NBC") is vested with substantial regulatory powers over all electronic media. It also exerts influence upon the composition of the governing bodies of the public radio and public television service.

One of the consequences of the changes brought about by the parliamentary and presidential elections held in autumn 2005, was the impetus to modify the composition and working practices of the NBC. The Transformations and Modifications to the Division of Tasks and Powers of State Bodies Competent for Communications and Broadcasting Act, of 29 December 2005 (or "the 2005 Act") – adopted by the Parliament, signed by the President and published in the Official Journal at a very fast pace – introduced amendments to the Broadcasting Act 1992.

The 2005 Act's entry into force brought about the early expiry of the terms of office of all existing members of the NBC. The Council would from now on function as a body composed of 5 members. Two would be appointed by the *Sejm* (the first chamber of the Polish Parliament), two members would be appointed by the Senate (the second chamber of the Polish Parliament), and a final member would be appointed by the President of the Republic. This structure would replace the existing nine member composition. Furthermore, the powers of appointing and dismissing the President of the NBC were granted to the President of the Republic. Previously the Council itself carried out this appointment.

The 2005 Act entered into force upon the expiry of fourteen days from the date of its publication in the Journal of Laws, with the exception of Articles 6.2 and 21 (see below) which came into force on the actual day of publication (Article 24).

The constitutional review in the present case was initiated by the Commissioner for Citizens' Rights and a group of deputies from the *Sejm*.

The Tribunal ruled that: the 2005 Act as a whole conforms to constitutional Article 2 of the Constitution (rule of law), Article 7 of the Constitution (functioning of public organs authority on the basis, and within the limits, of the law), Article 112 of the Constitution (role of the *Sejm*'s Rules of Procedure) and Article 119.1 of the Constitution (requirement of three readings of a bill in the *Sejm*) and is not inconsistent with constitutional Article 83 of the Constitution (general obligation to observe the law) and Article 123.1 of the Constitution (admissibility of urgent legislative procedure).

Article 6.1 of the 2005 Act, which gives the NBC the new task of introducing the protection of journalistic ethics, does not conform to Articles 2, 7 and 54.1 of the Constitution (freedom of expression).

Article 6.2.b of the 2005 Act (appointment and dismissal of the NBC's President by the President of the Republic) does not conform to Articles 7, 10.1 of the Constitution (separation of powers), Article 144.1, 144.2 of the Constitution (issue by the President of the Republic of Official Acts whose validity is, in principle, conditional upon the countersignature of the Prime Minister) and Article 214.1 of the Constitution (appointment of NBC members by the *Sejm*, Senate and President of the Republic). It is not inconsistent with Article 144.3.27 of the Constitution (right of the President of the Republic to appoint members of the NBC without countersignature).

Article 6.2.c of the 2005 Act (abolishing the right of the NBC to dismiss its President) conforms to Articles 2, 7 and 10.1 of the Constitution.

Article 6.6 of the 2005 Act (privileged treatment of so-called "social" broadcasters over the conditions for renewal of licenses to broadcast radio or television programmes) does not conform to Article 20 of the Constitution (social market economy), Article 32 of the Constitution (equality), Article 54.1, 54.2 of the Constitution (admissibility of licensing for radio and television broadcasting stations) and Article 64.2 of the Constitution (equal protection of ownership and other property rights).

Article 21.1 of the 2005 Act which shortens the terms of office of those in office at the NBC before the legislation without applying the rule that they exercise their functions until the appointment of their successors does not conform to Articles 2, 7 and 213.1 which are the constitutional articles governing the tasks of the NBC.

Article 24 of the 2005 Act (entry into force of the Act on the date of its publication), in the part concerning the date of entry into force of Article 6.2 (amending the Broadcasting Act 1992 as to the composition of the NBC, the mode of appointing its members and President, as well as the duration of its term of office) and Article 21 of the above Act, do not conform to Article 2 of the Constitution.

The notion of “journalistic ethics”, within Article 6.1 of the 2005 Act, refers to non-legal criteria of assessing events in the sphere of the freedom of expression. Vesting the NBC with the task of “initiating and undertaking measures concerning the protection of the principles of journalistic ethics” extends beyond the NBC’s constitutional role and position.

On the one hand, appointing or dismissing the NBC’s President does not constitute a prerogative of the President of the Republic – by contrast with appointing NBC members (Article 144.3.27 of the Constitution). On the other hand, appointing (and dismissing) the NBC President by the President of the Republic, each time with the Prime Minister’s countersignature, would infringe the Constitution since the Council is a constitutional body placed beyond the scheme of separation of powers (Article 10 of the Constitution).

Article 24 of the 2005 Act, insofar as it fails to envisage any period of *vacatio legis*, is subject to scrutiny under the principles of correct legislation, stemming from the rule of law clause (Article 2 of the Constitution). The minimum standard here is determined by the Act on Promulgation of Normative Acts and Certain Other Legal Acts 2000 which provides for a fourteen-day period as a basic duration of *vacatio legis*. The 2000 Act allows for exceptions from this basic rule “in justified cases”, for instance where important State interests require the immediate entry into force of a given enactment.

The provision in dispute entitles a social broadcaster to apply, no more than 12 months before the expiry of a licence he already possesses, for the licence for a successive period. The renewal of the licence can be denied only in certain cases set out very precisely in the legislation. This makes the legal situation of social broadcasters different from that of all other broadcasters. The differentiation criterion – i.e. the fact that a social broadcaster does not pursue economic activity, and, in particular, does not display any advertisements or sponsored communications – may not be recognised as relevant in that regard.

Cross-references:

- Judgment K 5/93 of 23.11.1993, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1993, no. II, item 39; *Bulletin* 1993/3 [POL-1993-3-018];
- Resolution W 3/93 of 02.03.1994, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1994, no. I, item 17; CODICES [POL-1994-X-001];
- Resolution W 7/94 of 10.05.1994, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1994, no. I, item 23; *Bulletin* 1994/2 [POL-1994-2-007];
- Judgment K 17/93 of 07.06.1994, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1994, no. I, item 11; *Bulletin* 1994/2 [POL-1994-2-009];
- Judgment K 29/95 of 23.04.1996, *Orzecznictwo Trybunału Konstytucyjnego* (Official Digest), 1996, no. I, p. 78; *Bulletin* 1996/1 [POL-1996-1-007];
- Judgment K 15/96 of 18.03.1997, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1997, no. 1, item 8; *Bulletin* 1997/1 [POL-1997-1-007];
- Procedural decision Ts 1/97 of 04.02.1998, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 2, item 17;
- Judgment U 19/97 of 25.05.1998, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 4, item 47; *Bulletin* 1998/2 [POL-1998-2-011];
- Judgment K 17/98 of 26.05.1998, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1998, no. 4, item 48; *Bulletin* 1998/2 [POL-1998-2-012];
- Judgment K 30/98 of 23.06.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 5, item 101; *Bulletin* 1999/2 [POL-1999-2-023];
- Judgment K 11/99 of 15.09.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 6, item 116;
- Judgment K 13/99 of 03.11.1999, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 1999, no. 7, item 155;
- Judgment SK 5/99 of 17.10.2000, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2000, no. 7, item 254; *Bulletin* 2000/3 [POL-2000-3-023];
- Judgment K 5/00 of 17.01.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 1, item 2;

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- Judgment P 12/00 of 21.02.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 3, item 47; *Bulletin* 2001/2 [POL-2001-2-010];
 - Judgment K 32/00 of 19.03.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 3, item 50;
 - Judgment K 27/01 of 03.10.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 7, item 209; *Bulletin* 2002/1 [POL-2002-1-004];
 - Judgment K 33/00 of 30.10.2001, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2001, no. 7, item 217; *Bulletin* 2002/1 [POL-2002-1-005];
 - Judgment K 20/01 of 27.05.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 3A, item 34; *Bulletin* 2002/2 [POL-2002-2-016];
 - Judgment K 14/02 of 24.06.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 4A, item 45;
 - Judgment SK 27/01 of 11.12.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 7A, item 93; *Bulletin* 2003/1 [POL-2003-1-010];
 - Judgment K 9/02 of 12.12.2002, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2002, no. 7A, item 94;
 - Judgment K 28/02 of 24.02.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 2A, item 13;
 - Judgment K 43/02 of 03.06.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 6A, item 49;
 - Judgment SK 38/01 of 07.07.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 6A, item 61;
 - Judgment K 26/03 of 24.11.2003, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2003, no. 9A, item 95;
 - Judgment K 14/03 of 07.01.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 1A, item 1;
 - Judgment K 45/02 of 20.04.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 4A, item 30;
 - Judgment K 1/04 of 19.10.2004, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2004, no. 9A, item 93; *Bulletin* 2004/3 [POL-2004-3-024];
 - Judgment SK 13/05 of 12.09.2005, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2005, no. 8A, item 91;
 - Judgment SK 30/05 of 16.01.2006, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 1A, item 2; *Bulletin* 2006/1 [POL-2006-1-002];
- Procedural decision K 4/06 of 22.02.2006, *Orzecznictwo Trybunału Konstytucyjnego Zbiór Urzędowy* (Official Digest), 2006, no. 2A, item 24.

Languages:

Polish, English (summary).



Portugal

Constitutional Court

Statistical data

1 January 2006 – 30 April 2006

Total: 268 judgments, of which:

- Prior review: 2 judgments
- Abstract *ex post facto* review: 3 judgments
- Appeals: 204 judgments
- Complaints: 47 judgments
- Electoral disputes: 2 judgments
- Political parties and coalitions: 4 judgments
- Declaration of assets and income: 3 judgments
- Political parties' accounts: 1 judgment
- Incompatible activities by holders of political office: 2 judgments

Important decisions

Identification: POR-2006-1-001

a) Portugal / b) Constitutional Court / c) Second Chamber / d) 03.01.2006 / e) 4/06 / f) / g) *Diário da República* (Official Gazette), 32 (Series II), 14.02.2006, 2098-2115 / h) CODICES (Portuguese).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
 5.3.36.2 **Fundamental Rights** – Civil and political rights – Inviolability of communications – Telephonic communications.

Keywords of the alphabetical index:

Telephone tapping, necessary guarantees / Telephone tapping, tape, destruction.

Headnotes:

Article 34.4 of the Constitution permits the public authorities to interfere with telecommunications, albeit as an exceptional measure, but solely in connection

with criminal proceedings and in cases laid down by law (although it imposes no express requirement for a judicial decision). Since interception and recording of telephone conversations constitute a restriction of a fundamental right, this restriction must be confined to what is strictly necessary to safeguard other rights or interests protected by the Constitution, without diminishing the scope or extent of the essential substance of the constitutional precepts.

According to the Constitutional Court's established precedents, whether interference with telephone communications is permissible depends not only on the existence of a prior judicial authorisation but also on the placing of the operation under judicial supervision. This supervision must be "close" and "monitor the content" of conversations with the dual objective of:

- i. ending as soon as possible any telephone tapping which proves unjustified or pointless; and
- ii. submitting to prior judicial "assessment" the evidence to be adduced at the trial obtained by this means. However, the stringent criterion adopted does not mean that all telephone tapping operations must be physically carried out by a judge, a position which would correspond to a "maximalist interpretation" and which the Court did not endorse.

The rules governing telephone tapping have generated a number of doubts and questions. At the level of the Constitutional Court's case-law these doubts and questions have focused almost exclusively on the duration of judicial supervision of the conduct of the operation, whereas in legal writings and judicial practice they have also concerned the conditions under which authorisation was given for an operation from the standpoints of the suitability of the "catalogue" of offences, clear determination of the persons liable to have their conversations tapped or the lack of a legal limit on the duration of telephone tapping. With particular regard to the conduct of the operation, the nature of exchanges between the police authorities, the public prosecutor and the judge is not defined, and there are differences of opinion as to the content of the report (or reports) to be produced. In addition, attention has been drawn to the drawback of immediately destroying recordings which the judge has deemed irrelevant, as it would then become entirely impossible to use passages which the prosecution or the defence may consider important.

Summary:

Article 34 of the Constitution provides that an individual's home and the privacy of his or her

correspondence and other means of private communication shall be inviolable and prohibits any interference by the public authorities with correspondence, telecommunications or other means of communication, except in cases laid down by law in connection with criminal procedure (the phrase “and other means of communication” was added under the constitutional reform of 1997 to take account of modern means of remote communication which do not correspond to the traditional concepts of correspondence of telecommunications). It follows from this wording that interfering with communications is admissible solely in criminal proceedings and as laid down by law. However, this Article of the Constitution does not provide, at least not expressly or directly, that the interference is possible only where it complies with a judicial decision, as is nonetheless the case when entering a person’s home against their will, which can take place only “by order of the competent judicial authority and in the cases and according to the forms laid down by law.”

Any finding of unconstitutionality with regard to the impugned interpretations of the rules, all of which concern the conditions of judicial supervision of the conduct of the operation, can be founded solely on a violation of the principle of proportionality applicable to restrictions of rights, freedoms and guarantees.

According to Judgment no. 407/97 and the Court’s subsequent case-law, the particular social nuisance caused by interfering with telecommunications entails that the judicial authority should supervise not just the launch of the operation but also its conduct. This supervision must be continuous and close, both in time and physically, to the source, but this does not necessarily mean that “all telephone tapping operations must be physically carried out by a judge”, as a “maximalist interpretation” would require. The interpretation whereby, in order to determine the beginning of the period during which interception of telephone communications is permitted (where a date is not set directly by the judge), the effective date of the start of the operation must be taken into consideration, not the date of the judicial decision authorising it, cannot lead to a finding that the requirement of judicial supervision of the operation is adversely affected, notably in view of the facts that the interference with the fundamental right in question takes place only when the telephone tapping commences, and that, in the case under consideration, the police body responsible for the investigation and the body capable of carrying out the interception and recording operations were not the same, nor were they geographically close. In addition, it does not seem that these bodies made improper use of the opportunity afforded by the authorisation, with the result that the appropriateness and objectiveness of their activities cannot be called into question.

No fault can be found with the interpretation that the Constitution does not require the immediate issue of a report on the telephone tapping, specifying when it began, since a possible delay (of between 2 and 28 days) does not inevitably affect the requirement of supervision of the operation by a judicial authority, notably where, as in the present case, the delays were due to technical reasons and did not lead to an unacceptable restriction of the defendants’ right to respect for their privacy.

One of the most criticised aspects of the current legal system lies in the fact that the law does not specify a maximum duration for telephone tapping operations and fails to stipulate whether the report must be drawn up at the end of the authorised period or whether “interim” reports should be produced. A maximum duration of sixty days cannot be considered to result in an unacceptable loss of control over the operation by the judicial authority, even where combined with the interpretation that, failing a judicial decision to the contrary, the report on the telephone tapping operation must be drawn up at the end of each period of tapping and not immediately after each intercepted conversation. The relevant police authority must indicate therein the passages considered to be of importance as evidence.

At all events, the recorded intervals between the periods of performance of the tapping operations and the dates of issuance of the relevant reports, between those dates and the dates of transmission to the investigating judges and between the latter dates and the dates on which the judges themselves listened to the recordings were in no case so protracted that compliance with the condition of judicial supervision could be called into question.

The immediate destruction of recordings of intercepted conversations regarded as irrelevant could be deemed unacceptable from a constitutional standpoint, since it would deprive the defence of the possibility of requesting a transcript of passages of the recordings not selected by the judge, but which the defence considered important for revealing the truth, a possibility which would exist if the recording was destroyed only immediately after being listened to by the judge. In Judgment no. 426/2005 the Court held that “the defence (like the prosecution) must be able to request a transcript of passages other than those initially selected by the judge, either because it considers them important in themselves or because they are of use in clarifying the meaning of previously selected passages or placing them in context.”

The legislative criterion at issue could not be criticised from a constitutional angle, above all from the standpoint of safeguarding the interests of a

defendant or of persons whose communications were being tapped. Nonetheless, attention must be drawn to the fact that all participants in an operation are subject to a duty of professional discretion, in order simultaneously to safeguard such persons' right to privacy. With regard to passages of conversations regarded as inadmissible as evidence or irrelevant, which have therefore not been included in the case-file, this obligation does not end after the stage in the proceedings subject to the secrecy requirement.

In sum, the Court did not regard as unconstitutional the combined interpretation of the relevant provisions of the Code of Criminal Procedure in so far as:

- a. the duration of the tapping operations was calculated from the date on which the operations began, not from the date of the judicial decision authorising them, and the lapse of time between these two dates was justified on account of technical difficulties and communication problems between the various bodies concerned;
- b. there is no requirement that reports on telephone tapping operations, specifying when they began, should be issued immediately; in addition, in the case under consideration, the issuance of these reports was delayed for technical reasons, but this did not affect the judicial authority's supervision of the operation;
- c. there is no requirement that a report be issued after each recording of an intercepted conversation, since the setting of a sixty-day time-limit on tapping operations cannot be deemed to result in an unacceptable loss of control over the operation by the judicial authority, even where combined with the interpretation that, failing a judicial decision to the contrary, the report on the telephone tapping operation must be drawn up at the end of each period of tapping;
- d. the strict imposition of a maximum duration between the end of the recording (or of its component stages) and the transmission of the relevant report to the judge is not necessary provided that the successive intervals between either the periods of interception and the dates on which the relevant reports must be issued, between those dates and the dates on which the reports must be transmitted to the investigating judges or between those dates and the dates on which the judges themselves listen to the recordings are in no case so protracted that compliance with the requirement of judicial supervision, imposed by the Constitution, can be called into question;
- e. the immediate destruction of recordings of intercepted conversations which the judge deems irrelevant is not required. On the contrary, it must be deemed unacceptable from a constitutional

standpoint to deprive a defendant, persons whose communications are intercepted or the prosecution of the possibility of requesting a transcript of passages of recorded communications which the judge did not select, either because they consider those passages to be important in themselves or because they are of use in clarifying the meaning of previously selected passages or placing them in context.

Supplementary information:

On the basis of the Code of Criminal Procedure, the Constitutional Court delivered Judgment no. 407/97, its first decision in matters of telephone tapping, which however focused on interpretation of the term "immediately" concerning the transmission to the judge having ordered or authorised the tapping operation of the report on the interception and recording operations as well as of the tapes and other similar evidence. According to the Constitutional Court, the particular nuisance caused by the interference which telephone tapping constitutes required the judge's substantial involvement throughout the duration of the operation, through the exercise of continuous supervision which was close to the source both in time and physically. This supervision must allow a real possibility of upholding or modifying the decision ordering the telephone tapping operation, according to the manner in which it was conducted. However, the Court pointed out that the stringent criterion adopted did not mean that "all telephone tapping operations must be physically carried out by a judge." The Constitutional Court dealt with this issue in Judgment no. 407/97, *Bulletin* 1997/2 [POR-1997-2-003], but also in Judgments nos 347/2001, 528/2003, 379/2004 and 223/2005 (all concerned with the question of the "immediate" transmission to the judge of the report on the interception and recording operations), Judgment no. 411/2002 (in which the Court found unconstitutional an interpretation of the rules which invalidated the time-limit for applications to have recordings of telephone conversations adduced as evidence during the preliminary investigation declared null and void) and Judgment no. 198/2004, *Bulletin* 2004/1 [POR-2004-1-007] (in which the Court did not deem unconstitutional the interpretation of a provision of the Code of Criminal Procedure as permitting the use of other pieces of evidence, separate from the recordings of the telephone tapping operations and subsequent thereto, where this evidence consisted in statements made by the defendants themselves, and notably in a confession, despite the nullity/invalidity of the telephone tapping operations performed).

Many of the questions raised have their basis in the Portuguese legal system's compliance with the

requirements of the case-law of the European Court of Human Rights in these matters, regard being had to Article 8 ECHR. The Constitutional Court referred to the European Court of Human Rights' ruling that national laws must take precautions in order "to communicate the recordings intact and in their entirety for possible inspection by the judge ... and by the defence" and to establish the circumstances in which recordings may be erased or the tapes be destroyed, in particular when the accused has been discharged or acquitted or the judgment has become final (see paragraph 34 of the *Huvig* Judgment of 24 April 1990, *Series A of the Publications of the Court*, no. 176-B; paragraph 35 of the *Kruslin* Judgment of the same date, *Series A of the Publications of the Court*, no. 176-A; paragraph 59 of the *Valenzuela Contreras* Judgment of 30 July 1998, *Reports* 1998-V and paragraph 30 of the *Prado Bugallo* Judgment of 18 February 2003). This case-law was of particular relevance to the present appeal (a request for the immediate destruction of recordings deemed irrelevant by the investigating judge).

Lastly, a study of the legal systems of countries whose main constitutional rules in these matters are similar to those applied by Portugal shows that legislators have adopted diverse approaches to regulating telephone tapping, notably with regard to the role played by the judge either at the authorisation stage or during supervision of the operation.

Languages:

Portuguese.



Romania Constitutional Court

Important decisions

Identification: ROM-2006-1-001

a) Romania / **b)** Constitutional Court / **c)** / **d)** 18.07.2005 / **e)** 95/2005 / **f)** Decision on the plea of unconstitutionality brought against the Act on reproductive health and medically assisted human reproduction / **g)** *Monitorul Oficial al României* (Official Gazette), 664/26.07.2005 / **h)** CODICES (Romanian, French).

Keywords of the systematic thesaurus:

1.3.2.1 **Constitutional Justice** – Jurisdiction – Type of review – Preliminary review.

1.3.5.5 **Constitutional Justice** – Jurisdiction – The subject of review – Laws and other rules having the force of law.

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

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

3.13 **General Principles** – Legality.

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

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

Keywords of the alphabetical index:

Decree, legislative, constitutionality, control / Decree, legislative, validating act.

Headnotes:

1. Government orders become normative texts having force of law when parliament approves them. Constitutional review prior to enactment – Article 146.a of the Constitution – focuses on the act approving the order and its normative content, even if the order itself is temporary and no longer applies or has been rescinded. If the Constitutional Court is unable to review laws approving orders which are unconstitutional or no longer apply, for the purpose of restoring the rule of law enshrined in the Constitution, this means that the latter's provisions are not binding.

2. Dismissal by ministerial order of managing staff of in-patient health facilities violates the fundamental right to health protection guaranteed by law, the limits imposed on the powers of public authorities, the obligation to respect the law as long as the rules under which the managing bodies were appointed remain in force, and the right to be heard before the order is issued. Moreover, such dismissal implies presumption of guilt.

Summary:

I. Under Article 146.a of the Constitution, 38 senators asked the Constitutional Court to find that Article 20.5 of the government's emergency order no. 154/2005, rectifying the state budget for 2005, approved by the act which parliament passed at its sitting on 20 December 2005, was unconstitutional.

In the reasons given for the application, it was argued that the text complained of violated Article 1.3 of the Constitution on the rule of law, Article 16 of the Constitution on equality of rights, Article 21.3 of the Constitution on the right to a fair hearing, Article 23.11 of the Constitution on the presumption of innocence, Article 24 of the Constitution on the right to defence, Article 34 of the Constitution on the right to health protection and Article 115.4.6 of the Constitution on the constitutional system of emergency orders.

II. The deliberations covered various questions with a bearing on the application's admissibility, i.e.:

- whether the application could be examined under Article 146.a of the Constitution, which provides for constitutional review of laws before they are enacted, and not under the constitutional review procedure for orders;
- whether emergency Order no. 154/2005 could be subjected to constitutional review, since it was a temporary normative text, whereas Section 29.1 of Act no. 47/1992 provides for constitutional review only of laws or orders which are actually in force;
- whether 20.5 of the Order could be subjected to constitutional review, if it had been implicitly rescinded.

Concerning the application's admissibility, the Court notes that government orders, once they have been approved by parliament in accordance with Article 115.7 of the Constitution, cease to be independent normative texts and become, as a result of parliament's approving them, law-type texts – even though they also retain, for technical, legislative

reasons, the identifying characteristics assigned to them when the government adopted them.

This being so, the application cannot be declared inadmissible on the ground that the government emergency Order no. 154/2005 is also referred to expressly in the law approving the order.

Concerning the admissibility of subjecting laws which are no longer in force – either because they were temporary and have lapsed, or because they have been repealed – to constitutional review, the Court notes that this issue does not arise when it is ruling, under Article 146.a of the Constitution, on the constitutional validity of laws before they are enacted, since these are clearly not normative texts which no longer apply, but laws adopted by parliament, which must be enacted by the President of Romania under Article 77 of the Constitution, and published in the Romanian Official Journal (*Monitorul Oficial*), so that they can come into force three days later, or on some later date specified in the text. Nor is there any question of reviewing a law which no longer applies when the law reviewed prior to enactment approves a temporary order which has lapsed or been rescinded, since the direct object of such review is the constitutional validity of the law approving the order.

Anything else would mean that the Constitutional Court could not review a law approving an unconstitutional order, for the purpose of restoring the rule of law enshrined in the Constitution, and accordingly that the latter's provisions were not binding.

Moreover, Article 20.5 of the order is not a temporary provision which has lapsed. Nor was it subsequently rescinded, either expressly or implicitly, by emergency Order no. 206/2005.

In view of the above, the Court considers that there is nothing to make the plea of unconstitutionality inadmissible.

The phrase, "restructuring of managing boards and committees", used in the order and the law approving it, means dismissal of the members of these bodies by order of the Minister of Health or the ministers responsible for in-patient health facilities.

These provisions violate Articles 115.6, 1.3, 1.4, 1.5 and 24.1 of the Constitution, because the organisation and operation of hospitals, including appointment and dismissal of their managing bodies, may be regulated only by law, in the narrow sense of that term, and not by emergency orders. Romania is a law-governed state, organised in accordance with the principle of separation of powers as a constitutional democracy, in which compliance with the Constitution and laws is.

compulsory Dismissal by ministerial order of the members of managing boards appointed by regional or local councils, or other institutions which are not subordinate to the government, violates the principle of the rule of law and its corollary, the requirement that public authorities act only within the limits of their powers. In fact, power to dismiss members of managing boards appointed by authorities other than the Ministry of Health lies with those authorities.

The legislator is undoubtedly free to repeal or amend the existing regulations, or to adopt new regulations on reorganisation of in-patient health facilities, providing *inter alia* for appointment and dismissal of managing boards by ministerial order. These new regulations would have to be implemented in accordance with Article 15.2 of the Constitution. As long as the rules under which these boards have been appointed remain in force, the adoption of regulations on dismissal which run counter to those rules flagrantly violates the obligation to respect the law, making it possible to dismiss management staff of in-patient health facilities arbitrarily, without accusing them of any offence or giving them a chance to be heard before the ministerial order is issued. Finally, it establishes a presumption that the staff in question are guilty of professional and administrative misconduct – which violates the principle of presumption of innocence enshrined in Article 23.11 of the Constitution.

Languages:

Romanian.



Slovakia

Constitutional Court

Statistical data

1 January 2006 – 30 April 2006

Number of decisions taken:

- Decisions on the merits by the plenum of the Court: 8
- Decisions on the merits by the panels of the Court: 143
- Number of other decisions by the plenum: 1
- Number of other decisions by the panels: 270

Important decisions

Identification: SVK-2006-1-001

a) Slovakia / **b)** Constitutional Court / **c)** Plenum / **d)** 18.10.2005 / **e)** PL. ÚS 8/04 / **f)** / **g)** *Zbierka zákonov Slovenskej republiky* (Official Gazette), 539/2005; *Zbierka náleзов a uznesení Ústavného súdu Slovenskej republiky* (Official Digest) / **h)** CODICES (Slovak).

Keywords of the systematic thesaurus:

- 3.10 **General Principles** – Certainty of the law.
 3.12 **General Principles** – Clarity and precision of legal provisions.
 5.2.2.2 **Fundamental Rights** – Equality – Criteria of distinction – Race.
 5.2.2.3 **Fundamental Rights** – Equality – Criteria of distinction – National or ethnic origin.

Keywords of the alphabetical index:

Positive discrimination / European Community, directive, transposition / Directive, EU Council, implementation / Anti-discrimination law.

Headnotes:

The constitutional order of the Slovak Republic only recognises certain derogations from the universal notion of equality. Such derogations must have as

their explicit constitutional basis the addressing of natural inequalities within society. An example might be Article 38 of the Constitution.

Summary:

I. The Slovak Government asked the Constitutional Court for a ruling as to the constitutional compliance of one of the provisions of Section 8.8 of Law no. 365/2004 (the “anti-discrimination law”). It states: “With a view to ensuring equality of opportunities in practice, and to complying with the principle of equal treatment, specific affirmative measures may be adopted to prevent or compensate for disadvantages linked to racial or ethnic origin”. The government suggested that this might infringe the principles of legal certainty and equal treatment. They also criticised the wording of the provision as being unclear and hard to understand, as the purpose of the specific affirmative measures is not made clear. They observed, too, that the conditions under which the specific measures might be adopted are imprecise, which could result in a breach of the Constitution.

II. The Constitutional Court granted the government’s motion and stated that this provision of the anti-discrimination law was out of line with Article 1.1 and the first sentence of Article 12.1 and 12.2 of the Constitution. In arriving at its decision, the Court took into account the principles of equality and non-discrimination which are essential components of the international protection of human rights and fundamental freedoms (Article 7 of Universal Declaration of Human Rights, Article 26 of International Covenant on Civil and Political Rights and Article 14 ECHR).

The Constitutional Court interpreted equality as meaning that everyone has the same value and deserves equal care and respect. Any unfair discrimination is prohibited. However, in certain instances, some people may be on the receiving end of measures removing certain disadvantages or obstacles in the way of the general principle of equality. Any provision introducing positive measures must be formulated in such way that it would be possible to perceive it as a derogation or uneven application of the general principle of equality.

The Constitutional Court shared the Government’s view that the challenged provision of the anti-discrimination law does not define the concepts needed for the practical applicability of this norm, and could create scope for arbitrary and ambiguous interpretation and application.

In the Constitutional Court’s opinion, the legal norm lacks a conceptual framework to ensure equality of opportunities and to maintain the principle of equal treatment, and there is no clear and comprehensible definition of the temporary character of the affirmative measures. The methods for achieving this aim should be specified so that the rights of others are respected.

There are no limitations in the challenged provision for adopting special affirmative measures, as it determines neither their subject nor the criteria for decision-making. These shortcomings cannot be addressed by interpretation pursuant to Article 152.4 of the Constitution. The provision accordingly contravenes the principle of the state governed by the rule of law as set out in Article 1.1 of the Constitution.

The current interpretation of Article 12.2 of the Constitution is that it prohibits any positive or negative discrimination linked to racial or ethnic origin. The challenged provision is therefore at odds with the first sentence of Article 12.1 and 12.2 of the Constitution.

The Constitutional Court’s decision contains two dissenting opinions and one concurring opinion.

In the first dissenting opinion, three judges of the Court interpreted the legislation systematically. They reviewed the provision from the aspect of international law on the basis of Article 1.2 of the Constitution and concluded that the provision was aimed at the transposition and implementation of Article 5 of Council Directive no. 2000/43/EC of 29 June 2000. This is a positive action which does not prevent the Member States of the European Union from adopting special measures for prevention or compensating for disadvantages linked to racial or ethnic origin. The dissenters expressed the view that the creation of conditions for equality of opportunity of access to all social positions may also be found in international documents, in which the equality principle is not considered to be the only possible approach to a fair status for individuals within society. Instead, differences between individuals are addressed sensibly, carefully and effectively through special measures.

They also stated that the principle that membership of a national minority or ethnic group is not permitted to cause damage to anybody is an acceptable constitutional justification for introducing specific measures which will guarantee its application. The challenged provision conforms to the above principle and cannot be said to be unconstitutional. This conclusion was also supported by the grammatical interpretation of the key words “affirmative” and “ensure”. There can be no doubt as to the temporary nature of the affirmative provisions as it stems from

their purpose, namely the guaranteeing of equality of opportunities. Article 2.2 and 2.3 of the Constitution can be said to prevent misinterpretation of the challenged provision due to uncertainty. The possible inapplicability, vagueness or imperfect nature of the challenged provision do not necessarily mean that it is unconstitutional. A lack of clarity may be addressed by a constitutionally conforming interpretation, pursuant to Article 152.4 of the Constitution.

In the second dissenting opinion, the argument was put forward that Article 12.1 of the Constitution embodies the general principle of equality. Equality as a category of constitutional law is not absolute, it is relative. It is possible under the Constitution for there to be different treatments to ensure equality of rights. The challenged provision is a framework one. It contains no rules of conduct; it merely contains legal principles enabling the adoption of special affirmative measures. It cannot contravene Articles 1.1, 12.1 and 12.2 of the Constitution, as it is covered by Article 152.4 of the Constitution.

The observation was also made that the affirmative measures should not be described as “positive discrimination” as their aim is to create a level playing field of opportunities which will overcome the disadvantages of certain groups within society and enable them to enjoy equal rights. Reference was also made in this opinion to international documents.

In the concurring opinion, the judge pointed out that positive discrimination based on preference of certain defined groups including affirmative measures is necessary for effective implementation of the rights and freedoms pursuant to the Constitution and international treaties. He went on to say that positive discrimination is admissible if it is directly mentioned in the Constitution or an international treaty, or if it has the form of a specific measure, it is embodied in law and it is necessary for the effective implementation of a certain right pursuant to the Constitution or an international treaty. Any exception from the constitutional prohibition of discrimination must be explicitly stated in law. The challenged provision does not meet these criteria. If a provision requires a record of national or racial origin in order to be implemented, this is at odds with Article 12.2 of the Constitution.

Languages:

Slovak.



Slovenia Constitutional Court

Statistical data

1 January 2006 – 30 April 2006

During this period, the Constitutional Court held 27 sessions (13 plenary and 14 in chambers). Of the 14, 4 were in civil chambers, 6 in penal chambers and 4 in administrative chambers. There were 340 unresolved cases in the field of the protection of constitutionality and legality (denoted U- in the Constitutional Court Register) and 1 206 unresolved cases in the field of human rights protection (denoted Up- in the Constitutional Court Register) from the previous year as at 1 January 2006. The Constitutional Court accepted 270 new U- and 653 new Up- cases in this period.

In the same period, the Constitutional Court decided:

- 114 cases (U-) in the field of the protection of constitutionality and legality, in which the Plenary Court handed down:
 - 55 decisions and
 - 59 rulings;
- 20 cases (U-) cases joined to the above-mentioned for joint hearing and adjudication.

The total number of U- cases resolved was 134.

In the same period, the Constitutional Court resolved 388 (Up-) cases in the field of the protection of human rights and fundamental freedoms (28 decisions were issued by the Plenary Court, 360 decisions were issued by a chamber of three judges).

Decisions are published in the Official Gazette of Slovenia. Constitutional Court rulings, however, are not generally published in an official bulletin, but are delivered to the parties to 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-2006-1-001

a) Slovenia / **b)** Constitutional Court / **c)** / **d)** 09.03.2006 / **e)** Up-719/03 / **f)** / **g)** *Uradni list RS* (Official Gazette), 30/06 / **h)** *Pravna praksa*, Ljubljana, Slovenia (abstract); CODICES (Slovenian, English).

Keywords of the systematic thesaurus:

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

Keywords of the alphabetical index:

Defendant, incrimination of co-defendants, cross-examination / Burden of proof, inversion.

Headnotes:

If a defendant incriminates his co-defendants in his statements, under the court rules his co-defendants may examine him. The defendant in such circumstances enjoys the privilege against self-incrimination as set out in Article 29.4 of the Constitution, and may refuse to answer a particular question or indeed any of them at all, as he is not obliged to defend himself. If this is the case, the co-defendants cannot exercise the right delineated in Article 6.3.d ECHR, either wholly or in part. This right is also forfeited if the defendant made incriminating statements against other co-defendants during the investigation but fails to attend the main hearing and is therefore unavailable for cross-examination. If the co-defendants cannot exercise this legal guarantee the right to defence enshrined in Article 29 of the Constitution is violated.

Summary:

It is clear from the established jurisprudence of the European Court of Human Rights that if a defendant is unable to exercise his right to examine witnesses who incriminate him, any judgment convicting him cannot exclusively or to a decisive extent be based on their statements. In the case before the European Court of Human Rights, certain evidence had been presented which was to an important extent the basis for conviction. The Court which handed down the judgment evaluated other evidence to see whether it corroborated the disputed incriminating testimony. In fact all three challenged judgments cited other incriminating evidence with a view to confirming testimonies of co-defendants whom the complainant could not examine. The Constitutional Court established that the testimonies were crucial evidence against the complainant. In conformity with the established case law of the European Court of Human Rights, there was a violation of the right to examine an incriminating witness as determined in Article 6.3.d ECHR, and therefore also a violation of Article 29 of the Constitution.

In the Supreme Court judgment, the Court also expected the complainant to explain which decisive facts he wanted to prove by direct examination of his co-defendants. However, the burden of proof can be placed on the defence only when it requires testimony from witnesses in support of the case or when other

supporting evidence is being taken, not in the case of incriminating witnesses.

It is central to the complainant's case that important evidence incriminating him originated from the statements of two co-defendants made before the investigating judge before the process of investigation was formally opened, and the main hearing took place in their absence. The complainant had allegedly had no opportunity during the proceedings to examine the two co-defendants. He argued that this meant his rights as set out in Article 6 ECHR were not respected.

Clear case law from the European Court of Human Rights demonstrates that if a defendant is not able to exercise his right to examine incriminating witnesses, any judgment convicting him cannot exclusively or to a decisive extent be based on statements from those witnesses. There was evidence in the case before the European Court of Human Rights which to a significant extent formed the basis of conviction. The Court handing down the judgment had also evaluated other evidence to determine the extent to which it bore out disputed statements of incriminating witnesses.

In the judgments challenged by the complainant, all the other incriminating evidence was cited, in support of the testimony from incriminating witnesses. The Constitutional Court established that the testimonies of these two witnesses were crucial evidence against the complainant (that the matter concerned significant evidence has also been admitted by the Supreme Court). In conformity with established case law from the European Court of Human Rights, there had been a violation here of the right to examine an incriminating witness as determined in Article 6.3.d ECHR. Article 29 of the Constitution had accordingly also been breached.

Legal norms referred to:

- Article 29 of the Constitution;
- Article 6 ECHR;
- Article 59.1 of the Constitutional Court Act.

Languages:

Slovenian, English (translation by the Court).



South Africa Constitutional Court

Important decisions

Identification: RSA-2006-1-001

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 30.03.2006 / **e)** CCT 48/05 / **f)** Van der Merwe v. Road Accident Fund and Another / **g)** <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT48-05> / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

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

Keywords of the alphabetical index:

Interpretation, discriminatory / Compensation for damage / Damage, personal injury / Accident, road traffic / Marital status, discrimination / Marriage, equality.

Headnotes:

Section 18.b of the Matrimonial Property Act 88 of 1984, when read in light of the Section 9.1 of the Constitution (the equality clause) is invalid because it unfairly differentiates between a spouse who is married in community of property from spouses married out of community of property and denies, without a rational justification, such spouses the right to claim damages for patrimonial loss arising from bodily injuries inflicted by the other spouse.

Summary:

I. On 24 October 1999, in Cape Town, Mr David Van der Merwe intentionally drove his motor vehicle into his wife, the applicant, and reversed over her body. As a result of the collision, she sustained severe bodily injuries for which she had to receive extensive medical treatment. At the time of the collision, the couple were married in community of property. They have since divorced.

The applicant instituted action against the Road Accident Fund (the Fund) seeking to recover patrimonial and non-patrimonial damages suffered as a result of the bodily injuries. The Fund is the statutory body established to compensate those who suffer damages arising from bodily injuries caused by the driving of a motor vehicle. However, the Fund is liable to compensate the applicant only if she can institute a lawful claim against the driver of the motor vehicle that caused her bodily harm.

At the common law, spouses married in community relating to property are not entitled to claim damages from their spouses. Section 18.b modified this for claims of non-patrimonial loss for spouses married out of community of property. The Fund disputed its liability to pay the applicant on the basis that at common law, as modified by Section 18 of the Matrimonial Property Act, Mrs Van der Merwe had no valid claim. To meet this defence, Mrs Van der Merwe, challenged the constitutionality of Section 18.b.

The High Court held that the impugned section undermined the dignity of applicant and unfairly discriminated against her under the equality clause in Section 9.1 of the Constitution, on the ground of her marital status.

II. This matter came to the Constitutional Court for confirmation of the High Court order of constitutional invalidity in terms of Rule 16 of the Constitutional Court Rules. At the same time, the Fund appealed against the order in the Constitutional Court and contended that the legislation did not amount to a differentiation on the ground of marital status, and to the extent that it did, such differentiation was rationally connected to a legitimate government purpose.

The Constitutional Court admitted the Women's Legal Centre, as *amicus curiae*, which supported the confirmation of the declaration that Section 18.b as inconsistent with the Constitution.

Writing for the majority, Moseneke DCJ noted that the common law rule was a product of a patriarchal society under which the husband was the sole administrator of the estate and the wife had no rights.

When read in light of the equality provision of the Constitution it is invalid because the rule unfairly differentiates between marriages that are concluded in community of property and those that are concluded out of community of property. The Court found no rational reason for the distinction. The Fund contended that the applicant chose to marry in community of property and therefore waived her right to attack the validity of these laws and therefore must be held to the consequences of her choice. The Court held, however, that the objective

validity of a law is derived from the Constitution and not personal choice. There is no legitimate government interest that may be advanced by distinguishing between these types of marital regimes and such distinction arbitrarily limits the equality provisions of the Constitution. The distinction, therefore, cannot be justified and the impugned section must be severed.

By way of remedy the Court found that severance of the offending language and the reading-in of remedial words into the challenged section is appropriate because it is the least invasive of the legislative role of Parliament and preserves the remainder of the legislation. The Court ordered that the words "other than damages for patrimonial loss" in Section 18.b of the Act, be replaced with the words "including damages for patrimonial loss". The Court dismissed the appeal and ordered the Fund to pay the costs of the applicant in the High Court and in this Court.

In a short concurring judgment, Yacoob J noted that the choice argument was not relevant in this case as it would only be relevant to a justification only where the Court found the existence of a legitimate government purpose for the section under attack.

Cross-references:

- *Van der Merwe v. RAF* (CPD) Case no. 1803/02, 13.09.2005;
- *Du Plessis v. Pienaar NO and Others* 2003 (1) SA 671 (SCA), 2002 (4) All SA 311 (SCA);
- *S v. Zuma and Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC);
- *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others* 2000 (1) BCLR 39 (CC), 2000 (2) SA 1 (CC), *Bulletin* 2000/1 [RSA-2000-1-001].

Languages:

English.



Identification: RSA-2006-1-002

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 31.03.2006 / **e)** CCT 01/06 / **f)** Campus Law Clinic (University of KwaZulu-Natal Durban) v. Standard Bank of South Africa Ltd and Another / **g)** <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT1-06> / **h)** CODICES (English).

Keywords of the systematic thesaurus:

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

1.4.9.4 **Constitutional Justice** – Procedure – Parties – Persons or entities authorised to intervene in proceedings.

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

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

3.18 **General Principles** – General interest.

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

5.4.13 **Fundamental Rights** – Economic, social and cultural rights – Right to housing.

Keywords of the alphabetical index:

Appeal, leave to appeal / Housing, access / Housing, right / Property, protection, procedure.

Headnotes:

The fact that the applicant organisation was not a party to the proceedings below does not constitute an absolute bar to its obtaining leave to appeal.

The circumstances in which a court or court official will permit a creditor to execute against immovable property in order to recover a mortgage bond owed to it, and what safeguards, if any, should be required to ensure that the constitutional right of access to adequate housing (Section 26 of the Constitution) is taken into account when execution is against a home, are matters of important public interest.

Where the record on appeal is insufficient for full consideration of the issues and where interested parties have not been given a full opportunity to be heard, it is in the interests of justice that the case be dismissed.

Summary:

I. The applicant, the Campus Law Clinic at the University of KwaZulu-Natal, sought leave to appeal against a judgment of the Supreme Court of Appeal or alternatively direct access to the Constitutional Court. The Campus Law Clinic was not a party to the proceedings in the Supreme Court of Appeal and therefore requested that the Constitutional Court allow it to bring this application in the public interest and in terms of Section 38 of the Constitution, which provides broad rules of standing. The first respondent, Standard Bank, opposed the application. The second respondent, the Minister of Justice and Constitutional Development (Minister), was cited

despite not having been a party to the prior proceedings. None of the original defendants in the proceeding below were part of this application.

The background to this application arose from summonses issued by the Standard Bank in the High Court against nine defendants. Those summonses sought that the property of the defendants be ordered to be executable as a result of the defendants being in default of paying their home loans. Ordinarily, if such an application were unopposed, the registrar would grant judgment by default. Eight of the nine applications were unopposed. However, the Deputy Judge President of the High Court instructed the registrar to not order the immovable property executable. The matters were enrolled for hearing.

The High Court refused to grant the execution orders based on the Constitutional Court judgment in *Jaffha v. Schoeman and Others; Van Rooyen v. Stoltz and Others*, which held that an order of execution against immovable property may not be granted except by a court that has considered all the relevant circumstances including the constitutional right of access to housing.

The Supreme Court of Appeal reversed the decision of the High Court and held that Standard Bank could execute against the properties. It also issued a direction requiring that a plaintiff seeking to declare immovable property executable must alert the defendant of his or her constitutional right to adequate housing.

II. In dismissing the application, the Constitutional Court held that the case raised constitutional issues and that it was in the public interest that matters surrounding the question of execution of mortgaged property be addressed. The Court found that the fact that the Campus Law Clinic was not a party to the proceedings below did not necessarily constitute an absolute bar to obtaining leave to appeal. It held, however, that it was not in the interests of justice for the appeal to be granted. The Court reasoned that the record on appeal was insufficient for a proper consideration of all the relevant issues. Furthermore, interested parties such as the Minister, lending institutions and home-owner associations were not given a full opportunity to be heard. The Court emphasised that the Campus Law Clinic and other interested parties may institute fresh proceedings with a view to producing a full record to enable all the issues raised to be dealt with in a comprehensive manner.

Cross-references:

- *Standard Bank of South Africa Ltd v. Saunderson and Others Case 2006 (2) SA 264 (SCA);*

- *Jafftha v. Schoeman and Others*, *Bulletin* 2004/2 [RSA-2004-2-010];
- *Van Rooyen v. Stoltz and Others* 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC), *Bulletin* 2004/2 [RSA-2004-2-010];
- *Standard Bank of South Africa Ltd v. Snyders and eight similar cases* 2005 (5) SA 610 (C);
- *Nedbank Ltd v. Mortinson* 2005 (6) SA 462 (W);
- *Lawyers for Human Rights and Another v. Minister of Home Affairs and Another* 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC), *Bulletin* 2004/1 [RSA-2004-1-005];
- *Ferreira v. Levin NO and Others*, *Bulletin* 1995/3 [RSA-1995-3-010];
- *Vryenhoek and Others v. Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC), *Bulletin* 1995/3 [RSA-1995-3-010];
- *Phillips and Others v. National Director of Public Prosecutions* 2006 (1) 505 (CC); 2006 (2) BCLR 274 (CC);
- *National Gambling Board v. Premier, Kwazulu-Natal, and Others* 2002 (2) SA 715 (CC); 2002 (2) BCLR 156 (CC);
- *Lane and Fey NNO v. Dabelstein and Others* 2001 (2) SA 1187 (CC); 2001 (4) BCLR 312 (CC);
- *Bruce and Another v. Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC);
- *Khosa and Others v. Minister of Social Development and Others*, *Bulletin* 2004/1 [RSA-2004-1-002];
- *Mahlaule and Another v. Minister of Social Development and Others* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC), *Bulletin* 2004/1 [RSA-2004-1-002].

Languages:

English.



Identification: RSA-2006-1-003

a) South Africa / **b)** Constitutional Court / **c)** / **d)** 18.05.2006 / **e)** CCT 31/05 / **f)** Phumelela Gaming and Leisure Limited v. Grundlingh and Others / **g)** <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT31-05> / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 3.17 **General Principles** – Weighing of interests.
- 5.3.39 **Fundamental Rights** – Civil and political rights – Right to property.
- 5.3.39.3 **Fundamental Rights** – Civil and political rights – Right to property – Other limitations.
- 5.4.6 **Fundamental Rights** – Economic, social and cultural rights – Commercial and industrial freedom.

Keywords of the alphabetical index:

Common law, development / Trade, exercise / Gambling, competition / Competition, unfair / Competition, property right, limitation.

Headnotes:

A delictual claim by a totalisator against bookmakers on the ground that the use of the totalisator's dividends amounted to unlawful competition. The test for unlawful competition as applied by the Supreme Court of Appeal was not in need of development in terms of the spirit, purport and objects of the Bill of Rights. Development in terms of Section 39.2 of the Constitution should take into account all the rights in the Bill of Rights, which in this case means not only Section 25 which protects property rights but also Section 22 which promotes freedom of trade. The interpretation of the common law by the Supreme Court of Appeal did not amount to the arbitrary deprivation of property.

Summary:

I. Phumelela Gaming and Leisure Limited (the applicant) operated totalisator betting, a computerised system for betting on horseracing and other sport. A person who wishes to wager money on the outcome of a horserace may choose to place a bet with a bookmaker or on a totalisator. A totalisator operates on the basis that all the money placed on any particular betting is pooled and after deductions for administrative fees and taxes, the remainder is divided among the winners and paid out as dividends. A bookmaker on the other hand, fixes odds in advance. To the extent that both rely for their business on the betting money of the public, they are in competition. The applicant sought leave to appeal against the finding of the Supreme Court of Appeal which set aside an interdict prohibiting two bookmakers (the respondents) from using the totalisator's dividends. The interdict had been obtained in the Pretoria High Court against the bookmakers. The applicant contended that bookmakers should be prohibited from using its results or dividends as a basis on which to offer bets, because this constituted the delict of unlawful competition. It brought its challenge in

terms of Section 39.2 of the Constitution, which provides that any development of the common law must promote the spirit, purport and objects of the Bill of Rights. It alleged that its goodwill is protected against arbitrary deprivation by Section 25 of the Constitution, and the Supreme Court of Appeal's interpretation of the wrongfulness element of the delict amounted to an arbitrary deprivation. An application for direct access to challenge the constitutionality of the definition of open bets in the National Gambling Act 7 of 2004 was also made.

II. Langa CJ writing for the majority held that the applicant raised the crucial constitutional issue of whether the Supreme Court of Appeal had regard to the spirit, purport and objects of the Bill of Rights as required by Section 39.2 of the Constitution in applying the test for wrongfulness to the facts of the case, and hence the Court had jurisdiction to hear it. In relation to the claim of unlawful competition it was held that courts have an obligation to promote the spirit, purport and object of the Bill of Rights when interpreting any legislation or developing the common law or customary law. In dealing with the issue of the claim for unlawful competition, the Court held that the determinative test is wrongfulness, which involves the determination of public policy and the legal convictions of the community. It held that any form of competition poses a threat to rivals but not all competition or interference with property interests constitutes unlawful competition. The common law determines the limits of unlawful competition. The question for determination was whether, according to the legal convictions of the community, the competition or the infringement on the goodwill is reasonable or fair seen through the prism of the Bill of Rights. The Court must therefore engage in a balancing exercise and in doing so that the application of Section 39.2 would have to take account of the rights that may be protected by the right to freedom of trade. Accordingly, the right to property in Section 25 of the Constitution is not absolute and should not be employed in a manner that ignores other constitutional rights and values. The Bill of Rights does not expressly promote competition principles, but the right to freedom of trade, enshrined in Section 22 of the Constitution is consistent with the protection of competition as being in the public welfare. If the Court were to develop the common law test of wrongfulness to protect the applicant's property rights to the detriment of the values on the other end of the scale, it would be discarding the nuanced test that has been developed through case law.

Consequently, although the Supreme Court of Appeal's decision did not expressly mention Section 39.2 of the Constitution it did review the

legislation, weighing it against the other factors, hence its decision could not be faulted, for the Bill of Rights emphasises the principles of competition already at play in the common law, hence it was unnecessary to develop the common law in this case. On the question of arbitrary deprivation of property the Court held that since the conduct of the bookmakers did not constitute unlawful competition, it followed that the finding of the Supreme Court of Appeal could not be faulted.

The application for direct access failed as the Court held that it was not in the interests of justice to decide the challenge of constitutionality of the definition of 'open bet' as the court of first and last instance without the possibility of an appeal. No compelling circumstances had been shown to justify such a course.

As a result, the application for leave to appeal was granted. The appeal was dismissed and the application for direct access was refused on the ground that it was not in the interests of justice to grant it.

Cross-references:

- *Lorimar Productions Inc and Others v. Sterling Clothing Manufacturers (Pty) Ltd* 1981 (3) SA 1129 (T);
- *S v. Basson* 2005 (1) SA 171 (CC); 2004 (6) BCLR 625 (CC);
- *K v. Minister of Safety and Security* 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC);
- *S v. Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC);
- *Carmichele v. Minister of Safety and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC), *Bulletin* 2001/2 [RSA-2001-2-010];
- *National Education Health and Allied Workers Union v. University of Cape Town and Others* 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC), *Bulletin* 2002/3 [RSA-2002-3-019];
- *De Reuck v. Director of Public Prosecutions, Witwatersrand Local Division and Others* 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC), *Bulletin* 2003/3 [RSA-2003-3-009];
- *Brummer v. Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC);
- *Member of the Executive Council for Development Planning and Local Government, Gauteng v. Democratic Party and Others* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC);
- *President of the Republic of South Africa and Others v. United Democratic Movement (African Christian Democratic Party Intervening; Institute for Democracy in South Africa and Another as*

- Amicus Curiae* 2003 (1) SA 472 (CC); 2002 (11) BCLR 1164 (CC);
- *Fraser v. Naudé and Others* 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC);
 - *Bruce and Another v. Fleecytex* 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC);
 - *S v. Bequint* 1997 (2) SA 887 (CC); 1996 (12) BCLR (CC);
 - *K v. Minister of Safety and Security* 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC);
 - *Minister of Safety and Security and Another v. Carmichele* 2004 (3) SA 305 (SCA);
 - *Van Eeden v. Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA);
 - *Matthews and Others v. Young* 1922 Appellate Division 492;
 - *Franschhoekse Wynkelder (Ko-operatief) Bpk v. South African Railways and Harbours* 1981 (3) SA 36 (C);
 - *A Becker & Co (Pty) Ltd v. Becker and Others* 1981 (3) SA 406 (AD);
 - *Union Wine Ltd v. E Snell and Co Ltd* 1990 (2) SA 189 (C);
 - *Taylor and Horne (Pty) Ltd v. Dentall (Pty) Ltd* 1991 (1) SA 412 (AD);
 - *Bress Designs (Pty) Ltd v. GY Lounge Suite Manufacturers (Pty) Ltd* 1991 (2) SA 455 (W);
 - *Atlas Organic Fertilizers (Pty) Ltd v. Pikkewyn Ghwano (Pty) Ltd and Others* 1981 (2) SA 173 (T) at 188-189;
 - *Payen Components SA Ltd v. Bovic Gaskets CC and Others* 1994 (2) SA 464 (W);
 - *Elida Gibbs (Pty) Ltd v. Colgate Palmolive (Pty) Ltd* (1) 1988 (2) SA 350 (W);
 - *Times Media Ltd v. South African Broadcasting Corporation* 1990 (4) SA 604 (W);
 - *Aetiology Today CC t/a Somerset Schools v. Van Aswegen and Another* 1992 (1) SA 807 (W);
 - *The Concept Factory v. Heyl* 1994 (2) SA 105 (T);
 - *Zondi v. MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC); 2005 (4) BCLR, *Bulletin* 2005/3 [RSA-2005-3-013];
 - *National Gambling Board v. Premier KwaZulu-Natal and Others* 2002 (2) SA 715 (CC); 2002 (2) BCLR 156 (CC).

Languages:

English.



Spain Constitutional Court

Important decisions

Identification: ESP-2006-1-001

a) Spain / **b)** Constitutional Court / **c)** Plenary / **d)** 15.02.2001 / **e)** 46/2001 / **f)** / **g)** nº 65, 16.03.2001 / **h)**.

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

Keywords of the alphabetical index:

Sect, public order, danger / Church, autonomy / Church, registration / Church, recognition / Public order, threat.

Headnotes:

When establishing a register of religious bodies for the purpose of affording special legal protection to the religious denominations or communities entered therein, the state is not entitled to assess the legitimacy of the religious beliefs of these denominations or communities but simply to ascertain whether they are excluded from the sphere of protection established by the Religious Freedom Act or whether they engage in activities or take measures which run counter to public order as protected by law in democratic societies.

The public order clause in Article 16 of the Constitution, which is the only restriction on the right to religious freedom and worship, cannot be interpreted by the authorities as a preventive clause against mere suspicions of future activities and their hypothetical consequences, save where, in exceptional cases, the risk factors are duly established and the measure adopted is proportionate to and consonant with the aims pursued.

Summary:

I. The judgment in question was a ruling on a constitutional appeal lodged by the Unification Church against an administrative decision upheld in the courts, in which the authorities refused to enter the Church on the register of religious bodies referred to in Section 5 of the Religious Freedom Act (implementing Act no. 7/1980 of 5 July 1980). The administrative decision was based on two types of reason: firstly, the lack of any religious substance to the body in question, as it did not have its own specific belief or set of beliefs or any specific and established form or place of worship and its only worshippers were simply the small group of followers who had first applied for it to be registered; secondly, the requirement to preserve public order, protected by law in all democratic societies, in accordance with Article 16.1 of the Constitution – a requirement which, moreover, marked out the limits of religious freedom. It was submitted that backing for the second argument was provided by the conclusions reached in a plenary session of the Spanish Congress of Deputies following the publication of the opinion of the Parliamentary Commission on Sects in Spain and the European Parliament Resolution of 22 May 1984, which criticised the activities of the Unification Church and, in particular, its methods for recruiting new followers.

II. In its judgment, the Constitutional Court began by reviewing the nature and scope of the right to religious freedom before describing the purpose and meaning of entering a religious body on the register of religious bodies. In this connection, it emphasised that the main implication of registration was the recognition of the religious body's legal personality as a religious group, in other words the identification and legal acceptance of a group of persons intending to exercise, free of all constraint, their fundamental right to the collective enjoyment of their religious freedom. Acknowledging this specific and special legal personality had repercussions both at internal level, as it gave the religious body concerned a certain status reflected in the freedom it was granted to organise itself, and at external level, in that the outward manifestation of the exercise of this fundamental right by any group or community entered in the register was made so much easier that religious freedom could be exercised collectively without any constraint, hindrance or disruption of any sort. When establishing the register of religious bodies for the aforementioned purposes, the state was not entitled to carry out any kind of assessment of the legitimacy of the religious beliefs of the bodies or communities concerned or of their various modes of expression; it was merely required to ensure, through a simple act of observation and not one of

classification, that the body applying for registration was not among those that had been statutorily excluded from legal protection – for beliefs linked to the study and experience of psychic or parapsychological phenomena combined with humanist or spiritual values or other similar purposes other than religious ones – and that the activities engaged in or acts performed when practising the religion did not infringe the rights of others to exercise their fundamental rights and freedoms and were not contrary to public safety, health or morals, in other words public order as protected by law in democratic societies.

As the only restriction on the exercise of the right to religious freedom (under Article 16.1 of the Constitution), public order could not be interpreted as a preventive clause against potential risks. Quite the opposite was in fact true as, generally speaking, public order could only be relied on as a restriction on freedom of religion and worship where it had been proved in court that there was a genuine danger for public safety, health and morals, which were all components of democratic societies. In exceptional cases, it was possible to use the public order clause as a preventive clause if the direct aim was to protect the public safety, health and morals inherent in all democratic societies and provided that the risk factors were duly established and that the measure taken was proportionate to and consonant with the aims pursued. Save in these exceptional circumstances, only a final, unappealable decision ruling on the practices or activities of such a group could be relied on to prove the existence of conduct contrary to public order and warranting the lawful restriction of the exercise of freedom of religion and worship and hence the rejection of an application to be entered on the registry of religious bodies or, where necessary, a decision to strike out the body concerned.

In accordance with this constitutional doctrine, the Constitutional Court allowed the constitutional appeal and set aside the impugned administrative and judicial decisions, holding that the decision to refuse to register the religious body was based on grounds which were contrary to religious freedom. With regard to the first ground relied on, the Constitutional Court pointed out that the authorities should not assume the right to appraise the religious substance of the body concerned but merely ascertain that it was not among the bodies statutorily excluded from legal protection. With regard to the second, the Court found that it could not be inferred from the parliamentary conclusions and resolutions referred to, except as pure conjecture, that there was a definite risk or danger to public order that could be directly attributed to the religious body making the application. It was impossible therefore to give any reasoned or

proportionate justification, from the constitutional viewpoint, for the decision to reject the Church's application to be entered in the register of religious bodies.

Supplementary information:

Four judges filed a dissenting opinion against this judgment.

Languages:

Spanish.



Identification: ESP-2006-1-002

a) Spain / b) Constitutional Court / c) Plenary / d) 17.03.2001 / e) 69/2001 / f) / g) nº 83, 06.04.2001 / h).

Keywords of the systematic thesaurus:

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

5.2 **Fundamental Rights** – Equality.

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

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:

Limitation period, criminal law, suspension / Judge, challenging / Immunity, criminal / Evidence, sufficient / Judge, impartiality, objective / Judge, impartiality, subjective / Judge, media, information leak, bias.

Headnotes:

A statement by a co-accused can constitute sufficient evidence to overturn the presumption of innocence provided that it is supported by an external event, item of information or circumstance which confirms it.

The guarantee of immunity, under which only the Supreme Court can hear cases involving deputies and senators, does not prevent an investigating judge from taking certain measures where there is not enough evidence to place a deputy under investigation.

The right to an impartial judge guarantees that all appellants' claims will be heard by a judicial body unconnected with the litigants (subjective impartiality) or with the interests inherent in the subject-matter of the trial (objective impartiality). All investigating judges have a duty to be impartial.

If a judge who has performed certain functions within the executive then returns to his original post in the judiciary, this does not in itself infringe the right to an impartial judge. An infringement of the right to an impartial judge can only be established if it is proved that an investigating judge has made use of extra-judicial knowledge or acted under the influence of obvious hostility towards the applicant.

Certain leaks of information to the media can infringe the right to a fair trial.

With regard to offences committed by a group, the running of time for the purposes of the limitation of prosecution is suspended as soon as proceedings are instituted against a group of persons presumed to be responsible.

The Constitutional Court is entitled to examine any potential infringement of the right to presumption of innocence where the judicial authority's investigating activities establish guilt without having proved all the elements which constitute an offence.

Any alleged violation of fundamental rights connected with an interlocutory application challenging a judge can be remedied during the judicial proceedings before the final judgment bringing an end to the criminal proceedings is delivered. Irregularities and procedural defects that occur in connection with an application challenging a judge are unconstitutional if they have a specific material impact.

Summary:

In Judgment 69/2001, the Constitutional Court ruled on a constitutional appeal lodged by the former director of the State Security Services against a decision by the Criminal Division of the Supreme Court in which the applicant had been convicted for the offences of embezzlement of public funds and false imprisonment. The Constitutional Court dismissed the appeal.

The applicant's submissions related to two matters:

1. The criminal investigation and the investigating judge's alleged bias;
2. The Supreme Court's decision: the applicant complained of an infringement of his right to a fair trial, the right to adduce all relevant evidence, the right to impartiality and the right to presumption of innocence.

The right to an impartial judge (under Article 24.2 of the Constitution) guarantees that all judicial claims shall be heard by a judicial body unconnected with the litigants (subjective impartiality) and with the disputed interests (objective impartiality), in accordance with the case-law of the European Court of Human Rights and the Constitutional Court itself. Investigating judges have a personal duty to be impartial as they have the power to take extremely serious measures (such as arrest warrants or provisional release orders).

In the present case, the judge in the *Audiencia Nacional* initially appointed to conduct the investigation had performed executive functions in the same ministry as the applicant. That being said, it was not established that the investigating judge's former political activities had led him to form an opinion on the parties to or the subject-matter of the trial (whether through the use of extra-judicial knowledge or because of a presumed hostility towards the applicant), calling into question the neutrality or impartiality which one is entitled to expect from any judge.

The subsequent investigation, conducted by the Supreme Court after the criminal case had been referred to it by the *Audiencia Nacional*, could not be said to have been marred by any infringement of the right to an impartial judge as the investigation had been conducted afresh right from the beginning and had not simply repeated the previous proceedings. Furthermore, it had been conducted with the strictest regard to all the requirements of impartiality.

The applicant had given three grounds on which to challenge the impartiality of the investigating judge at the *Audiencia Nacional*:

- a. the investigating judge had already been the subject of a preliminary complaint by the applicant;
- b. there had been obvious hostility between the investigating judge and the applicant; and
- c. the investigating judge had lost all impartiality with regard to the subject-matter of the trial.

In the Supreme Court judgment against which the constitutional appeal had been lodged, these three grounds had been dismissed. The Constitutional Court also found that the right to judicial impartiality had been respected.

With regard to the first ground, the case-law of the Supreme Court provided that complaints against judges had to be filed before the criminal proceedings opened. In the instant case, the complaint had been filed in 1995, well after the opening of the proceedings (which began in 1988). No proof of the alleged hostility between the applicant and the investigating judge had been given during the trial and so this ground had also been dismissed. And the same conclusion had to be reached in respect of the investigating judge's alleged lack of objective impartiality.

Neither had there been any infringement of the right to the presumption of innocence (Article 24.2 of the Constitution). If the only evidence relied on was the statement of a co-accused, then it was essential to seek some basic corroboration or confirmation of the content of the statement. This meant that the co-accused's statement had to be supported or confirmed by an external event or item of information allowing it to be regarded as sufficient evidence. In the present case, several items of information (documents from the Ministry of Defence's National Intelligence Centre, the lack of an inquiry by the relevant bodies and certain telephone calls) had confirmed the co-accused's statement.

The right to a judge predetermined by law (Article 24.2 of the Constitution) had not been infringed. The applicant submitted that the Criminal Division of the Supreme Court should have taken over the investigation, which had been assigned initially to the *Audiencia Nacional*, as soon as it had learnt that one of the co-accuseds had made a statement implicating the Minister of the Interior of the time, who, as a deputy in the Cortes Generales, enjoyed immunity from prosecution (Article 71.3 of the Constitution).

Article 71.3 of the Constitution provided as follows: "Only the Criminal Division of the Supreme Court shall have jurisdiction to try cases involving deputies or senators". This special right of immunity had to be interpreted restrictively because of its exceptional nature. This meant that charges had to be based on sound and proper evidence. Following an inconsistent and implausible statement by a co-accused, the central investigating court had rightly decided not to transfer the case to the Supreme Court. The case had only been transferred when the evidence for the statement had become solid enough to place the Minister of the Interior under investigation.

The disclosure in the media, by at least one of the Supreme Court judges, of the decision arrived at and some of what had been said in the deliberations, had not, in the present case, infringed the right to a fair trial from the viewpoint of the right to judicial impartiality. At the time when this information had been leaked, the hearing had already been closed, all the evidence had been produced and the deliberations on the court's decision had ended. Neither had it been established that the leaks in certain newspapers had resulted in a lack of neutrality or impartiality in the judge's views.

The right to adduce relevant evidence (Article 24.2 of the Constitution) had not been infringed. In a rational decision stating its reasons, the Supreme Court had rejected the applicant's proposal to take evidence from a witness on the ground that it was not relevant and was unconnected with the facts being tried. The applicant was not able to prove in his constitutional appeal that the court's dismissal of the evidence proposed had deprived him in any way of his grounds of defence.

The applicant submitted that the criminal complaint filed by a group of citizens should not have had the effect of suspending the running of time for the purposes of limitation of prosecution as it was not directed against him as an individual. However, in the impugned decision, the Supreme Court had stated that, where offences were committed by a group, the running of time was suspended if the proceedings were brought against a group of persons presumed to be responsible (in the present case, the GAL group) without it being necessary to identify the members of the group individually. This was the reasoned and well-founded conclusion that had been arrived at on the basis of a legal principle enshrined in Article 114 of the Criminal Code of 1973 (Article 132.2 of the 1995 Criminal Code, currently in force). There had therefore been no violation of the right to effective judicial protection (Article 24.1 of the Constitution).

The Constitutional Court considered, moreover, that by deciding to suspend the running of time for the purposes of limitation, the impugned decision had not infringed the right to equality before the law (Article 14 of the Constitution). The applicant maintained that this decision had been an unwarranted departure from judicial precedent, but the Constitutional Court held that, in the instant case, the Supreme Court had considered its own case-law and explained why it was appropriate to deal with the matter differently in this case.

An application challenging a judge can be filed and dealt with during the judicial proceedings provided that the final judgment putting an end to the criminal proceedings has not been delivered. In the present case, the irregularities complained of when the application challenging the judge was filed had been dealt with during the judicial proceedings by the Criminal Division of the Supreme Court. The applicant had not therefore been materially deprived of his grounds of defence.

One judge filed a dissenting opinion against this judgment.

Supplementary information:

Other constitutional appeals were lodged in connection with the same case – see Constitutional Court Judgments nos. 63/2001, 64/2001, 65/2001, 66/2001, 67/2001, 68/2001 and 70/2001, all of 17.03.2001.

Cross-references:

Concerning the right to presumption of innocence and the statements of co-accused:

- Constitutional Court Judgments no. 153/1997 of 29.09.1997 (legal ground no. 6) and no. 49/1998 of 02.03.1998 (legal ground no. 5), *Bulletin* 1997/1 [ESP-1997-1-004].

Concerning the right to a judge predetermined by law:

- Constitutional Court Judgments no. 199/1987 of 16.12.1987 (legal ground no. 6) and no. 170/2000 of 26.06.2000 (legal ground no. 2).

Concerning the guarantee of immunity for deputies and senators under Article 24.2 of the Constitution:

- Constitutional Court Judgment no. 22/1997 of 11.02.1997 (legal ground no. 2), *Bulletin* 1997/1 [ESP-1997-1-004].

Concerning the right to an impartial judge:

- Constitutional Court Judgments no. 145/1988 of 12.07.1988 (legal ground no. 5) and no. 162/1999 of 27.09.1999 (legal ground no. 5), *Bulletin* 1999/3 [ESP-1999-3-020];
- European Court of Human Rights Judgments of 01.10.1982 (*Piersack v. Belgium*), *Series A of the*

- *Publications of the Court*, no. 53; 24.11.1986 (*Gillow v. the United Kingdom*), *Series A of the Publications of the Court*, no. 109; 25.11.1993 (*Holm v. Sweden*), *Series A of the Publications of the Court*, no. 279-A and 28.10.1998 (*Castillo Algar v. Spain*), *Reports 1998-VIII*.

Concerning the right to a fair trial in relation to leaks of information in the media:

- Constitutional Court Judgment no. 136/1999 of 20.07.1999 (legal ground no. 8), *Bulletin 2000/1* [ESP-2000-1-001];
- European Court of Human Rights Judgment of 29.08.1997 (*Worm v. Austria*), *Reports 1997-V*.

Concerning the right to adduce relevant evidence:

- Constitutional Court Judgments no. 131/1995 of 11.09.1995 (legal ground no. 2), no. 1/1996 of 15.01.1996 (legal ground no. 2) and no. 129/1998 of 16.06.1998 (legal ground no. 2).

Languages:

Spanish.



Sweden

Supreme Administrative Court

Important decisions

Identification: SWE-2006-1-001

a) Sweden / **b)** Supreme Administrative Court / **c)** Grand Chamber / **d)** 16.02.2006 / **e)** 7462-05 / **f)** / **g)** *Regeringsrättens Årsbok* / **h)** CODICES (Swedish).

Keywords of the systematic thesaurus:

3.16 **General Principles** – Proportionality.
 5.1.1.3 **Fundamental Rights** – General questions – Entitlement to rights – Foreigners.
 5.3.5.1 **Fundamental Rights** – Civil and political rights – Individual liberty – Deprivation of liberty.
 5.3.9 **Fundamental Rights** – Civil and political rights – Right of residence.

Keywords of the alphabetical index:

Foreigner, detention, pending expulsion / Detention, order, extension / Detention, pending expulsion.

Headnotes:

A foreigner can only be detained for more than a certain period of time in exceptional circumstances. If an extension to a detention order is considered, such a measure shall be in reasonable proportion to the interest of facilitating the enforcement of expulsion at a future date.

Summary:

I. AA had been sentenced to expulsion at the end of his prison sentence. He had been held in detention since 23 August 2004. The enforcement of the expulsion order on 24 March 2005 was delayed by the Head of the Ministry of Justice following a demand from the European Court of Human Rights. It had been made clear that the European Court could not be expected to reach a decision on the administrative question until the end of March 2006 at the earliest. The investigation in the case showed that AA was in an advanced state of HIV-infection and dependent on heavy medication and constant medical monitoring.

AA demanded that the Supreme Administrative Court should revoke the decision as to detention and that he should be released.

II. In its decision of 16 February 2006, the Supreme Administrative Court handed down the following judgment.

Chapter 6 Section 2 first sub-Section 3 in the Aliens Act (1989:529) allows for the detention of a foreigner aged eighteen or over if, for instance, a question arises of the enforcement of an expulsion order. A detention order on these grounds may, according to the second sub-Section of the above Act, only be issued where the personal circumstances of the foreigner or some other circumstances give reason to believe that he might abscond or engage in criminal activity in Sweden. If, within the terms of the Aliens Act, a detention order has been made, a foreigner may not be detained for more than two weeks unless there are exceptional grounds for the imposition of a longer period.

The stated provisions show that an extension of the prescribed maximum time for detention can only be ordered if the reason for detention still remains. Exceptional circumstances would also need to exist to justify the longer period of detention.

The Supreme Administrative Court found no reason to question the judgment that in AA's case circumstances still existed which justified detention. The question here was whether exceptional grounds existed to detain him for a longer period of time.

The Supreme Administrative Court established that AA had been detained for nearly eighteen months and that the timing of the enforcement of the expulsion order was still not clear. There would have to be exceptional grounds to justify any further detention. The Court found that in this particular case, such a measure could not be regarded as being in reasonable proportion to the interest of facilitating enforcement of an expulsion at a future date and therefore exceptional grounds for continued detention no longer existed. The Supreme Administrative Court revoked the detention ruling and ordered AA's immediate release. At the same time the Court ordered that he should remain under supervision.

Two judges gave dissenting opinions to the effect that the detention ruling should remain in force.

Languages:

Swedish.



Switzerland

Federal Court

Important decisions

Identification: SUI-2006-1-001

a) Switzerland / **b)** Federal Court / **c)** Penal Cassation Court / **d)** 12.10.2005 / **e)** 6P.22/2005 / **f)** X. v. Public Prosecution Service of the Canton of Aargau / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 131 I 476 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

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

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

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

5.3.15 **Fundamental Rights** – Civil and political rights – Rights of victims of crime.

Keywords of the alphabetical index:

Witness, refusal / Witness, prosecution / Witness, questioning / Witness, defendant's right to cross-examination.

Headnotes:

Article 6.1 ECHR in conjunction with Article 6.3.d ECHR; Article 32.2 of the Federal Constitution; right to question a victim who is a minor; refusal to give evidence.

The right to question a prosecution witness is inalienable where the witness's evidence is decisive for the conviction (recital 2.2).

This right is violated where, more than four years after first being questioned, the witness refuses to make any additional statement and the court nonetheless bases its decision on the initial statement, which constitutes decisive evidence (recital 2.3.4).

Summary:

X. was employed as a nursing auxiliary in a home for people with disabilities. He was charged with having engaged in sexual acts, in September 2000, with one of the inmates, A., who had been born in 1982 and had the intellectual level of a fifth-year primary school pupil.

After the offence had been reported by the head of the home, X. was questioned by the police. The public prosecutor instructed a specialist doctor to question the victim, who was interviewed in the presence of his mother and the home's group leader. The victim accused X. of reprehensible behaviour. The prosecutor allowed X.'s counsel to submit questions to the doctor with a view to clarifying the inmate's statements in relation to the declarations made by X. X. subsequently lodged a number of requests for A. to be re-interviewed and asked to be allowed to question him concerning the facts. The prosecutor refused. In a judgment of 16 March 2004 the Brugg District Court convicted X. of engaging in sexual acts with a dependent person within the meaning of Article 188 of the Swiss Criminal Code.

X. appealed to the Aargau Cantonal Court and again asked that A. be interviewed. The Cantonal Court ordered that the victim should be re-interviewed, in the form of a video conference, on the basis of a list of questions supplied by X.'s counsel. The specialist doctor who had already questioned the victim was asked to conduct this interview, which took place in November 2004. The victim answered a number of questions of a general nature but refused to respond to questions concerning sexual matters or the offences with which X. had been charged; he stated that he remembered nothing and that for him the case was closed.

The Cantonal Court upheld the first court's judgment. It found that X. had fully enjoyed the rights of the defence and held that the victim's refusal to answer questions of fact during the second interview was a matter for the court's discretion and it was therefore allowable to refer to the statements made during the first interview.

Lodging a public-law appeal, X. asked the Federal Court to overturn the Cantonal Court's judgment and the finding of guilt. He relied *inter alia* on Article 6.1 and 6.3.d ECHR and Article 32.2 of the Federal Constitution and contended that there had been a violation of the rights of the defence. The Federal Court allowed the public-law appeal and set aside the Cantonal Court's judgment.

The Federal Court examines the rights of the defence from the standpoints of the Convention and the Constitution, which require that persons charged with an offence should be able to defend themselves in an effective manner. They must *inter alia* be able to ask a prosecution witness questions aimed at verifying the evidence against them and the witness's credibility. This right is inalienable where the testimony constitutes the sole evidence and is decisive for finding the defendant guilty. Only in special circumstances can a confrontation between the defendant and the witness be waived.

The Cantonal Code of Criminal Procedure provides that, in principle, children who are the victims of sexual offences perpetrated by adults shall be interviewed only once, in order to safeguard them from the psychological damage which repeated questioning could cause; but this is without prejudice to the rights of the defence. The Federal Law on Assistance for Victims of Offences also provides that the authorities shall avoid bringing the defendant into the victim's presence where the latter so requests, unless this cannot be avoided due to the defendant's right to a fair trial.

In this case the witness's initial statements were decisive for X.'s conviction. The possibility of re-interviewing the witness could not be deemed effective; the second interview took place more than four years after the alleged offence was committed and resulted in a refusal to give evidence. In view of X.'s various requests, it would have been possible for the authorities to arrange a second interview sooner after the disputed events. In the light of all the circumstances, X. did not enjoy his rights of defence in an effective manner. The judgment at issue accordingly breached the conventional and constitutional guarantees and must therefore be annulled.

Languages:

German.



Identification: SUI-2006-1-002

a) Switzerland / **b)** Federal Court / **c)** First Public Law Chamber / **d)** 25.10.2005 / **e)** 1A.180/2005 / **f)** Federal Office of Justice v. President of the Appeals

Division of the Federal Criminal Court and Public Prosecution Service of the Confederation / **g)** *Arrêts du Tribunal fédéral* (Official Digest), 132 II 1 / **h)** CODICES (German).

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
4.11.2 **Institutions** – Armed forces, police forces and secret services – Police forces.
4.16 **Institutions** – International relations.

Keywords of the alphabetical index:

Undercover agent, foreign / Mutual assistance, international, special trust.

Headnotes:

Undercover agents operating under the provisions on mutual assistance. Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters and Federal Law on Covert Investigations (LFIS).

By making no express provision for it, parliament did not rule out application of the LFIS in the context of mutual assistance (recital 3.2).

Undercover agents operating under the provisions on mutual assistance pose particular problems because the flow of information between the agents and their superiors cannot be scrutinised and such an operation undermines the fundamental principle of mutual assistance law whereby no information useable by the requesting authority must reach it before the final decision comes into force (recital 3.3).

It is therefore justifiable to grant this kind of mutual assistance solely to states with which there is a special relationship of trust; the conclusion of an international treaty regulating operations of this kind may be an element along these lines (recital 3.4). The Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters could constitute such a treaty; since the Netherlands has not yet ratified this instrument, the Public Prosecution Service of the Confederation did not breach federal law by refusing the mutual assistance requested (recital 3.5).

Summary:

A public prosecutor in the Netherlands sent Switzerland a request for mutual assistance in criminal matters and requested permission for an undercover operation by agents who were to

investigate a criminal organisation with aggravated drug trafficking and money laundering activities. On the basis of a favourable opinion from the Federal Office of Justice, in a decision of 12 September 2003 the Federal Prosecutor granted the request for mutual assistance and gave permission for the undercover agents to operate in Switzerland.

A request to prolong the undercover agents' operation until the end of 2005, which was examined under a procedure of which the details are of no relevance here, was refused by the Federal Prosecutor in a final decision of 28 June 2005.

Lodging an administrative law appeal, the Federal Office of Justice asked the Federal Court to annul the final decision of 28 June 2005.

Mutual assistance in criminal matters may be granted if provided for by Swiss law, notably the Federal Law on International Assistance in Criminal Matters, or an international treaty. The measures requested need merely be lawful under national law. This is the case with operations by undercover agents as provided for in the new Federal Law on Covert Investigations. It is of scant importance that, unlike the Federal Law on Surveillance of Postal Correspondence and Telecommunications, this law makes no express mention of the application of such measures when implementing a request for international assistance in criminal matters.

Undercover operations constitute a considerable rights interference and can be allowed only if the strict conditions of the Federal Law on Covert Investigations are observed. This kind of measure poses even greater problems in matters of international mutual assistance where the information gathered by a foreign undercover agent in Switzerland on behalf of the requesting state is transmitted before the entry into force of the final decision and therefore cannot be subject to effective scrutiny by the national authorities. Operations by foreign undercover agents are therefore allowed in accordance with the principle of trust, that is to say assuming that the requesting state will comply with the conditions on which such international mutual assistance is granted. On account of these particularities it is justifiable to confine granting mutual assistance to states which guarantee compliance with the obligations and conditions of international mutual assistance. This is the case where an international treaty provides for operations by foreign undercover agents on a reciprocal basis.

The Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters provides for and regulates covert investigations by

foreign undercover agents in the context of international mutual assistance. The Netherlands have signed this protocol but have not (yet) ratified it, with the result that it does not apply in this case. In the absence of a treaty between Switzerland and the Netherlands or of other guarantees, an undercover operation by agents of the Netherlands in Switzerland cannot be allowed. The Federal Prosecutor's final decision of 28 June 2005 therefore does not breach federal law.

Languages:

German.



“The former Yugoslav Republic of Macedonia” Constitutional Court

Important decisions

Identification: MKD-2006-1-001

a) “The former Yugoslav Republic of Macedonia” / b) Constitutional Court / c) / d) 12.04.2006 / e) U.br.191/2005 / f) / g) *Sluzben vesnik na Republika Makedonija* (Official Gazette), 52/2006, 20.04.2006 / h) CODICES (English).

Keywords of the systematic thesaurus:

- 3.9 **General Principles** – Rule of law.
- 3.21 **General Principles** – Equality.
- 4.5.11 **Institutions** – Legislative bodies – Status of members of legislative bodies.
- 5.2.1.3 **Fundamental Rights** – Equality – Scope of application – Social security.
- 5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.
- 5.3.38.3 **Fundamental Rights** – Civil and political rights – Non-retrospective effect of law – Social law.
- 5.4.16 **Fundamental Rights** – Economic, social and cultural rights – Right to a pension.

Keywords of the alphabetical index:

Parliament, member, old-age pension scheme, equality / Pension, old-age, parliament, member, equality.

Headnotes:

The legislator introduced unequal treatment into the provisions of a law by providing more favourable conditions for members of parliament, because they are in the same social position as other holders of public functions.

The principle of the prohibition of the retroactive effect of laws reinforces the legal safety of citizens and prevents the weakening of the rule of law.

Summary:

A number of individuals, political parties and others requested the Court to examine the constitutionality of Articles 1, 31.1.7, 40-45, 47 and 48 of the Law on members of parliament (“Official Gazette of the Republic of Macedonia”, no. 84/2005).

The Court held that the challenged provision in Article 31.1.7 of the Law (reimbursement of costs for the attendance of parliamentary sessions and of the Working Body of Parliament, and per diem for official trips inside the country) neither corresponded to the principle that each employee is entitled to an appropriate wage in accordance with his/her contribution to the work, nor to the principle of equality among the holders of public office.

In order to obtain an overview of the extent to which Articles 40-45, 47 and 48 of Law deviates from the general rules, the Court took into account the provisions of the Pension and Disability Insurance Law, the Electoral Law and the Rules of Procedure of the Assembly.

On the basis of constitutional, legal and procedural provisions, the Court concluded that the aforementioned articles were not in line with the generally established principles of the pension and disability insurance system.

The Court therefore held that the challenged provisions of the Law, taken on their own, are not contrary to the constitutional principles of equality and the rule of law merely because the legislator had defined different, more favourable conditions for early retirement schemes for this category of insurees. However, according to the Court, these conditions must be based on justifiable grounds, be in line with the general principles governing rights in this area, and should only apply if there is a reason to exclude the interested persons from the group of insurees to which they belong, so as not to infringe Article 1 of the Constitution (democratic and social state), which may indirectly affect other constitutional principles such as those of equality, the rule of law and social justice.

However, the explanation provided by the draft law does not put forward justifiable reasons. Therefore, in the absence of such reasons, the question arises whether or not the legal position of members of parliament, which ensues from the Constitution (i.e. the manner of acquiring the mandate, the legal nature and the length of the mandate, the representative character of the function, the detailed rights, duties and responsibility of the member of parliament, the publicity of the work, the limited mandate, the

impossibility for the member of parliament to pursue another profession, duty or profitable activity, etc.), may be the reason for the extent of the deviation from the principle of equality of rights in the area of pension schemes and disability insurance made by the legislator.

According to the Court, the mere status of a member of parliament in the legal system of the state is not reason enough to justify the extent of the deviation made by the legislator from the general principles in this area.

On the contrary, with the determination of a very low minimum period of insurance and age for the acquisition of a more favourable old age pension scheme for the members of parliament – as compared to the ones established under the general law for all citizens – the right to an early retirement scheme not only on the ground of efforts made and years of age, but also on the ground of the terms of office of a member of parliament (of at least 2 years); the amount of the old age pension on more favourable grounds than the existing ones, the Court found that the rights were not even close to those from which the legislator deviated envisaging special conditions for retirement for a certain category of employees.

After considering the entire legal regulations, the Court held that, by providing more favourable conditions for only a certain group of holders who are in the same social position as other holders of public functions, the legislator has created unequal treatment to the detriment of those who are not included in this law.

The right to equality is one of the fundamental legal principles of the Constitution. It provides that all citizens have the right to be treated equally by the law and that state authorities protect citizens against any form of discrimination in the enjoyment of their rights. For this reason, the legislator must treat them equally and, according to the Court, this right is nothing more than the acquisition of rights under privileged conditions and refers only to members of parliament and not to all holders of public office who are in the same social position or to all citizens, without justified grounds for doing so. In this way, the legislator puts citizens on an unequal footing, which is contrary to Article 9 of the Constitution.

The Court also held that Articles 47 and 48 of the Law contain the right to early-, disability and family retirement schemes as high as 80% of the average salary of the member of parliament in the last three months of work, including: the members of parliament who have completed at least half of the term of office

in parliament, counting from the beginning of the mandate, as well as the members of parliament who have exercised the right to remuneration upon their request in the Parliament of the Republic of Macedonia beginning from the first pluralist composition of the Parliament of the independent and sovereign Republic of Macedonia.

Under Article 52.4 of the Constitution, the prohibition of retroactive effect of laws is a principle that reinforces the legal safety of citizens and prevents the weakening of the rule of law. Consequently, the deviation from this principle can only be allowed under the Constitution if it is in favour of the exercise of the freedoms and rights of citizens. The law had a retroactive effect that was more favourable, but only for a certain category of citizens, namely the members of parliament as holders of public office on the ground of their status. The Court therefore held that this was not in line with the principles of prohibition of retroactive effect of laws and the rule of law.

Languages:

Macedonian, English.



Turkey

Constitutional Court

Important decisions

Identification: TUR-2006-1-001

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 01.06.2005 / **e)** E.2004/60, K.2005/33 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 23.03.2006, 26117 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

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

3.13 **General Principles** – Legality.

4.4.4.1 **Institutions** – Head of State – Status – Liability.

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

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

Keywords of the alphabetical index:

Corruption, eradication / Civil service, corruption, eradication / Civil service, ethics.

Headnotes:

It is possible under the Constitution for a board within the executive power to determine ethical codes. Once some behavioural codes have been set out in legislation, similar codes may be left to the board to determine. Its competence may be extended to autonomous administrations, local government and other public corporate organisations. Examples of areas where the Board of Ethics has competence include the preparation of bye-laws on ethical codes, the determination of public officials who shall be under the scrutiny of the Board, and the determination of the quality and quantity of gifts which public officials may receive.

Summary:

Several deputies applied to the Constitutional Court for an assessment as to the compliance of various provisions of Law no. 5176 on the Establishment of Public Officials Board of Ethics with the Constitution.

The law sets out the aims of this organisation, and the scope of the ethical principles with which public officials must comply.

a. The first paragraph of Article 1

This paragraph provided that “the aim of this law is to determine the establishment of the Public Officials Board of Ethics, its duties and its working procedures and to set out the principles of ethical behaviour such as transparency, impartiality, honesty, accountability, and observance of public benefit to which public officials must adhere”.

The deputies argued that the term “such as” gives competence to the Board, an executive body, to determine which acts and actions shall be regarded as unethical. In their view, the Law should have stated clearly the type of behaviour which would be regarded as unethical.

The second paragraph of Article 128 of the Constitution states that “the qualifications of public servants and other public employees, procedures governing their appointment, duties and powers, their rights and responsibilities, salaries and allowances, and other matters relating to their status shall be regulated by law”.

Universal values such as respect, honesty, justice, trustworthiness, responsibility and accountability, integrated with the moral values of a society, set a benchmark for the way members of that society behave. The legislator had already included some of those values within the legislation. Other similar behavioural values are clearly indicated by the term “such as”. Therefore, the administration could not create new ethical values which were incompatible with the ethical values enumerated in the law and it could not be argued that the term “such as” constitutes delegation of legislative power to the executive.

The above provision was therefore found to comply with the Constitution.

b. The second paragraph of Article 1

This paragraph stipulated that “this law shall cover all personnel in the departments within the general budget, administrations within the supplementary budget, revolving fund establishments, local government and their organisations, all public administration with independent boards and with public legal personality and funds, presidents and members of administrative and auditing boards and presidents and members of governing bodies.”

It was suggested that some of the public institutions mentioned in this paragraph already have autonomy, which would be jeopardised if their observance of ethical rules were to fall within the control of a board of ethics bound to the Prime Minister. They maintained that the institutions were taken under the control of the Board of Ethics while universities were not excepted from it. In Turkey, the term “universities” includes faculties, institutions, professional high schools and similar institutions.

Separation of powers does not only mean separation of competence as between the legislature, executive and judiciary but also separation of powers as between the components of each branch. Autonomous public institutions are definitely not created to be privileged and unaccountable. They must perform their special functions properly within a pluralist society.

Regulations as to ethical principles, which are to be followed by public officials and which are aimed at transparency and the eradication of corruption in public administration, do not impinge upon the autonomous status of some public institutions. Impartiality, transparency, trustworthiness, accountability and other values are the same from one society to another or from one institution to another. Self-regulation and autonomy should not be perceived as bestowing privilege on public institutions.

Justice Fulya Kantarcıoğlu put forward a dissenting opinion as to this part of the judgment.

On the other hand, the term “institutions” used in the paragraph does not mean institutions under the umbrella of universities. Rather, these are public institutions such as “Turkish Standards Institution” or the “State Statistical Institution”.

The second paragraph of Article 1 was accordingly found to comply with the Constitution.

c. The term “the President of the Republic” in the third paragraph of Article 1

The third paragraph of Article 1 states that “the provisions of that law shall not be applied to the President of the Republic, members of the Turkish Grand National Assembly, members of the Council of Ministers, or members of the Turkish Army, judiciary and universities”.

The deputies argued that the President of the Republic may not be placed under a status of responsibility. He should not, therefore, be exempted from that responsibility within the meaning of

Article 105 of the Constitution (which relates to presidential accountability and non-accountability).

Article 105 of the Constitution regulates the way the principle of responsibility should be applied within a parliamentary regime. The President of the Republic does not have political responsibility for acts related to his duties and he has no criminal responsibility other than high treason. The aim of the Law no. 5176 is to determine ethical behavioural principles and to ensure public officials obey them. Ethical values such as transparency, impartiality, trustworthiness, accountability and the observance of public interest are all related to the duties of public officials. The assumption should not be made that the President of the Republic falls under the control of the Board of Ethics as a public official. The provision accordingly complies with the Constitution.

d. The term “to determine the ethical behaviour principles that public officials shall obey while performing their duties by means of bye-law” in Article 3.

Article 3 authorises the Board of Ethics to prepare a bye-law to determine which actions shall be regarded as ethical or non-ethical. The deputies contended that the Board of Ethics should not be given the competence to issue bye-laws. Only the Prime Minister, Ministries and public corporate bodies can issue them.

Bye-laws are issued to ensure the smooth application of laws and regulations. They may not contradict the laws or regulations and they are subject to judicial review. The Board of Ethics is only in fact competent to prepare the bye-laws. Once they have prepared them, the bye-laws will only come into force once the Prime Minister has approved them and it is he who will issue them. Article 3 is therefore compliant with the Constitution.

e. The last sentence of Article 4.1

Article 4.1 of the law provided that “complaints can be made to the Board of Ethics of unethical behaviour at the public institutions and organisations indicated in the Law on the part of public officials having a status higher than general director or the equivalent. The titles which should be deemed as equivalent to general director are to be determined by the Board of Ethics, taking into account the nature of the organisation and the service of public institutions”.

The deputies suggested that the competence given to the Board of Ethics by the last sentence of Article 4.1 is the type of competence only the legislature should enjoy, and that it is not something which can be

delegated to a board within the executive branch. Furthermore, any obligation imposed on public officials must be designated by law.

Titles such as general director, head of board, head of chamber, and counsellor are used to designate people at similar or at the same hierarchical levels. Their status may only be understood within the context of the relevant law and the organisation in question. Some titles and levels of responsibility are understood to be at “general director level”, even though the incumbent is not necessarily given the title of general director.

When Law no. 5176 was enacted, those titles and levels were not listed. However, it is clear that the structure and services carried out by public institutions are to be taken into account when the Board of Ethics decides which titles and levels shall be deemed as equivalent to general director. This argument was therefore rejected.

f. The first sentence of Article 4.2

The first sentence of Article 4.2 of Law no. 5176 stipulated that complaints concerning unethical behaviour on the part of public officials other than general director and the equivalent should be dealt with by the disciplinary authority of the institution in question. That authority would decide whether they had contravened the ethical values set down in the bye-laws issued by the Board of Ethics.

The deputies argued that the Board of Ethics had no competence to issue bye-laws as it is not a public corporate body.

The term “bye-laws issued by the Board of Ethics” in the first sentence of Article 4.2 does not mean that the Board has the competence to regulate by means of by-laws. Rather, it means that the Board will prepare bye-laws and the Prime Minister will issue them. This fact is explained in Article 7 of Law no. 5176 as “The issues regarding the application of that law shall be designated in the bye-laws prepared by the Board. The bye-laws prepared by the Board shall come into force once the Prime Minister has approved them.”

Justice Fulya Kantarcioğlu put forward a dissenting opinion as to this part of the judgment.

g. The phrase “to determine the scope of the ban on receiving gifts” in Article 9 of Law no. 5176 annexed to the end of Article 29 of Law no. 657 on Public Officials.

Article 9 of Law no. 5176 added a paragraph to the end of Article 29 of Law no. 657, providing that “The Board of Ethics of Public Officials shall have competence as to the determination of the scope of receiving gifts and is empowered to demand, where necessary, a list of the gifts received by public officials above the rank of general director or the equivalent.”

The deputies alleged that the scope of the ban on gifts should be designated in the law since it imposes obligations on public officials as provided in Article 128 of the Constitution.

Public officials are restricted in receiving gifts and certain other advantages so that they are not influenced in carrying out their duties. The competence and the duty to determine the acceptable quality and quantity of gifts presents from a humanitarian standpoint are not new obligations imposed on public officials and may not be regarded as the delegation of legislative power. The demand was duly rejected.

Languages:

Turkish.



Identification: TUR-2006-1-002

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 16.10.2005 / **e)** E.2001/383, K.2003/92 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 19.01.2006, 26054 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

4.6.9 **Institutions** – Executive bodies – The civil service.

4.15 **Institutions** – Exercise of public functions by private bodies.

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

Keywords of the alphabetical index:

Technology development zone, administration / Expropriation, by private entity.

Headnotes:

Basic functions of a permanent nature required by public services must be carried out by the state, state economic enterprises and other public corporate bodies. The competence to grant licences and permission in Technology Development Zones may not be delegated to private companies, but only to the state, state economic enterprises or other public corporate bodies.

The power to expropriate can only be exercised by the State and public corporations where this is necessary in the public interest. This power may not be given to private corporations. Public bodies can, however, expropriate in favour of private real or legal personalities where this is necessary.

Summary:

The President of the Republic sought a ruling from the Constitutional Court as to whether certain provisions of Technology Development Zones Law no. 4691 were contrary to the Constitution.

a. The third sentence of Article 4.3 of Law no. 4691

Under the third sentence of Article 4.3 of Law no. 4691, licences and permissions related to the use of land and the planning, construction and usage of buildings and establishments in the technology development zones shall be given to “the administrative company” and they shall be controlled by them.

The President of the Republic suggested that the granting of licences and permissions for the construction and usage of buildings is a basic public service of a permanent nature and as such must be performed in accordance with the principles of general administration. However, the above provision gives these powers to private foreign companies. Arguably, therefore, the provision is at odds with the principles set out in Article 128 of the Constitution.

All activities relating to the sub-structure of the land and all local and regional plans concerning investment have a bearing on the way land is to be used. As a precondition for licences and permissions, planning procedures must be carried out in accordance with laws, regulations and zoning plans. Such plans for the usage of the land and the buildings and establishments which will be set up there have to be prepared by the owners and submitted to the relevant authority. The granting of licences and permissions for the construction and the usage of buildings and establishments is one of the controls and responsibilities forming part of the construction process.

In its decision of 11 December 1986, the Constitutional Court had ruled that the duty and competence of granting licences for the construction and the usage of buildings are administrative functions. Control over this issue is a basic function of the public services, of a permanent nature. As such, it must be performed in accordance with the principles of general administration. Under Article 128 of the Constitution, the above functions must be carried out by public servants and other public employees.

The third sentence of Article 4.3 of the Law no. 4691, on the other hand, envisages that the above permissions may be given by “administrative companies”. The same piece of legislation defines “administrative company” as any private joint stock company. Such a company will employ its staff under labour law principles. Since the personnel employed by a private company cannot be regarded as public servants or public employees, this would mean that private sector staff would be granting licences and permissions, which of course contravenes Article 128 of the Constitution. The above provision was found unconstitutional and repealed. Justice Mr H. Kilic put forward a dissenting opinion as to this part of the judgment.

b. First sentence of Article 5.5 of the Law no. 4691

The first sentence of Article 5.5 of the Law no. 4691 provided that “administrative companies may expropriate or have real estate expropriated on its behalf if this is to the public benefit.”

The President of the Republic suggested that expropriation is, in essence, a kind of competence afforded to the State and public bodies. Expropriation may be made by the State or public bodies in favour of private legal personalities where this would be in the public interest.

Under Article 46 of the Constitution, the State and public corporations are entitled to expropriate privately-owned real estate wholly or in part and impose conditions on its use in accordance with principles and procedures prescribed by law, provided that compensation is paid in advance, where this is in the public interest.

Expropriation is the termination of private ownership of real estate without the will of the owner to satisfy the needs of society as a whole. Thus, the subject of expropriation is privately owned real estate and only the State or public corporations have the competence to expropriate it.

The above provision gave private legal entities the power to expropriate real estate contrary to Article 46 of the Constitution. Since expropriation requires the use of public power, it may not be regarded as a competence which private companies can exercise. Nevertheless, public corporate bodies may expropriate real estate in favour of real or legal private personalities if this is in the public interest.

The provision was found to be contrary to Article 46 of the Constitution and it was repealed. Justice S. Akbulut put forward a dissenting opinion.

Languages:

Turkish.



Identification: TUR-2006-1-003

a) Turkey / b) Constitutional Court / c) / d) 18.10.2005 / e) E.2003/7, K.2005/71 / f) / g) *Resmi Gazete* (Official Gazette), 22.02.2006, 26088 / h) CODICES (Turkish).

Keywords of the systematic thesaurus:

- 5.1.3 **Fundamental Rights** – General questions – Limits and restrictions.
- 5.2.2 **Fundamental Rights** – Equality – Criteria of distinction.
- 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
- 5.3.13.17 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Rules of evidence.
- 5.3.13.19 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Equality of arms.

Keywords of the alphabetical index:

Tax, litigation, evidence, admissible / Customs, taxpayer, discrimination.

Headnotes:

The right to fair trial would be breached, if restrictions were imposed on the documentation to be presented

to administrative courts. Any data and documentation may be used in support of a claim before the courts. Parties must have the same legal rights before the courts irrespective of whether they are plaintiffs or defendants, public bodies or individuals.

Differences in the procedural rules applying to custom duty taxpayers and other taxpayers are at odds with the equality principle of the Constitution. Custom duty taxpayers and other taxpayers must be subjected to the same rules as to the suspension of tax when a case is brought before the tax courts.

Summary:

The Ordu Tax Court requested a ruling from the Constitutional Court as to the compliance of Article 245.2 and 245.3 of the Customs Law with the Constitution.

1. Article 245.2 of the Customs Law

Under this article, only documents and data used in appeals before the customs administration can be used in appeals before the administrative judiciary.

The right to fair trial is enshrined in Article 36 of the Constitution. It bestows a universal right to litigation, whether as plaintiff or defendant, and the right to fair trial before the courts through lawful means and procedures. The natural result of that principle is that individuals are granted the right to defend themselves and to present claims before the judicial authorities. Article 13 of the Constitution, as amended by Law no. 4709, provides that fundamental rights and freedoms may only be restricted by law and for the reasons set out in the relevant parts of the Constitution. Such restrictions must not conflict with the letter and spirit of the Constitution and the requirements of democracy, society as a whole, the secular Republic and the principle of proportionality. There is no provision for restriction of the right to fair trial in Article 36 of the Constitution. Therefore constitutional principles would be breached if restrictions were imposed on the documentation and data to be presented to the tax courts.

The most effective and certain way for somebody to defend themselves against allegations or to contest actions on the part of administrative authorities is to assert these rights before the judicial authorities and to prove the claim before the courts. The right to defend oneself and to present a claim lies at the very heart of the right to a fair trial. These rights cannot be separated from each other. The right to fair trial is not only a fundamental right, but it also guarantees and protects other rights and freedoms. The administration is equipped with far more data and comprehensive

documentation than the average customs duty taxpayer, lodging or defending a claim. As a result, customs duty taxpayers must be allowed to use evidence or documentation which has been obtained after an appeal before the customs administration.

Article 245.2 of the Custom Law restricts custom taxpayers' right to defence and prevents the judicial authorities from reaching a just and correct conclusion. It is therefore in breach of Article 36 of the Constitution. There is no provision within the Constitution for restriction of the right to fair trial. The restriction brought about by Article 245.2 is out of line with Article 13 of the Constitution.

2. Article 245.3 of the Custom Law

Under this article, appeals before the administrative judiciary against administrative decisions shall not preclude the implementation of the decision under appeal. As a rule, under Turkish administrative judiciary procedure, bringing an action before the Council of State (High Administrative Court) or administrative courts shall not prevent the execution of an administrative act. However, in the tax courts, bringing an action arising from a tax dispute will halt the collection of the disputed part of the imposed taxes, fees, duties and other financial obligations or increases and penalties arising from these obligations. Article 245.3 of the Custom Law sought to prevent the halting of the collection of the disputed part of the custom taxes and penalties despite an action having been lodged with the tax court. The Court argued in its application to the Constitutional Court that differentiation between custom taxpayers and other taxpayer is contrary to Article 10 of the Constitution.

The principle of equality before the law is enshrined in Article 10 of the Constitution. All individuals are equal before the law with no discrimination on the grounds of language, race, colour, sex, political persuasion, philosophical belief, religion or sect. This principle prevents other rules with the same status being enacted as well as the creation of privileged groups or individuals. If different legal rules with the same status were enacted, this would be at odds with the equality principle.

In Turkey, financial obligations are regulated by a number of laws and codes and various procedures exist for the imposition, accrual and collection of taxes, fees and duties. This is because it is recognised that all these financial obligations have different characteristics. The rules governing the imposition and calculation of financial obligations are to be found in the Tax Procedures Law no. 213.

Those relating to the collection of financial dues can be found in Law no. 6183.

The definitions of taxpayer in the Tax Procedures Law and the Custom Law are similar. Financial obligations such as tax, fees and duties have their own characteristics, but it is beyond doubt that taxpayers of custom duty and other kinds of taxpayers have the same legal status as litigants before the judicial authorities.

Therefore, it is contrary to the principle of equality to enact different procedural rules for custom duty taxpayers and other taxpayers. This means that Article 245.3 of the Custom Law is contrary to the Constitution and should be repealed.

One of the judges put forward a dissenting opinion.

Languages:

Turkish.



Identification: TUR-2006-1-004

a) Turkey / **b)** Constitutional Court / **c)** / **d)** 19.12.2005 / **e)** E.2005/143, K.2005/99 / **f)** / **g)** *Resmi Gazete* (Official Gazette), 21.02.2006, 26087 / **h)** CODICES (Turkish).

Keywords of the systematic thesaurus:

4.4.1 **Institutions** – Head of State – Powers.
4.6 **Institutions** – Executive bodies.
4.6.9 **Institutions** – Executive bodies – The civil service.

Keywords of the alphabetical index:

Public official, appointment, joint signature.

Headnotes:

Salaries and allowances of public servants and public officials must be regulated by law. It is contrary to constitutional principles to leave competence in this area to the Council of Ministers.

Public officials of high rank play an important role in the determination of the goals and policies of public organisations. They must accordingly be appointed under the joint signature of the President of the Republic, the Prime Minister and the relevant minister.

Summary:

The President of the Republic asked the Constitutional Court to assess the compliance of Articles 45.2 and 56.1 of the Statistical Law no. 5429 with the Constitution.

1. Article 128 of Law no. 5429

Law no. 5429 provides that some officials, including the president, vice presidents, and head of chambers of the Turkish Statistical Institute could be employed on the basis of a contract without being bound by the provisions of State Officials Law no. 657 and other laws. Article 45.2 of the Law states that the Council of Ministers will decide upon employment procedures, salary rates and benefits for these personnel. The President of the Republic argued that the pay scales and other benefits of the officials employed at the Institute must be set out in legislation, rather than being decided upon by the Council of Ministers.

Article 128 of the Constitution reads as follows: “The fundamental and permanent functions required by the public services that the state, state economic enterprises and other public corporate bodies are assigned to perform, in accordance with principles of general administration, shall be carried out by public servants and other public employees.

The qualifications of public servants and other public employees, procedures governing their appointment, duties and powers, their rights and responsibilities, salaries and allowances, and other matters related to their status shall be regulated by law”.

The Turkish Statistical Institute is a public body under the auspices of the State. The duties given to the Institute by law are, without a doubt, classed as public services because they are permanent and regular activities responding to the general and common needs of society. The personnel employed in accordance with the principles of general administration at the Institute are among those mentioned in Article 128 of the Constitution. Under this article, the salaries and allowances of personnel employed at the Institute must be regulated by law. In spite of that requirement, it is unconstitutional to leave the power to determine the salaries and allowances of such personnel to the Council of Ministers.

2. Article 8 of Law no. 5429

This law states that “All appointments at the Institute shall be made by the President of the Institute with the exception of the head of the advisory unit”. Before the enactment of Law 5429, some of the appointments at the Institute were made by means of joint signature, i.e. by the relevant Minister, Prime Minister and the President of the Republic. The new law amended the system and removed the requirement of joint signature for the appointment of officials at the Institute. This resulted in a narrowing of the power of the President of the Republic on the appointment of officials.

According to Article 8 of the Constitution, executive power and function shall be exercised by the President of the Republic and the Council of Ministers in conformity with the Constitution and the law. “Signing decrees” is listed in Article 104 of the Constitution as one of the executive functions of the President of the Republic.

The decrees mentioned in Article 104 are those with force of law, various decrees of the Council of Ministers as well as joint appointment decrees of high officials. Since the power and function is carried out by the President and the Council of Ministers, those decrees must be jointly signed in order to have effect.

Thus, it is a constitutional requirement that high-ranking public officials be appointed by a joint signature decree since they are involved in the determination of public policy; they have effective public authority; they have important powers and responsibilities in their leadership roles at the institution; they manage the organisations and staff and represent the institution. According to Article 56.1 of Law no. 5429, all appointments shall be made by the President of the Institute so that his choice alone will determine the appointment of high-ranking public officials with very important duties and responsibilities.

The President of the Institute and the vice presidents are *ex officio* members of the Statistical Council with a vital role in setting official statistical targets and in the functioning of the Institute. They must be regarded as high-ranking officials and be appointed by a joint signature decree.

Therefore, Article 56.1 of the Law no. 5429 is contrary to the Constitution and must be repealed.

Justice Serdar Ozguldur had a different additional reasoning and put forward a dissenting opinion.

Justice Serdar Ozguldur had a different additional reasoning and put forward a dissenting opinion.

Languages:

Turkish.



United Kingdom House of Lords

Important decisions

Identification: GBR-2006-1-001

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 15.02.2006 / **e)** / **f)** Januzi v. Secretary of State for the Home Department / **g)** [2006] *UKHL* 5 / **h)** [2006] 2 *Weekly Law Reports* 397.

Keywords of the systematic thesaurus:

2.1.1.4.5 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Geneva Convention on the Status of Refugees of 1951.

2.1.3.3 **Sources of Constitutional Law** – Categories – Case-law – Foreign case-law.

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

Keywords of the alphabetical index:

Asylum, seeker / Asylum, grounds, economic conditions / Persecution, racial, victim.

Headnotes:

The question whether it would be unduly harsh or unreasonable to require an asylum seeker to relocate to a safer area within the country of his nationality so as to avoid persecution is not to be judged by considering whether the quality of life in the place of relocation meets the basic norms of civil, political and socio-economic human rights. No comparison is to be made between such norms in the place of relocation and the place where he intends to seek asylum.

Summary:

In one of four appeals raising the same issue, Mr Januzi, an ethnic Albanian from the Serb dominated area of Kosovo, claimed asylum in the United Kingdom on the ground that he had a well founded fear of racial persecution by the Serbian authorities. The Secretary of State rejected his application on the basis that it would not be unduly

harsh to expect him to relocate to one of a number of other areas in Kosovo where the Albanian population predominated (what Lord Bingham called the “relocation alternative”).

The common issue in the appeals was whether, in judging reasonableness and undue harshness, account should be taken of any disparity between the civil, political and socio-economic human rights which a person would enjoy under the leading international human rights conventions, particularly the 1951 Geneva Convention relating to the Status of Refugees, and those that he would enjoy at the place of relocation.

The success of his claim turned on the interpretation of “refugee” in Article 1.A.2 of the Geneva Convention. That definition has three qualifying conditions. First, a causative condition which governs the whole definition: owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. Second, the person should be outside the country of his nationality. Third, the person must either be unable or “unwilling” to avail himself of the protection of the country of his nationality, owing to fear of being persecuted for a Convention reason. From the third condition, the reasonableness test of internal relocation has been readily and widely accepted – the difficulty in this case was as to how the test should be applied. The House held that the definition must be interpreted in light of the Convention as a whole and it must be kept in mind that the Convention is an international, living instrument and should not be narrowly interpreted.

The Lords considered the New Zealand jurisprudence which represents the “high water mark” of Mr Januzi’s case. The line taken in New Zealand – the New Zealand Rule – was that for the reality of protection in the place of relocation to be meaningful, there must be provision of basic norms of civil, political and socio-economic rights. This approach has previously been rejected by the English Court of Appeal (see, *E v. Secretary of State for the Home Department* [2004] Q.B. 531) and the House considered that it had rightly done so for five reasons.

First, there is nothing in the article of the Convention from which the New Zealand Rule may by any process of interpretation be derived. Second, the rule cannot be properly implied into the Convention – the thrust of the Convention is to ensure the fair and equal treatment of refugees in countries of asylum. Third, the rule is not expressed in Council Directive 2004/83/EC of 29 April 2004, an important instrument, on minimum standards for the qualification and status of third country nationals.

Fourth, the rule is not supported by such uniformity of practice based on legal obligation and such consensus of professional and academic opinion as would be necessary to establish a rule of customary international law. Fifthly, adoption of the rule would give the Convention an effect which is not only unintended but anomalous in its consequences. Suppose a person lives in a poor country, with low standards of social provision and with scant respect for human rights. He is subject to persecution for Convention reasons and escapes to a rich country, where if he is recognised as a refugee, he would enjoy all the rights guaranteed to refugees in that country. He could with no fear of persecution live elsewhere in his country of nationality but would there suffer all the drawbacks of living in a poor and backward country. It would be strange if the accident of persecution were to entitle him to escape, not only from that persecution, but from the deprivation to which his home country is subject.

The House left open the possibility that a comparison between the asylum seeker’s situation in the UK and what it will be in the place of relocation might be relevant when considering the European Convention on Human Rights or the requirements of humanity.

Languages:

English.



Identification: GBR-2006-1-002

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 08.03.2006 / **e)** / **f)** *R (Gillan) v. Commissioner of Police of the Metropolis and Another* / **g)** [2006] UKHL 12 / **h)** [2006] 2 *Weekly Law Reports* 537.

Keywords of the systematic thesaurus:

3.13 **General Principles** – Legality.
 5.2.2.3 **Fundamental Rights** – Equality – Criteria of distinction – National or ethnic origin.
 5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.

Keywords of the alphabetical index:

Personal autonomy, exercise / Search, police / Terrorism, fight.

Headnotes:

A stop and search under the Terrorism Act 2000 is too brief and unobtrusive to amount to a deprivation of liberty within Article 5.1 ECHR. It is not sufficiently serious to amount to a breach of Articles 8, 10 and 11 ECHR and, in any case, it would be justified as a proportionate response to the great danger of terrorism. The measures used were prescribed by law as required by the Convention even though they were informed by codes of practice which are, for good reason, not publicly available.

Summary:

On their way to protest peacefully against an arms fair, a PhD student and a journalist (travelling separately) were randomly stopped and searched for “articles concerned with terrorism” by the police. Nothing incriminating was found. The searches lasted no more than 30 minutes. The stop and search was carried out under Sections 44 to 47 of the Terrorism Act 2000. That Act was, as the Lords explained, a substantial measure intended to overhaul, modernise and strengthen the law relating to the growing problem of terrorism.

The power to stop and search involves a three-stage procedure. First, any constable in uniform must be authorised to stop a pedestrian where he considers it “expedient for the prevention of acts of terrorism” (Section 44.3). Second, the authorisation must be confirmed by the Secretary of State within 48 hours. Third, a stop and search “may be exercised whether or not the constable has grounds for suspecting the presence of articles of that kind”. Failure to co-operate with the police is an offence punishable by imprisonment or a fine. The Secretary of State is under a general statutory obligation to provide codes of practice; Code A stresses that care must be taken not to discriminate against members of minority ethnic groups.

The claimants presented their claim to the House under four main heads. First, they contended that the use of “expedient” could not have been intended to sanction police intrusion into the freedom of individuals unless such a power was necessary. The House rejected this argument as “expedient” has a meaning quite distinct from “necessary” and the statutory context, particularly the many constraints placed on the decision maker, justified this

interpretation. Further, the principle of legality has no application in this context since, even if the legislation interferes with fundamental rights, it does so not by general words but detailed, specific and unambiguous provisions.

Second, the claimants attacked the authorisation and confirmation on a number of grounds: for example, the geographical coverage and what in effect amounted to a continuous ban. The claimants had turned down the opportunity to examine evidence in this regard in the Divisional Court. The Lords held that the decisions made had to be respected, not out of deference but out of “relative institutional competence”.

Third, the claimants claimed a violation of Articles 5, 8, 10 and 11 ECHR. Article 5 ECHR (right to liberty and security) complaint was closely connected with Article 2 Protocol 4 ECHR (freedom of movement). They argued that as they had no effective choice but to co-operate with the stop and search, this amounted to a temporary restriction on their movement. The House observed that there was no Strasbourg decision on facts closely analogous to the present case and that each case turns very much on its own facts. A principle that could be ascertained was that the court should consider the type, duration, effect and manner of implementation of the measure in question. The House held that given the procedure will ordinarily be relatively brief and that the person stopped will not be arrested, handcuffed, confined or removed to a different place, such a person could not be described as having been deprived of their liberty.

In terms of Article 8 ECHR, the right to respect for private and family life, the House held that even when construed generously to embrace wider rights to personal autonomy, it could scarcely be said that the intrusion could be serious enough to engage the Convention. In any case, it would be justified under Article 8.2 ECHR as a proportionate response to counter the great danger of terrorism. This reasoning was equally applicable to Article 10 ECHR (freedom of expression) and Article 11 ECHR (freedom of assembly and association).

The claimants’ final challenge was as to the lawfulness of the regime; particularly whether it met the Convention requirement of being “prescribed by law” or “in accordance with the law”. They contended that “law” includes written and unwritten domestic law but must be more than mere administrative practice and that law must be accessible, foreseeable and compatible – the authorisation and confirmation were not accessible. The House doubted that Code A could be regarded as “law” and held that there were strong reasons for not publishing the details of

authorisations as doing so would identify vulnerable targets and undermine the strategy of catching suspects without giving them warning. Further, the constable's discretion was closely constrained, susceptible to challenge by judicial review and could result in claims in tort for wrongful imprisonment.

Although the issue did not need to be determined in this case, Lord Hope analysed the question of discrimination. Lord Brown found this issue to be substantially the most difficult question in the case. Lord Hope addressed the question as to how to square the fact that it is likely to be difficult in practice to detect discriminatory use of the stop and search power with the principle of legal certainty that requires that the use of such powers must be in accordance with law. How is discriminatory practice to be avoided?

He observed that for the system to be effective, it must be flexible. Precise rules cannot be laid down in advance. Further, terrorist threats are likely to be linked to sectors of the community that, because of their racial, ethnic or geographical origin, are readily identifiable. He noted that the motive for direct discrimination is irrelevant – it is always unlawful. He emphasised that the mere fact that a person appears to be of Asian origin is not a legitimate reason for the exercise of the stop and search power. His solution was to hold that racial background might have a part to play in attracting a constable's attention but a further selection process (based on a professional's intuition) will have to be undertaken before the power is exercised in order for it to be lawful.

Languages:

English.



Identification: GBR-2006-1-003

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 22.03.2006 / **e)** / **f)** R (SB) v. Governors of Denbigh High School / **g)** [2006] UKHL 15 / **h)** [2006] 2 *Weekly Law Reports* 719; [2006] 2 *All England Reports* 487.

Keywords of the systematic thesaurus:

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

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

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

Keywords of the alphabetical index:

Education, school, pupil, religious identity / Religion, freedom, positive / Headscarf, refusal to remove.

Headnotes:

A uniform policy restricting the kind of religious dress that could be worn at school did not infringe a pupil's right under Article 9 ECHR to manifest her religion, provided there were alternative schools available where she could manifest her religion in the way in which she dressed. Article 9 ECHR does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing.

Summary:

For her first two years at Denbigh High School, a mixed-sex, multi-cultural and multi-faith secular school, Miss Begum wore the *shalwar kameez* without complaint. On the first day of a new school year, she arrived at school, accompanied by her brother and another man, wearing a *jilbab* (a long shapeless black gown). This was not one of the three uniform options permitted under the school's uniform policy, a policy arrived at after extensive consultation with the community (and which had been explained to all prospective parents and pupils). There were three other schools in the area where wearing the *jilbab* was permitted.

The school told her to go home and change and not to return until she complied with the uniform policy. This instruction was immediately met by hostility from the men accompanying her and threats of a lawsuit. Her claim was that her right under Article 9 ECHR to manifest her religion or beliefs had been unjustifiably limited. Further, her exclusion from the school violated her right not to be denied education under Article 2 Protocol 1 ECHR. The House's decision on the latter issue was based entirely on its decision in *A v. Head Teacher and Governors of Lord Grey School* [2006] 2 W.L.R. 690 [GBR-2006-1-004]. In essence, it was the claimant's unwillingness to comply with uniform policy that resulted in her being out of school; the school genuinely wanted her to return and did not intend to exclude her.

The Lords observed that Article 9 ECHR protects both the right to hold a belief, which is absolute, and a right to manifest belief, which is qualified. The Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice or observance and there are other means open the person to practise or observe his or her religion without undue hardship or inconvenience (see, *Sahin v. Turkey*, Application no. 44774/98). The Lords considered that it need not be impossible for the claimant to attend another school where she would manifest her religion before there would an interference with her Article 9 ECHR right but in this case, there was nothing to show that she would even have found it difficult.

The majority found that there had been no interference with the claimant's right to manifest her belief in practice or observance as there was nothing to stop her from going to a school where wearing a *jilbab* was permitted. Article 9 ECHR does not require that one should be allowed to manifest one's religion at any time and any place of one's own choosing. It would be irresponsible for any court to overrule a school's uniform policy given that the court lacked the experience and knowledge to do so. Domestic courts should accept the decision of parliament to allow individual schools to make their own decisions about uniforms. Even if there was an interference with Article 9 ECHR, the House found that it would be justified under Article 9.2 ECHR as it was legitimate and proportionate to its purpose.

The House gleaned the following principles from the Strasbourg jurisprudence. Although Article 9 ECHR is of high importance, there is a need in some situations to restrict freedom to manifest religious belief. This, and a willingness to compromise and seek balance, is required to achieve religious harmony and tolerance. It is for the national state to decide what is necessary to protect the rights and freedoms of others as there will inevitably be variation of practice and tradition among member states.

Unlike the Court of Appeal, the Lords did not consider the way in which the school went about resolving the issue to be relevant: the focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision making process, but on whether a Convention right has been violated. What matters is the practical outcome, not the quality of the decision making process that led to it.

Languages:

English.



Identification: GBR-2006-1-004

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 22.03.2006 / **e)** / **f)** A v. Head Teacher and Governors of Lord Grey School / **g)** [2006] UKHL 14 / **h)** [2006] 2 *Weekly Law Reports* 690; [2006] 2 *All England Reports* 457.

Keywords of the systematic thesaurus:

1.6 **Constitutional Justice** – Effects.
5.4.2 **Fundamental Rights** – Economic, social and cultural rights – Right to education.

Keywords of the alphabetical index:

Sanction, school / Education, school, choice / Education, school, disciplinary exclusion, temporary.

Headnotes:

A school boy's rights under Article 2 Protocol 1 ECHR were not infringed by his precautionary exclusion from school despite the fact that the school had acted unlawfully under domestic law. Article 2 Protocol 1 ECHR does not afford a person a right to education at a particular institution but only guarantees fair and non-discriminatory access to education; as the boy was offered access to alternative suitable education, his right under Article 2 Protocol 1 ECHR had not been infringed.

Summary:

A boy of compulsory school age was excluded from school pending the outcome of his prosecution for arson, having been accused of setting fire to a class room. The prosecution was eventually discontinued for want of evidence and the boy was invited back to school. During his absence from school, he was initially given self-assessing work and subsequently did better in his standard assessments tests than had been predicted before the incident. The school later referred him to the local education authority, which

referred him to a pupil referral unit (an interim school for children who are excluded). The latter's offer of tuition was declined. The boy's family, without good reason, generally failed to co-operate with school's attempts to find practical solution to the matter.

The majority of Lords reluctantly concluded, as was accepted by the parties and both courts below, that the school had not followed the procedures laid down by statute and regulations governing exclusions. Under Section 64.4 of the School Standards and Framework Act 1998, a school may only exclude a pupil on disciplinary grounds. The exclusion may be fixed (for a period not exceeding 45 days) or permanent. The difficulty which the school faced was, as the majority found, that the legislation was singularly inapt to deal with this kind of situation: it did not contemplate a precautionary exclusion where neither a fixed nor permanent exclusion was appropriate.

The majority observed that despite its negative formulation, Article 2 Protocol 1 ECHR does enshrine a right; but, in comparison to other Convention rights, it is weak (and deliberately so) as it does not generate a right to education of a particular kind or quality, other than that prevailing in the state. It does not guarantee compliance with domestic law and does not concern itself with the procedures used by a school to make adverse decisions against a pupil – it is only concerned with results. The test as to compliance with Article 2 Protocol 1 ECHR is a highly pragmatic one, to be applied to the specific facts of each case: have the authorities of the state acted so as to deny to a pupil effective access to such educational facilities as the country provides? In this case, as suitable and adequate alternative arrangements were available, there was no infringement of Article 2 Protocol 1 ECHR.

The Lords held that the duties owed by the education authorities and the school exist only in public law and do not create private law rights of action. The majority considered that as the boy would have no claim in Strasbourg, it followed that there cannot have been an infringement of a Convention right giving rise to a claim under Section 6 of the Human Rights Act 1998. The school's duties only exist in public law and do not create private law rights of action. It is thus illegitimate to promote the public law duty of the school, not giving rise to a private right of action, to a duty under that Section remedial by a claim for damages by saying that in domestic law the school bore the "primary duty to educate the child". Lady Hale concluded that, if one was necessary (which she thought it was), the appropriate remedy would have been a declaration that the school had acted incompatibly with his right to education.

Languages:

English.



Identification: GBR-2006-1-005

a) United Kingdom / **b)** House of Lords / **c)** / **d)** 08.03.2006 / **e)** / **f)** Leeds City Council v. Price and others / **g)** [2006] UKHL 10 / **h)** [2006] 2 *Weekly Law Reports* 571.

Keywords of the systematic thesaurus:

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

2.1.3.2.2 **Sources of Constitutional Law** – Categories – Case-law – International case-law – Court of Justice of the European Communities.

2.2.1 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources.

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

Keywords of the alphabetical index:

Traveller, camp site / Property, illegally occupied / Property, possession / Property, public.

Headnotes:

In possession proceedings brought by a local authority, it is for the occupier to raise a defence under Article 8.2 ECHR that possession is not justified and he must be given a fair opportunity to do so. However, this Article 8 ECHR defence will be struck out unless he can show the legislation itself to be incompatible with Article 8 ECHR. Where a decision of the House of Lords is clearly incompatible with the jurisprudence of the European Court of Human Rights, for the sake of certainty the former should be followed.

Summary:

In two cases, local authorities sought to recover possession of property to which they had an

unqualified legal right. The first involved accommodation that had been made available to homeless people who would not otherwise have qualified for housing and the second involved travellers who had moved their caravans onto a recreation ground owned by the local authority without its consent and remained there as trespassers.

Although the first case involved resolution of a private law issue, the two more important issues were as follows. First, the extent to which, if at all, domestic rules of precedent are, or should be modified to give effect to the United Kingdom's obligations under the European Convention and the duties imposed on domestic courts by the Human Rights Act 1998. In other words, which authority should domestic courts follow when the European Court of Human Rights (the Strasbourg Court) hands down a judgment that is unquestioningly incompatible with House of Lords authority. This issue emerged as a consequence of the Strasbourg Court's decision in *Connors v. United Kingdom* (Judgment of 27.05.2004) 40 E.H.H.R. 189 being incompatible with the House of Lords decision in *Harrow London Borough Council v. Qazi* [2004] 1 A.C. 983.

The second issue was essentially that which arose in *Qazi*: whether, when domestic property law gives a local authority an unqualified right to possession, Article 8.2 ECHR is satisfied. In other words, is it the case that the interference is justified and the matter need not be considered by the county court? In *Qazi*, the majority answered this question in the affirmative. The minority held that the question of justification, if raised did fall to be considered. In *Connors*, without considering *Qazi*, it was held that Article 8.2 ECHR was not justified where there were inadequate procedural safeguards protecting a vulnerable group's (travellers) right to a home. In this case, the majority held that the ratio of *Connors* could not be confined to travellers.

The solution adopted by the House was that a person must be given a fair opportunity to contend that the excepting conditions in Article 8.2 ECHR have been met on the facts of his case. But, it is not necessary for the public authority from the outset to plead and prove that the possession order sought is justified – that would in the overwhelming majority of cases be burdensome and futile. It is for the occupier to assert an Article 8 ECHR defence. The majority held that a defence which does not challenge the law as incompatible with Article 8 ECHR but is only based on the occupier's personal circumstances should be struck out. Thus, courts should proceed on the assumption that domestic law strikes a fair balance of competing interests and that it is compatible with

Article 8 ECHR. It is for the county court judges, who have practical experience, to give guidance as to what might rank as exceptional circumstances.

As to the first issue, that of precedence, the House observed that the mandatory duty imposed on domestic courts by Section 2 of the 1998 Act is to take into account any judgment of the Strasbourg Court but they are not strictly required to follow Strasbourg ruling. In contradistinction, they are so bound under Section 3.1 of the European Communities Act 1972. The House considered that certainty is best achieved by adhering, even in the Convention context, to the domestic rules of precedent. This conclusion is reinforced by the fact that the Strasbourg Court most often affords national states a generous margin of appreciation. The effective implementation of the Convention depends on constructive collaboration between the Strasbourg Court and national courts.

Languages:

English.



United States of America

Supreme Court

Important decisions

Identification: USA-2006-1-001

a) United States of America / **b)** Supreme Court / **c)** / **d)** 18.01.2006 / **e)** 04-1144 / **f)** Ayotte v. Planned Parenthood of Northern New England, *et al.* / **g)** 126 *Supreme Court Reporter* 961 (2006) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

1.6 **Constitutional Justice** – Effects.
 2.3.3 **Sources of Constitutional Law** – Techniques of review – Intention of the author of the enactment under review.
 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:

Abortion, minor, parent, consultation / Abortion, minor, judicial authorisation, speed / Abortion, minor, health, danger / Court, finding of unconstitutionality, law, partial invalidation / Legislature, intent, determination.

Headnotes:

The Constitution permits legislatures to require parental involvement, when a minor considers a termination of her pregnancy.

The Constitution prohibits legislatures from restricting access to abortions that are necessary for preservation of the life or health of the mother.

When confronting a constitutional flaw in a legislative act, it is preferable for a court to enjoin only the unconstitutional applications of the act, thereby leaving other applications in force, or to sever the problematic provision from the remainder of the statutory text, rather than invalidating the entire act; however, any judicial decision concerning a remedy must be grounded in the legislature's intent, with the

court determining after a finding of a provision's unconstitutionality whether the legislature would have preferred what is left of the statute to no statute at all.

Summary:

I. A 2003 legislative act of the State of New Hampshire, entitled the Parental Notification Prior to Abortion Act (the "Notification Act"), prohibits a physician from performing an abortion on a pregnant minor (a person under eighteen years of age) until forty-eight hours after that person's parent or guardian has received written notice from the physician that such procedure will be performed. The Act allows for three circumstances in which a physician may perform an abortion without such notification to the minor's parent or guardian: if the physician certifies that the abortion is necessary to prevent the minor's death and there is insufficient time to provide the required notice; if a person entitled to receive notice certifies that he or she already has been notified; and if a judge authorises the abortion upon having made a finding that the minor is mature and capable of giving informed consent, or that an abortion without notification is in the minor's best interests.

A physician and three medical clinics filed a lawsuit that challenged the constitutionality of the Notification Act. They claimed that the legislation was unconstitutional because it failed to allow a physician to provide a prompt abortion to a minor whose health would be endangered by delays necessitated by the Act's provisions, because its life exception was inadequate, and because of confidentiality requirements associated with the judicial authorisation exception. The U.S. District Court, in a decision affirmed in its entirety by the U.S. Court of Appeals for the First Circuit, declared the Notification Act to be unconstitutional and issued a permanent injunction against its enforcement.

II. The U.S. Supreme Court accepted review of the decision of the Court of Appeals. The Court's purpose in doing so was to decide whether the lower courts acted incorrectly in invalidating the entire Notification Act because of one constitutional infirmity – the absence of an exception for the preservation of pregnant minors' health. Before consideration of this question, the Court's opinion set forth two established legal propositions: that States "unquestionably" have the right to require parental involvement, by means of legislation such as the Notification Act, when a minor considers a termination of her pregnancy; and that the U.S. Constitution, under a string of precedents beginning with the Court's 1973 decision in *Roe v. Wade*, prohibits a State from restricting access to abortions that are necessary for preservation of the life or health of the mother. At the Supreme Court, the

State of New Hampshire did not dispute that it would be unconstitutional to apply the Notification Act in a manner that would subject minors to significant health risks.

Thus, the Court accepted the lower court determinations that the Notification Act was constitutionally deficient in not making an explicit exception for pregnant minors facing a medical emergency. The Court's decision therefore centered on the question of how to remedy the absence of such a provision. Here, the Court noted that when confronting a constitutional flaw in a legislative act, it is preferable for a court to enjoin only the unconstitutional applications of the act, thereby leaving other applications in force, or to sever the problematic provision from the remainder of the statutory text. This approach, the Court explained, is grounded in three interrelated principles. First, if a court were to invalidate more of a legislature's work than is necessary, it would frustrate the intent of the elected representatives of the people. Second, mindful of their constitutional mandate and institutional competence, courts should restrain themselves from rewriting a legislative act to conform it to constitutional requirements. Third, any judicial decision concerning a remedy must be grounded in the legislature's intent, since a court must not use its remedial powers to circumvent that intent. Thus, after finding an application or portion of a legislative act unconstitutional, a court then must ask whether the legislature would have preferred what is left of the statute to no statute at all.

In the instant case, the Court noted that the lower courts had chosen the most blunt remedy – a permanent injunction against enforcement of the Notification Act in its entirety. Although in an earlier abortion decision, *Stenberg v. Carhart*, the Court did invalidate a State's entire abortion statute, the Court declined to do so in the instant case. It concluded that a more modest remedy might be possible because only a few applications of the Notification Act – those in which a pregnant minor might face an emergency health issue – would present a constitutional problem. Concluding that the matter of the New Hampshire's legislature's intent concerning a remedy was an "open question", the Court vacated the judgment of the Court of Appeals and remanded the case back to the lower courts for a determination on this question.

Cross-references:

- *Roe v. Wade*, 410 *United States Reports* 113, 93 *Supreme Court Reporter* 705, 35 *Lawyer's Edition Second* 147 (1973);

- *Stenberg v. Carhart*, 530 *United States Reports* 914, 120 *Supreme Court Reporter* 2597, 147 *Lawyer's Edition Second* 743 (2000).

Languages:

English.



Identification: USA-2006-1-002

a) United States of America / **b)** Supreme Court / **c)** / **d)** 06.03.2006 / **e)** 04-1152 / **f)** *Rumsfeld v. Forum for Academic and Institutional Rights* / **g)** 126 *Supreme Court Reporter* 1297 (2006) / **h)** CODICES (English).

Keywords of the systematic thesaurus:

- 1.3.5.14 **Constitutional Justice** – Jurisdiction – The subject of review – Government acts.
- 3.18 **General Principles** – General interest.
- 4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
- 5.2.2.11 **Fundamental Rights** – Equality – Criteria of distinction – Sexual orientation.
- 5.3.21 **Fundamental Rights** – Civil and political rights – Freedom of expression.

Keywords of the alphabetical index:

Conduct, expressive / Judicial restraint, army / Army, homosexual, discrimination / Homosexuality, open, army, discrimination.

Headnotes:

Under the unconstitutional conditions doctrine, government may not deny a benefit to a person on a basis that impermissibly implicates his or her freedom of speech, even if he or she lacks a legal entitlement to that benefit.

A condition imposed on government funding is not unconstitutional if it advances a legislative mandate that could constitutionally be imposed directly.

Judicial deference is at its highest when the legislature acts pursuant to its constitutional authority to raise and support military forces.

Legislation conditioning an educational institution's federal funding upon provision of access to military recruiting activities regulates conduct, and not speech; therefore, such legislation does not implicate the constitutionally-guaranteed exercise of freedom of expression.

Conduct falls within scope of constitutionally-guaranteed freedom of speech only if it is inherently expressive.

Under intermediate judicial scrutiny, a content-neutral legislative act will be valid if it promotes a substantial governmental interest that would be achieved less effectively without the regulation.

The raising and supporting of military forces is an objective that advances a substantial governmental interest.

Summary:

I. The Forum for Academic and Institutional Rights ("FAIR"), a coalition of approximately thirty-five law schools in the United States, initiated a legal challenge to the constitutionality of the so-called "Solomon Amendment", a legislative act of the U.S. Congress. The Solomon Amendment, most recently revised in 2004, requires universities to allow recruiters for the U.S. military branches to interview students who seek positions in the military. Law schools generally permit employers, such as law firms and government agencies, to use their facilities for recruiting activities. If a university does not allow military recruiters such access in a form "that is at least equal in quality and scope" to access for other employers, it will lose the opportunity to receive various types of funding grants from the federal government. Congress enacted the Solomon Amendment in response to the practice of many law schools to deny access, or at least access equal to that provided other employers, to military recruiters because of the military's policy that excludes from military service gay men and lesbians who are open about their sexual orientation. According to the U.S. Department of Defense, military recruiters interview approximately 2,500 law students each year and hire about 400 for the Judge Advocate General's Corps of the various service branches.

The FAIR lawsuit was based on the claim that the Solomon Amendment violated the law schools' freedoms of speech and association, guaranteed under the First Amendment to the U.S. Constitution. The First Amendment states in relevant part that the Congress "shall make no law...abridging the freedom of speech." According to FAIR, the legislation places unconstitutional conditions on the law schools'

freedom of speech, compelling them to abandon the exercise of their rights by involuntarily providing support for the military's anti-gay message. Under the U.S. Supreme Court's "unconstitutional conditions doctrine", the government may not deny a benefit to a person on a basis that impermissibly implicates his or her freedom of speech, even if he or she lacks a legal entitlement to that benefit. FAIR argued that the Solomon Amendment's purported unconstitutional conditions also extended to the law schools' exercise of the right of freedom of association, by making them associate with military recruiters and presenting the impression to students that they support the military's employment policies.

The U.S. District Court rejected FAIR's constitutional claims, but the Court of Appeals for the Third Circuit reversed the lower court's decision. The Court of Appeals agreed that the Solomon Amendment violated the unconstitutional conditions doctrine by forcing law schools to choose between surrendering First Amendment rights and losing federal funding for their universities. The U.S. Supreme Court accepted the government's petition to review the Court of Appeals decision.

II. In a unanimous decision, the Supreme Court reversed the judgment of the Court of Appeals. In doing so, the Court set forth a number of reasons in its opinion.

First, the Court stated that the unconstitutional conditions doctrine is not applicable to governmental mandates that could constitutionally be imposed directly. The Court noted that judicial deference is at its highest when the Congress legislates pursuant to its constitutional power to raise and support military forces. Therefore, if it had wished to do so, Congress could have required universities directly to admit military recruiters, instead of using an indirect approach based on funding considerations. Thus, because the First Amendment could not prevent Congress from acting directly in this field, the Solomon Amendment does not place an unconstitutional condition on the receipt of federal funds.

Next, the Court rejected FAIR's contention that the legislation regulates the law schools' speech. Instead, it regulates the law schools' conduct, affecting what they must do (afford equal access to military recruiters), but not what they may or may not say. Indeed, the Court observed that the Solomon Amendment does not prevent the law schools from engaging in speech to register their opposition to the military's employment policies. Therefore, their exercise of free speech rights is not affected by their accommodation of military recruiters.

The Court also declined to recognise that the Solomon Amendment implicates the law schools' expressive conduct. In its jurisprudence, the Court has recognised that some forms of "symbolic speech", such as the burning of the flag, are within the scope of First Amendment protection. However, the Court pointed out that First Amendment protection extends only to conduct that is inherently expressive. The expressive component of a law school's actions regarding military recruitment, the Court determined, is created not by the conduct itself, but by the speech (for example, opposing the military's employment policies) that accompanies it. Meanwhile, the Court stated, even if the legislation were viewed as a content-neutral burden on expressive conduct, it would satisfy the applicable intermediate level of judicial scrutiny. Under intermediate scrutiny, legislation will be valid if it promotes a substantial governmental interest that would be achieved less effectively without the regulation. In this regard, the Court concluded, the Solomon Amendment clearly would be valid because it promotes a substantial governmental interest – raising and supporting military forces – that would be achieved less effectively if the military were unable to recruit on equal terms with other employers.

The Court also rejected FAIR's argument based on freedom of expressive association. It said there is little likelihood that students would identify the views of the military recruiters with those of the law schools. Recruiters, the Court observed, use law school facilities for the limited purpose of hiring students, not to become "members of the school's expressive association".

Languages:

English.



Inter-American Court of Human Rights

Important decisions

Identification: IAC-2006-1-001

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 18.11.2004 / **e)** / **f)** Serrano Cruz Sisters v. El Salvador / **g)** Secretariat of the Court / **h)**.

Keywords of the systematic thesaurus:

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

4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.

5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.

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

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.

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

Keywords of the alphabetical index:

Disappearance, forced / Obligation, positive / Human rights, violation, state, tolerance / Investigation, effective, requirement / Treaty, non-retrospective effect / State, responsibility, international / Truth, right to know / Impunity, duty of state to combat.

Headnotes:

The purpose of international human rights law is to provide the individual with the means to protect internationally recognised human rights before the State (its bodies, agents and all those who act in its name). All States are internationally responsible for any and every act or omission of any of their powers or bodies that violates internationally enshrined rights.

The State has the obligation to avoid and combat impunity, which the Court has defined as the absence of any investigation, pursuit, capture, prosecution and conviction of those responsible for the violations of rights protected by the American Convention.

The obligation to investigate human rights violations must be assumed by the State as its own legal duty, and must not depend upon the initiative of the victim or his family.

Any person, including the next of kin of victims of serious human rights violations, has the right to know the truth of everything that happened in relation to said violations.

Three elements should be taken into account in determining whether the time in which the proceeding was conducted was reasonable:

- a. the complexity of the case;
- b. the procedural activity of the interested part, and
- c. the conduct of the judicial authorities.

A prolonged delay may constitute, in itself, a violation of the right to a fair trial.

Habeas corpus represents the appropriate means of guaranteeing liberty, controlling the respect for a person's life and integrity, and preventing his disappearance or ignorance about his place of detention, and also to protect the individual from torture or other cruel, inhuman or degrading punishment or treatment.

Summary:

I. On 14 June 2003, the Inter-American Commission on Human Rights filed an application with the Court against the State of El Salvador for the Court to decide whether the State had violated Article 4 ACHR (Right to Life), Article 7 ACHR (Right to Personal Liberty), Article 18 ACHR (Right to a Name) and Article 19 ACHR (Rights of the Child), in relation to Article 1.1 ACHR (Obligation to Respect Rights), to the detriment of Ernestina and Erlinda Serrano Cruz. The Commission also requested the Court to decide whether the State had violated Article 5 ACHR (Right to Humane Treatment), Article 8 ACHR (Right to a Fair Trial), Article 17 ACHR (Rights of the Family) and Article 25 ACHR (Right to Judicial Protection), in relation to Article 1.1 ACHR (Obligation to Respect Rights), to the detriment of Ernestina and Erlinda Serrano Cruz and of their next of kin.

On 2 June 1982 the Serrano Cruz sisters, then 7 and 3 years of age, were disappeared when they were allegedly captured by the Salvadoran military.

II. In its Judgment of 1 March 2005, the Court held that it lacked jurisdiction to rule on possible violations that arose from facts or acts that occurred prior to 6 June 1995, or that began to be executed before that date, on which El Salvador deposited the instrument accepting the Court's jurisdiction with the OAS General Secretariat. Thus, the Court did not rule on the alleged violations of the right to life, rights of the family, right to a name, and rights of the child, embodied in Articles 4, 17, 18 and 19 ACHR.

Furthermore, the Court held that there had been serious omissions in the judicial investigation, particularly relating to the gathering of evidence, owing to the failure of the prosecutors to request, and the judges to order, the necessary evidentiary measures to determine what happened to Ernestina and Erlinda Serrano Cruz, discover their whereabouts and investigate and punish those responsible. The Court considered that the *habeas corpus* procedure and the criminal proceedings did not comply with the standards of access to justice and due process enshrined in the American Convention.

The Court held that the State had violated the right to judicial guarantees and judicial protection embodied in Articles 8.1 and 25 ACHR, in relation to Article 1.1 ACHR, to the detriment of Ernestina and Erlinda Serrano Cruz and their next of kin, as well as the right to humane treatment embodied in Article 5 ACHR, in relation to Article 1.1 ACHR, to the detriment of the next of kin of Ernestina and Erlinda Serrano Cruz.

The Court ordered the State, *inter alia*, to carry out, within a reasonable time, an effective investigation into the alleged facts in this case, identify and punish those responsible and conduct a genuine search for the victims. In order to determine the whereabouts of Ernestina and Erlinda Serrano Cruz, the Court ordered the State to establish a national commission to trace the young people who disappeared during the armed conflict when they were children, create a web page to this end, as well as a genetic information database. Among other forms of reparations, the State was ordered to designate a day dedicated to the children who disappeared during the internal armed conflict, and to provide free of charge, through its specialised health institutions, the medical and psychological treatment required by the next of kin of the victims. The State was also ordered to pay for material and moral damages, as well costs and expenses.

Languages:

English, Spanish.

*Identification:* IAC-2006-1-002

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 03.03.2005 / **e)** / **f)** *Huilca Tecse v. Peru* / **g)** Secretariat of the Court / **h)**.

Keywords of the systematic thesaurus:

- 1.6.2 **Constitutional Justice** – Effects – Determination of effects by the court.
- 2.1.1.4.10 **Sources of Constitutional Law** – Categories – Written rules – International instruments – American Convention on Human Rights of 1969.
- 4.11.1 **Institutions** – Armed forces, police forces and secret services – Armed forces.
- 5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.
- 5.3.17 **Fundamental Rights** – Civil and political rights – Right to compensation for damage caused by the State.
- 5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.
- 5.4.11 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Human rights, violation, state, tolerance / Investigation, effective, requirement / Obligation, positive / Obligation, state / Estoppel / Trade Union, leader, killing / Impunity, elements.

Headnotes:

A State that has taken a specific position that produces legal effects, cannot subsequently, based on the principle of *estoppel*, assume another conduct contrary to the former.

When there is a pattern of human rights violations, including extrajudicial executions, promoted or tolerated by the State, this gives rise to a climate that is incompatible with the effective protection of the right to life. The right to life is fundamental, so that the

realisation of the other rights depends on its protection. If the right to life is not respected, all the other rights are meaningless.

Compliance with Article 4 ACHR, in relation to Article 1.1 ACHR, not only presumes that no one shall be deprived of their life arbitrarily (negative obligation), but also requires States to take all appropriate measures to protect and preserve the right to life (positive obligation), in accordance with their obligation to ensure the full and free exercise of the rights of all persons subject to their jurisdiction.

Those who are protected by the Convention not only have the right and freedom to associate freely with other persons, without the interference of the public authorities limiting or obstructing the exercise of the respective right, which thus represents a right of each individual, but they also enjoy the right and freedom to seek the common achievement of a licit goal, without pressure or interference that could alter or change their purpose.

The execution of a trade union leader, in a context such as that of this case, not only restricts the freedom of association of an individual, but also the right and freedom of a determined group to associate freely, without fear.

In its individual dimension, labor-related freedom of association is not exhausted by the theoretical recognition of the right to form trade unions, but also corresponds, inseparably, to the right to use any appropriate means to exercise this freedom. When the Convention proclaims that freedom of association includes the right to freely associate “for [any] other purposes,” it is emphasising that the freedom to associate and to pursue certain collective goals are indivisible, so that a limitation of the possibilities of association represents directly, and to the same extent, a limitation of the right of the collectivity to achieve its proposed purposes. Hence the importance of adapting to the Convention the legal regime applicable to trade unions, as well as the State’s actions, or those that occur with its tolerance, that could render this right inoperative in practice.

In its social dimension, freedom of association is a mechanism that allows the members of a labor collectivity or group to achieve certain objectives together and to obtain benefits for themselves.

The content of freedom of association implies the power to choose how to exercise it. In this regard, an individual does not enjoy the full exercise of freedom of association, if, in reality, this power is inexistent or is limited so that it cannot be implemented. The State must ensure that people can freely exercise their

freedom of association without fear of being subjected to some kind of violence; otherwise, the ability of groups to organise themselves to protect their interests could be limited.

Impunity means the overall lack of investigation, tracing, capture, prosecution and conviction of those responsible for violations of the rights protected by the American Convention, and that the State is obliged to combat this situation by all available legal means.

When a State declares its acquiescence, it acknowledges its responsibility by accepting the occurrence of the facts, or the violation of the rights the parties claim, or both.

Summary:

I. On 12 March 2004, the Inter-American Commission on Human Rights filed an application with the Court against the State of Peru in relation to the alleged extrajudicial execution of a Peruvian trade union leader, Pedro Huilca Tecse, on 18 December 1992. The Commission alleged that this execution was carried out by members of the Colina Group – a death squadron linked to the Peruvian Army's Intelligence Service. The application also referred to the alleged lack of a complete, impartial and effective investigation into the facts. Based on the above facts, the Commission requested that the Court decide whether the State had violated Article 4 ACHR (Right to Life), in conjunction with Article 1.1 ACHR (Obligation to Respect Rights), to the detriment of Pedro Huilca Tecse, as well as Article 8 ACHR (Right to a Fair Trial) and Article 25 ACHR (Judicial Protection), in conjunction with Article 1.1 ACHR (Obligation to Respect Rights), to the detriment of Mr Huilca Tecse's next of kin. The representatives of the victim and his next of kin alleged there was also a violation of Article 16 ACHR (Freedom of Association), in conjunction with Article 1.1 ACHR (Obligation to Respect Rights).

II. The State of Peru submitted its acquiescence, but later withdrew said acquiescence, arguing that the agent appointed by the State to represent it in this case did not have the authorisation to do so. The Court considered that the acquiescence was binding, based on the principle of *estoppel*.

In its judgment of 3 March 2005, the Court held that the extrajudicial execution of Pedro Huilca Tecse was politically motivated, and the result of a covert operation carried by military intelligence and tolerated by different national authorities and institutions, which constitutes a violation of right to freedom of association, in relation to trade union rights. The

Court considered that the execution of Pedro Huilca Tecse had a chilling effect on the workers of the Peruvian trade union movement and thereby reduced the freedom of a specific group to exercise this right.

The Court held that the State violated Article 4 ACHR (Right to Life) and Article 16 ACHR (Freedom of Association), in conjunction with Article 1.1 ACHR (Obligation to Respect Rights), to the detriment of Pedro Huilca Tecse, as well as Article 8 ACHR (Right to a Fair Trial) and Article 25 ACHR (Judicial Protection), in conjunction with Article 1.1 ACHR (Obligation to Respect Rights), to the detriment of Mr Huilca Tecse's next of kin.

The Court, having partially accepted an agreement on reparations submitted by the parties involved, declared that the State had the obligation to pay moral and material damages to the victim and his next of kin, as well as costs and expenses.

The Court also ordered the State, *inter alia*, to organise a public act acknowledging its responsibility in relation to the case, establish a course on human rights and labor law, called the "*Cátedra Pedro Huilca*", praise the work of Pedro Huilca Tecse in favor of the trade union movement in Peru during the official celebrations of 1 May (Labor Day), erect a bust in memory of Pedro Huilca Tecse, and provide psychological care and treatment to the victim's next of kin.

Languages:

English, Spanish.



Identification: IAC-2006-1-003

a) Organisation of American States / b) Inter-American Court of Human Rights / c) / d) 15.06.2005 / e) / f) 19 Moiwana Village v. Suriname / g) Secretariat of the Court / h) CODICES (English).

Keywords of the systematic thesaurus:

1.3.1.1 **Constitutional Justice** – Jurisdiction – Scope of review – Extension.
5.3.2 **Fundamental Rights** – Civil and political rights – Right to life.

5.3.3 **Fundamental Rights** – Civil and political rights – Prohibition of torture and inhuman and degrading treatment.

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

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

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

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

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

Keywords of the alphabetical index:

iura novit curia, application / Indigenous people / Aboriginal people / Investigation, effective, requirement / Displaced person / Denial of justice, formal / Obligation, positive.

Headnotes:

The Court is competent to declare violations of the American Convention with regard to actions or omissions that have taken place following the date of recognition of the Tribunal's jurisdiction and with respect to any situations that have not ceased to exist by that date.

The Court has the competence – based upon the American Convention and grounded in the *iura novit curia* principle – to study the possible violation of Convention provisions that have not been alleged in the pleadings submitted before it, in the understanding that the parties have had an opportunity to express their respective positions with regard to the relevant facts.

A long-standing absence of effective remedies is typically considered by the Court as a source of suffering and anguish for victims and their family members that compromises the rights enshrined in Article 5 ACHR.

Liberty of movement, embodied in Article 22 ACHR, is an indispensable condition for the free development of a person. The right to freedom of movement and residence consists, *inter alia*, in the following:

- a. the right of all those lawfully within a State to move freely in that State, and to choose his or her place of residence; and
- b. the right of a person to enter his or her country and the right to remain in one's country. In addition, the enjoyment of this right must not be

made dependent on any particular purpose or reason for the person wanting to move or to stay in a place.

In the case of indigenous communities who have occupied their ancestral lands in accordance with customary practices – yet who lack real title to the property – mere possession of the land should suffice to obtain official recognition of their communal ownership. Indigenous communities hold unique and enduring ties that bind them to their ancestral territory. The relationship of an indigenous community with its land must be recognised and understood as the fundamental basis of its culture, spiritual life, integrity, and economic survival. For such peoples, their communal nexus with the ancestral territory is not merely a matter of possession and production, but rather consists in material and spiritual elements that must be fully integrated and enjoyed by the community, so that it may preserve its cultural legacy and pass it on to future generations.

A swift and exhaustive judicial investigation must be undertaken in a serious manner and not as a mere formality predestined to be ineffective. This effective search for the truth is the State's responsibility, and decidedly does not depend upon the initiative of victims and their family members or upon their submission of evidence. At a minimum, state authorities conducting an inquiry shall seek, *inter alia*:

- a. to identify the victim;
- b. to recover and preserve evidentiary material related to the death in order to aid in any potential prosecution of those responsible;
- c. to identify possible witnesses and obtain statements from them concerning the death;
- d. to determine the cause, manner, location and time of death, as well as any pattern or practice that may have brought about the death; and
- e. to distinguish between natural death, accidental death, suicide and homicide.

Furthermore:

- a. the crime scene must be exhaustively investigated and
- b. autopsies, as well as analyses of skeletal remains, must be rigorously performed by competent professionals, employing the most appropriate procedures.

A prolonged delay constitutes *per se* a violation of judicial guarantees, which only exceptionally could be justified by the State.

Summary:

I. On 20 December 2002, the Inter-American Commission on Human Rights filed an application with the Court against the State of Suriname for the Court to decide whether the State violated the rights to judicial protection and fair trial, in relation to the general obligation to respect rights, embodied in Articles 8, 25 and 1.1 ACHR, to the detriment of certain former residents of Moiwana Village, settled by the N'djuka community. The Commission alleged there had not been an adequate investigation of the 29 November 1986 massacre of over 40 members of the Moiwana Village, where members of the armed forces razed the village to the ground, forcing the survivors into exile or internal displacement. The Commission alleged that, while the attack itself predated Suriname's ratification of the American Convention and its recognition of the Court's jurisdiction, the Court still had jurisdiction over the alleged denial of justice and displacement of the Moiwana community that occurred subsequent to the attack. According to the Commission no one had been prosecuted or punished for the facts and the survivors remained displaced from their lands.

II. In its Judgment of 15 June 2005, the Court, by way of *iura novit curia*, held that the State violated the rights to humane treatment, freedom of movement and residence and property embodied in Articles 5.1, 22 and 21 ACHR, respectively, and the rights to judicial guarantees and judicial protection enshrined in Articles 8.1 and 25 ACHR, all in relation to Article 1.1 ACHR (Obligation to Respect Rights) to the detriment of the Moiwana community members. The Court ordered the State to investigate effectively the facts in question, identify, prosecute and punish the responsible parties; recover the remains of the Moiwana community members killed during the 1986 attack and deliver them to the surviving community members; adopt such legislative, administrative and other measures as are necessary to ensure the property rights of the members of the Moiwana community in relation to the traditional territories from which they were expelled, and provide for their use and enjoyment of those territories; guarantee the safety of those community members who decide to return to Moiwana Village; establish a developmental fund; publicly recognise its international responsibility for the facts of the case and issue an apology to the Moiwana community; build a monument and place it in a suitable public location; pay moral and material damages to the victims, and pay costs and expenses.

Languages:

English, Spanish.

Identification: IAC-2006-1-004

a) Organisation of American States / **b)** Inter-American Court of Human Rights / **c)** / **d)** 24.06.2005 / **e)** / **f)** Acosta Calderón v. Ecuador / **g)** Secretariat of the Court / **h)** CODICES (English).

Keywords of the systematic thesaurus:

3.9 **General Principles** – Rule of law.
 3.14 **General Principles** – *Nullum crimen, nulla poena sine lege*.
 3.16 **General Principles** – Proportionality.
 3.20 **General Principles** – Reasonableness.
 5.3.5 **Fundamental Rights** – Civil and political rights – Individual liberty.
 5.3.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial.
 5.3.13.2 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Effective remedy.
 5.3.13.3.1 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Access to courts – *Habeas corpus*.
 5.3.13.13 **Fundamental Rights** – Civil and political rights – Procedural safeguards, rights of the defence and fair trial – Trial/decision within reasonable time.
 5.3.13.26 **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:

Detainee, rights / Detention, as a preventive measure / Investigation, effective, requirement / Drug, trafficking / Detention, judicial supervision / Constitutional state, judge, role / Judge, role.

Headnotes:

The protection of personal liberty safeguards both the physical liberty of the individual and his personal safety, in a context where the absence of guarantees may result in the subversion of the rule of law and deprive those detained of minimum legal protection.

No one shall be deprived of his personal liberty except for reasons, cases or circumstances specifically established by law (material aspect) but,

also, under strict conditions established beforehand by law (formal aspect). No one shall be subject to arrest or imprisonment for reasons or methods that – although qualified as legal – may be considered incompatible with the fundamental rights of the individual, because they are, among other matters, unreasonable, unforeseeable or out of proportion.

Preventive detention is the most severe measure that can be applied to the person accused of a crime, reason for which its application must have an exceptional nature, since it is limited by the principles of legality, the presumption of innocence, necessity, and proportionality, all of which are strictly necessary in a democratic society.

Preventive detention is a precautionary measure, not a punitive one. The arbitrary extension of a preventive detention turns it into a punishment when it is inflicted without having proven the criminal responsibility of the person to whom this measure is applied.

In a Constitutional State, a judge must guarantee the rights of the person detained, authorise the adoption of precautionary or coercive measures when these are strictly necessary, and, in general, ensure that the accused receives a treatment consequent with the presumption of innocence.

A person deprived of his or her freedom without any type of judicial supervision must be released or be immediately brought before a judge.

A detained person must be taken before a competent judge or judicial authority, pursuant to the principles of judicial control and procedural immediacy. This is essential for the protection of the right to personal liberty and to ensure the protection of other rights, such as life and personal integrity. The simple awareness of a judge that a person is detained does not satisfy this guarantee, since the detainee must appear personally and give his or her statement before the competent judge or authority.

The procedures of *habeas corpus* and legal protection are judicial guarantees essential for the protection of several rights and also help to preserve legality in a democratic society.

A State has both the responsibility of guaranteeing the rights of the individuals under its custody as well as providing information and evidence related to what happens to the detainee.

The protection of the person against the arbitrary exercise of public power is the main objective of international human rights protection.

It is not enough for judicial recourses to exist formally, it is necessary that they be effective.

The reasonability of the time period of a judicial process must be analyzed with regard to the total duration of the process, from the first procedural act up to the issuing of a definitive judgment. In criminal matters, the term starts on the date of the arrest of the individual.

A State must not restrict a detainee's liberty beyond the limits strictly necessary to ensure that he will not impede the efficient development of the investigations and that he will not evade justice. In this sense, preventive detention is a cautionary measure and not a punitive one.

Article 8.2.b ACHR orders that the competent judicial authorities notify the accused of the charges presented against him, their reasons, and the crimes or offences he is charged with, prior to the execution of the process. In order for this right to fully operate and satisfy its inherent purposes, it is necessary that this notification be given before the accused offers his first statement. Without this guarantee, the latter's right to duly prepare his defence would be infringed.

A foreign detainee, when arrested and before offering his first statement before the authorities, must be notified of his right to establish contact with a third party, for example, a family member, a lawyer, or a consular official, in order to inform them that he is in the State's custody. The individual right to request consular assistance from his country of nationality must be recognised and considered within the framework of a set of minimum guarantees that offer foreigners the opportunity to adequately prepare their defence and have a fair trial.

States Parties to the American Convention may not order measures that violate the rights and freedoms recognised therein.

Summary:

I. On 25 June 2003, the Inter-American Commission on Human Rights filed an application with the Court against the State of Ecuador for the Court to decide whether the State had violated Article 2 ACHR (Domestic Legal Effects), Article 7 ACHR (Right to Personal Liberty), Article 8 ACHR (Right to a Fair Trial), Article 24 ACHR (Right to Equal Protection) and Article 25 ACHR (Right to Judicial Protection), all of them in connection with Article 1.1 ACHR (Obligation to Respect Rights), in detriment of Mr Rigoberto Acosta Calderón.

On 15 November 1989, the Customs Military Police in Ecuador arrested Mr Acosta Calderon, of Colombian nationality, under suspicion of drug trafficking. Mr Acosta Calderon's statement was not received by a judge until two years after his detention, he was not notified of his right to consular assistance, he was in custody pending trial for more than five years, and he was condemned on 8 December 1994 although the *corpus delicti* was never presented as evidence.

II. The Court held that the State had the obligation, according to its internal legislation, to prove, through chemical analysis, that the substance in question was cocaine paste. Ecuador never performed those chemical analyses and also lost all the alleged cocaine paste. Despite the fact that the State never presented this chemical report and, therefore, did not prove the existence of the substance whose possession was imputed to Mr Acosta Calderón, he remained imprisoned for more than five years. The above constituted an arbitrary arrest in his detriment.

Accordingly, the Court held that the State violated, to the detriment of Mr Acosta Calderón, the right to personal liberty enshrined in Article 7.1, 7.3 and 7.5 ACHR, in conjunction with Article 1.1 ACHR; the right to personal liberty and judicial protection enshrined in Articles 7.6 and 25 ACHR, in conjunction with Article 1.1 ACHR; and the right to a fair trial enshrined in Article 8.1, 8.2, 8.2.b, 8.2.d and 8.2.e ACHR, in conjunction with Article 1.1 ACHR; and breached its obligation established in Article 2 ACHR in connection with Article 7.5 ACHR.

As part of the reparations ordered by the Court, the State was ordered to eliminate Mr Acosta Calderón's name from the public registries in which he appears with a criminal record in connection to the present case, and to pay compensation to Mr Acosta Calderón for material and moral damages, as well as reimbursement of the costs and expenses incurred during the proceedings.

Languages:

English, Spanish.



Court of Justice of the European Communities and Court of First Instance

Important decisions

Identification: ECJ-2006-1-001

a) European Union / **b)** Court of Justice of the European Communities / **c)** Fifth Chamber / **d)** 07.01.2004 / **e)** C-60/02 / **f)** Criminal proceedings v. X / **g)** *European Court Reports* I-00651 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

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

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

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

Keywords of the alphabetical index:

Trademark, counterfeit goods, economic damage, criminal liability / Community law and national criminal law / Community law, interpretation.

Headnotes:

The duty to interpret national law so as to be compatible with Community law, in the light of its wording and purpose, in order to attain the aim pursued by the latter, cannot, of itself and independently of a law adopted by a Member State, have the effect of determining or aggravating the liability in criminal law of an entity which has failed to meet the requirements of a Community regulation.

That obligation finds its limits in the general principles of law which form part of the Community legal system and, in particular, in the principles of legal certainty

and non-retroactivity. In particular, the principle of non-retroactivity of penalties, enshrined in Article 7 ECHR and constituting a general principle of Community law common to the constitutional traditions of the member states, prohibits the imposition of criminal penalties for conduct which is not prohibited by a national rule, even if the national rule is contrary to Community law (see paras 61, 63-64, operative part 2).

Summary:

I. Several companies, all of them trademark proprietors, had applied to the Regional Court Eisenstadt (Austria), for judicial investigation of unidentified persons for contraventions of Austrian trademark protection law. One of the companies, Rolex, submitted that persons unknown had infringed its trademark rights by trying to transport 19 counterfeit watches bearing the Rolex trademark from Italy into Poland via Austria, a contravention of its trademark rights which was a criminal offence punishable under the Trademark Protection Act. The other companies had made similar applications relating to counterfeit clothing bearing their trademarks (judgment, Sections 16 and 17).

The Eisenstadt *Landesgericht* held that instituting a judicial investigation under the Austrian Code of criminal procedure required that the conduct complained of constituted an offence. In its view, however, the Austrian Trademark Protection Act had to be interpreted as not applying to mere transit of goods, an interpretation which the Austrian Government and the plaintiffs challenged in the main proceedings (judgment, Section 57). The Austrian Court likewise took the view that, under Article 7.1 ECHR, which had constitutional rank in Austrian law, acts which at the time they were committed were not illegal under national law or international law were not punishable (judgment, Section 19).

In that context the Eisenstadt *Landesgericht* had asked the Court to rule on whether a provision of national law, which could be interpreted to mean that mere transit of manufactured or distributed goods in breach of trademark law was not punishable was contrary to Article 2 of Council Regulation (EC) no. 3295/94 of 22 December 1994 laying down measures to prohibit the release for free circulation, export, re-export or entry for a suspensive procedure of counterfeit and pirated goods, as amended by Council Regulation (EC) no. 241/1999 of 25 January 1999 (judgment, Section 22).

II. After pointing out that it was not for it to express a view on the interpretation of national law, a matter which fell exclusively to the national courts (judgment,

Section 58) and that the national courts were required to interpret national law within the limits set by Community law in order to achieve the result intended by the Community rule in question (judgment, Section 59), the Court reaffirmed that this requirement to interpret national law compatibly in the light of the letter and purpose of Community law so as to achieve the result required by Community law could not, of itself and independently of a national law adopted by a member state, create or aggravate criminal liability of persons who had acted in contravention of a Community rule. It held that the requirement found its limits in the general principles of law which formed part of the Community legal system, in particular the principles of legal certainty and non-retroactivity. In particular, the principle of lawful punishment as established in Article 7 ECHR, forbade the imposition of criminal penalties for conduct which was not prohibited by a national rule, even if the national rule were contrary to Community law (judgment, Sections 61, 63 and 64).

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2006-1-002

a) European Union / **b)** Court of Justice of the European Communities / **c)** Grand Chamber / **d)** 13.01.2004 / **e)** C-453/00 / **f)** Kühne & Heitz NV v. Produktschap voor Pluimvee en Eieren / **g)** *European Court Reports* I-00837 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.6.9.2 **Constitutional Justice** – Effects – Consequences for other cases – Decided cases.

3.26.3 **General Principles** – Principles of Community law – Genuine co-operation between the institutions and the member states.

Keywords of the alphabetical index:

Export, refunds / Preliminary ruling, effects / Co-operation, fair, institutions, member states / *Res iudicata*, review of administrative decision, obligation.

Headnotes:

The principle of cooperation arising from Article 10 EC imposes on an administrative body an obligation to review a final administrative decision, where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the Court where:

- under national law, it has the power to reopen that decision;
- the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance;
- that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under Article 234.3 EC; and
- the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court (see para. 28, operative part).

Summary:

I. The *College van Beroep voor het bedrijfsleven* (the Dutch Appeal Court dealing with administrative disputes in economic matters) had asked the Court for a preliminary ruling on the interpretation of Community law and, in particular, the principle of co-operation arising from Article 10 EC. The question had been raised in proceedings between Kühne & Heitz NV and the Productschap voor Pluimvee en Eieren, a poultry and eggs group, concerning payment of export refunds (judgment, Sections 1 and 2). Kühne & Heitz had exported quantities of poultrymeat parts to non-member countries. In its declarations to the Netherlands customs authorities it had designated the goods as falling under the "Legs and cuts of legs of other poultry" sub-heading of the common customs tariff. On the basis of the declarations the Productschap had granted export refunds under that sub-heading and had paid the relevant amounts. After checking, however, the Productschap had reclassified the goods under the sub-heading "Other" and following that reclassification had demanded repayment of a specified amount from Kühne & Heitz. Its objection to the repayment claim having been rejected, Kühne & Heitz appealed against the rejection decision to the *College van Beroep voor het bedrijfsleven*. The *College* had dismissed the appeal on the ground that the goods in question were not covered by the term "legs" within the meaning of the relevant sub-heading of the common customs tariff (judgment, Sections 5 to 7). In those proceedings Kühne & Heitz had not requested that the matter be referred to the Court for a

preliminary ruling. Following a judgment subsequently delivered by the Court which was in line with their arguments, Kühne & Heitz had asked the Productschap to repay the refunds which, in their view, the Productschap had wrongly required of them, and had sought payment of a sum equivalent to the greater amount which they would have received in refunds if the chicken legs had been classified in accordance with the new judgment. The Productschap had rejected the requests and, ruling on the complaint submitted to it, had upheld its earlier rejection decision in a further decision. Kühne & Heitz had then appealed to the *College van Beroep voor het bedrijfsleven* against the second rejection decision (judgment, Sections 9 and 10).

It was in connection with examining an appeal of that kind that the *College van Beroep voor het bedrijfsleven* had wondered whether the finality of an administrative decision must exceptionally be disregarded in a case such as the one referred to it, in which, first, Kühne & Heitz had exhausted the legal remedies available to it; second, its interpretation of Community law had proved to be contrary to a judgment given subsequently by the Court; and third, the person concerned had complained to the administrative body immediately after becoming aware of that judgment of the Court (judgment, Section 17).

II. The issue having been referred to it for a preliminary ruling, the Court held that the principle of co-operation arising from Article 10 EC required that an administrative body review a final administrative decision, where an application for such review was made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the Court where:

- under national law it had the power to reopen decisions;
- the administrative decision in question had become final as a result of a judgment of a national court ruling at final instance;
- that judgment, in the light of a decision given by the Court subsequent to it, was based on a misinterpretation of Community law which had been adopted without the question's being referred to the Court for a preliminary ruling under Article 234.3 EC; and
- the person concerned had complained to the administrative body immediately after becoming aware of that decision of the Court (judgment, Section 28 and the operative paragraphs).

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2006-1-003

a) European Union / **b)** Court of First Instance / **c)** Fifth Chamber / **d)** 10.02.2004 / **e)** T-64/01 et T-65/01 / **f)** Afrikanische Frucht-Compagnie GmbH and Internationale Fruchtimport Gesellschaft Weichert & Co. v. Council and Commission / **g)** *European Court Reports* II-00521 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

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

4.6.10 **Institutions** – Executive bodies – Liability.

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

Keywords of the alphabetical index:

Liability, arising from a lawful act / Liability, non-contractual / Damage, serious.

Headnotes:

1. In order for the Community to incur non-contractual liability within the meaning of the second paragraph of Article 288.2 EC, a number of conditions must be satisfied: the conduct alleged against the Community institutions must be unlawful, the damage must be real and there must be a causal link between that conduct and the damage complained of.

As regards the first of those conditions, it must be shown that there has been a sufficiently serious breach of a rule of law intended to confer rights on individuals. As regards the requirement that the breach be sufficiently serious, the decisive test for finding that it is fulfilled is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where that institution has only a considerably reduced, or even no discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (see paras 70-71).

2. In the event of the principle of non-contractual liability as a result of a lawful act being recognised in Community law, a precondition for such liability would in any event be the cumulative satisfaction of three conditions: the reality of the damage allegedly suffered, the causal link between it and the act on the part of the

Community institutions, and the unusual and special nature of that damage. Damage is “special” when it affects a particular class of economic operators in a disproportionate manner by comparison with other operators, and unusual when it exceeds the limits of the economic risks inherent in operating in the sector concerned, the legislative measure that gave rise to the damage pleaded not being justified by a general economic interest (see paras 150-151).

Summary:

I. The actions for damages in which the case originated had sought compensation for damage which the plaintiffs alleged in connection with the regulations on import of bananas into the Community as found, respectively, in Council Regulation (EC) no. 1637/98 of 20 July 1998 amending Regulation no. 404/93 (OJ L 210, p. 28) (judgment, Section 19) and Commission Regulation (EC) no. 2362/98 of 28 October 1998, laying down detailed rules for the implementation of Regulation no. 404/93 regarding imports of bananas into the Community (OJ L 293, p. 32) (judgment, Section 24). The applicants were Hamburg (Germany) firms which imported and marketed third-country bananas in, *inter alia*, the new member states. They were mainly primary importers and, to a lesser extent, secondary importers (judgment, Section 30).

II. The Tribunal rejected the appeals as unfounded. However, it took the opportunity to point out that where an institution had only a considerably reduced, or even no, discretion, the mere infringement of Community law could be sufficient to establish the existence of a sufficiently serious breach (judgment, Section 71) and therefore might create non-contractual liability of the Community within the meaning of Article 288.2 EC. The Tribunal also pointed out that, if the principle of non-contractual liability for a lawful act were recognised in Community law, such liability would in any case depend on all of three requirements being met: reality of the damage allegedly suffered, a causal link between it and the act on the part of the Community institutions, and the unusual and special nature of that damage. It stated that damage was special when it affected a particular class of economic operators in a disproportionate manner in comparison with other operators, and unusual when it exceeded the limits of the economic risks inherent in operating in the sector concerned, the legislative measure that had given rise to the damage pleaded not being justified by a general economic interest (judgment, Sections 150 and 151).

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2006-1-004

a) European Union / **b)** Court of Justice of the European Communities / **c)** Plenary / **d)** 23.03.2004 / **e)** C-233/02 / **f)** France v. Commission / **g)** *European Court Reports* I-02759 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

1.3.5.2.2 **Constitutional Justice** – Jurisdiction – The subject of review – Community law – Secondary legislation.

2.3.3 **Sources of Constitutional Law** – Techniques of review – Intention of the author of the enactment under review.

3.13 **General Principles** – Legality.

4.17.3 **Institutions** – European Union – Distribution of powers between institutions of the Community.

Keywords of the alphabetical index:

Agreement, international, conclusion / Agreement, international, binding effect / Common commercial policy / Balance, institutional / Legislation, initiating.

Headnotes:

1. The fact that a measure, such as the Guidelines on regulatory cooperation and transparency agreed upon with the United States of America, is not binding is not sufficient to confer on the Commission the competence to adopt it. Determining the conditions under which such a measure may be adopted requires that the division of powers and the institutional balance established by the Treaty in the field of the common commercial policy be duly taken into account, since in this case the measure seeks to reduce the risk of conflict related to the existence of technical barriers to trade in goods (see para. 40).

2. For the purpose of determining whether or not a measure, such as the guidelines on regulatory cooperation and transparency agreed upon with the United States of America, is binding, the intention of the parties must in principle be the decisive criterion. In the present case, that intention is clearly expressed in the text of the Guidelines itself, paragraph 7 of which specifies that the purpose of the document is to establish guidelines which regulators of the United States Federal Government and the services of the Commission 'intend to apply on a voluntary basis'. On

the basis of that information, it is apparent that the parties had no intention of entering into legally binding commitments when they concluded those guidelines. Consequently, those guidelines do not constitute a binding agreement and therefore do not fall within the scope of Article 300 EC.

Since they are devoid of binding effect, those guidelines cannot impose obligations on the Commission in carrying out its role of initiating legislation in the context of the Community legislative process. Therefore, the mere fact that a measure such as those guidelines provides for the possibility of engaging in prior consultation and gathering all necessary information before submitting appropriate proposals cannot undermine the Commission's power of initiative (see paras 42-43, 45, 50-51).

Summary:

This case originated in the application by France for annulment of the decision by which the Commission concluded an agreement with the United States of America entitled "Guidelines on Regulatory Cooperation and Transparency" (judgment, paragraph 1). Discussions on the Guidelines had begun in July 1999 between the relevant services of the Commission and their colleagues in the services of the United States Trade Representative and the Department of Commerce. Throughout those discussions, the Commission's services had insisted that the guidelines would not create any rights or obligations at the international level between the European Community and the United States of America. The Guidelines had been finalised in February 2002 by agreement between the Commission's negotiators and their United States colleagues. The document was not signed. The text was notified to the Commission, which took formal note of it at a meeting on 9 April 2002. The text was not, however, published in the Official Journal of the European Communities (judgment, paragraphs 10 to 13).

With regard to the merits, the French Government relied on two pleas in law in support of its application, relating, first, to the Commission's lack of competence to adopt the contested measure and, secondly, to infringement of the sole right to initiate legislation conferred upon the Commission by the EC Treaty (judgment, paragraph 27).

The Court held, however, that none of the pleas in France's action was founded and therefore rejected it (judgment, paragraph 53).

By its first plea, the French Government claimed, more specifically, that the Commission was not competent to adopt the contested measure, inasmuch as the Guidelines amounted to a binding

international agreement the conclusion of which, under the division of powers pursuant to Article 300 EC, lay within the competence of the Council (judgment, paragraph 28). The Commission, on the other hand, took the view that the Guidelines did not constitute a legally binding agreement, as confirmed by analysis of the intention of the parties, which was the only decisive criterion in international law for the purpose of establishing the existence of binding effect (judgment, paragraph 32). It accordingly inferred that, inasmuch as the Guidelines were merely an agreement for practical co-operation, devoid of binding legal effect, the Commission had the power to agree such a document with the United States authorities (judgment, paragraph 37).

The Court held, however, that the fact that a measure such as the Guidelines on Regulatory Cooperation and Transparency agreed with the United States of America was not binding was not sufficient to confer on the Commission the competence to adopt it. Determining the conditions under which such a measure could be adopted required that the division of powers and the institutional balance established by the Treaty in the field of the common commercial policy be duly taken into account, since in this case the measure sought to reduce the risk of conflict related to the existence of technical barriers to trade in goods (judgment, paragraph 40).

By its second plea, the French Government claimed that the Guidelines infringed the EC Treaty in that they restricted the exercise of the Commission's sole right of initiative under the Community's legislative process and thereby affected that process as a whole. It argued in particular that the Commission was obliged to take the Guidelines into account at the stage of the legislative process for which it was responsible and that they therefore restricted the Commission's right of initiative. According to the French government, that restriction on the Commission's right of initiative gave rise to consequences for the Community's entire legislative process, since the nature of the proposals made by the Commission affected the freedom of action of the Council, which could reject those proposals only by unanimity (judgment, paragraphs 47 to 49).

The Court held, however, that, as they were devoid of binding effect in the case in question, the Guidelines could not impose obligations on the Commission in carrying out its role of initiating legislation. Therefore, the mere fact that a measure such as the Guidelines provided for the possibility of engaging in prior consultation and gathering all necessary information before submitting appropriate proposals could not be alleged to undermine the Commission's power of initiative (judgment, paragraphs 50 and 51).

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2006-1-005

a) European Union / **b)** Court of Justice of the European Communities / **c)** Sixth Chamber / **d)** 25.03.2004 / **e)** C-495/00 / **f)** Azienda Agricola Giorgio, Giovanni e Luciano Visentin e.a. v. Azienda di Stato per gli interventi nel mercato agricolo (AIMA) / **g)** *European Court Reports* I-02993 / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.2.2 **Sources of Constitutional Law** – Categories – Unwritten rules – General principles of law.
 2.2.1.6.4 **Sources of Constitutional Law** – Hierarchy – Hierarchy as between national and non-national sources – Community law and domestic law – Secondary Community legislation and domestic non-constitutional instruments.
 3.10 **General Principles** – Certainty of the law.
 3.16 **General Principles** – Proportionality.
 4.17.2 **Institutions** – European Union – Distribution of powers between Community and member states.

Keywords of the alphabetical index:

Community law, implementation by member states, application of national procedural rules.

Headnotes:

According to the general principles on which the Community is based and which govern relations between the Community and the member states, it is for the latter, under Article 5 of the EC Treaty (now Article 10 EC), to ensure that Community rules are implemented within their territories. In so far as Community law, including its general principles, does not include common rules to that effect then, when the national authorities implement Community rules, they are to act in accordance with the procedural and substantive rules of their own national law.

Nevertheless, when adopting measures to implement Community legislation, national authorities must exercise their discretion in compliance with the general rules of Community law, which include the principles of proportionality, legal certainty and the protection of legitimate expectations (see paras 39-40).

Summary:

I. The *Tribunale amministrativo regionale del Lazio* (Regional Administrative Court for Lazio) (Italy) had referred to the Court, for a preliminary ruling, three questions on the interpretation and validity of Articles 1 and 4 of Council Regulation (EEC) no. 3950/92 of 28 December 1992 establishing an additional levy in the milk and milk products sector, and of Articles 3 and 4 of Commission Regulation (EEC) no. 536/93 of 9 March 1993 laying down detailed rules for the application of the additional levy on milk and milk products (judgment, paragraph 1). Those questions were raised in proceedings between various Italian milk producers and the Italian Agricultural Market Intervention Board and other dairy producers, concerning the lawfulness of the decisions the Board had taken in 1999 to correct the reference quantities allocated for the milk marketing years 1995/96 and 1996/97, to reallocate the unused reference quantities for those years and, in consequence, to recalculate the levies payable by producers for those years (judgment, paragraph 2).

By its first question, the national court sought in essence to ascertain whether, on a proper construction of Articles 1 and 4 of Regulation no. 3950/92 and Articles 3 and 4 of Regulation no. 536/93, a member state was precluded, after checks had been carried out, from correcting the individual reference quantities allocated to each producer and, after the unused reference quantities had been reallocated, from recalculating in consequence the additional levies payable, after the final date for payment of those levies for the production period concerned (judgment, paragraph 25).

II. In replying to this preliminary question, the Court had occasion to point out that, according to the general principles on which the Community was based and which governed relations between it and the member states, it was for the latter, under Article 5 of the EC Treaty (currently Article 10 EC), to ensure that Community rules were implemented within their territories. It again asserted that, in so far as Community law, including its general principles, did not include common rules to that effect, when the national authorities implemented Community rules, they were to act in accordance with the procedural and substantive rules of their own national law. The Court pointed out in this connection that, when adopting measures to implement Community legislation,

national authorities must exercise their discretion in compliance with the general rules of Community law, which included the principles of proportionality, legal certainty and the protection of legitimate expectations (judgment, paragraphs 39 and 40).

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



Identification: ECJ-2006-1-006

a) European Union / b) Court of Justice of the European Communities / c) Plenary / d) 30.03.2004 / e) C-167/02 P / f) Willi Rothley and others v. European Parliament / g) *European Court Reports* I-03149 / h) CODICES (English, French).

Keywords of the systematic thesaurus:

4.5.4.1 **Institutions** – Legislative bodies – Organisation – Rules of procedure.
 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:

Parliament, member, investigation / Judicial review, principle / Parliament, member, infringement of privileges / Immunity, parliamentary / Fraud, combating / Parliament, member, immunity.

Headnotes:

There are no grounds for a finding that certain members of the European Parliament could not avail themselves of effective judicial protection if they were not permitted to bring an action for annulment before the Community Courts of a measure of the parliament concerning amendments to its Rules of Procedure following adoption of the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-Fraud Office (OLAF).

First, the provisions of that decision relating to cooperation with OLAF or to supplying it with information are intended – whatever their exact scope may be – to impose obligations upon members of the parliament, so that it is in the first instance for members, in any given case, either to act upon those obligations or not to comply with them if they are persuaded that it is open to them to do so without infringing Community law. If, in a specific case, one of the members of the parliament adopts that approach, any subsequent measures taken by the parliament with regard to that member and to his disadvantage will, in principle, be subject to judicial review.

Second, as regards the various measures which OLAF could take when exercising its investigative powers, there is nothing to suggest that, where such measures affect certain members of the parliament, the latter would have no effective judicial protection in respect of those measures, since the rules determining whether the Community Courts have jurisdiction, as regards either the commencement of direct actions before those Courts or where the Court is seised by way of a reference for a preliminary ruling made by a national court, must be interpreted above all in the light of the principle of effective judicial protection (see paras 48-50).

Summary:

I. Mr Rothley and 70 other members of the European Parliament had brought an appeal against the judgment of the Court of First Instance of 26 February 2002 in *Rothley and Others v. Parliament* (Case T-17/00, ECR II-579), in which the Court of First Instance had found inadmissible their action for annulment of the Parliament's decision of 18 November 1999 concerning amendments to its Rules of Procedure following adoption of the Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-Fraud Office (OLAF) (judgment, paragraph 1). The Court of First Instance had declared the action inadmissible on the ground that the appellants were not individually concerned by the contested measure for the purposes of Article 230 EC (judgment, paragraph 16).

In their appeal, the appellants maintained that, in finding their application inadmissible, the Court of First Instance had infringed the principle of the right to effective judicial protection. In particular, they claimed that the Court of First Instance had wrongly concluded that if an action of OLAF were to prejudice the individual immunity of a member of the parliament, the latter could avail himself of the judicial

protection and legal remedies provided for by the Treaty (judgment, paragraph 40).

II. The Court, however, dismissed this ground of appeal. It held that there were no grounds for a finding that certain members of the European Parliament could not avail themselves of effective judicial protection if they were not permitted to bring an action for annulment of a decision by parliament to amend its Rules of Procedure following adoption of the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-Fraud Office (OLAF) before the Community Courts. The Court considered, first, that the provisions of this decision relating to co-operation with OLAF or to supplying it with information were intended – whatever their exact scope might be – to impose obligations upon members of the parliament, so that it was in the first instance for members, in any given case, either to act upon those obligations or not to comply with them if they were persuaded that it was open to them to do so without infringing Community law. If, in a specific case, one of the members of the parliament adopted that approach, any subsequent measures taken by the parliament with regard to that member and to his disadvantage would, in principle, be subject to judicial review.

Second, with regard to the various measures which OLAF could take when exercising its investigative powers, there was nothing to suggest that, where such measures affected certain members of the parliament, the latter would have no effective judicial protection in respect of those measures, since the rules determining whether the Community Courts had jurisdiction, either with regard to the commencement of direct actions before those Courts or where the Court was seised by way of a reference for a preliminary ruling made by a national court, must be interpreted above all in the light of the principle of effective judicial protection (judgment, paragraphs 48 to 50).

Languages:

Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish, Swedish.



European Court of Human Rights

Important decisions

Identification: ECH-2006-1-001

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 11.01.2006 / **e)** 52562/99 and 52620/99 / **f)** Sørensen and Rasmussen v. Denmark / **g)** *Reports of Judgments and Decisions* of the Court / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1.4.4 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Convention on Human Rights of 1950.
 3.19 **General Principles** – Margin of appreciation.
 5.1.2 **Fundamental Rights** – General questions – Horizontal / Vertical effects.
 5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.

Keywords of the alphabetical index:

Trade union, membership, compulsory / Trade Union, closed shop agreement / Freedom of association, negative.

Headnotes:

Freedom of association encompasses a right not to be forced to join an association. In certain circumstances, States have a positive obligation to intervene in the relationship between private individuals by taking reasonable and appropriate measures to secure the effective enjoyment of the right to freedom of association.

Summary:

I. The first applicant was offered a short-term job as a holiday-relief worker, one of the conditions of employment being that he become a member of a trade union, SID. On receiving his first pay slip, he realised that he was paying a subscription to that union, although he had applied for membership of a different union. He informed his employer that he did not want to pay the subscription to SID and as a result he was dismissed for not satisfying the

requirements for obtaining the job. The second applicant was offered a job as a gardener on the condition that he become a member of SID, with which the employer had entered into a closed shop agreement. The applicant, who had been unemployed, joined SID so that he could take up the job, although he did not agree with the union's political views.

In the application lodged with the Court, the applicants claimed that the obligation to belong to a trade union as a condition of employment violated their right to freedom of association. They relied on Article 11 ECHR.

II. The Court recalled that freedom of association encompasses a negative right of association, that is a right not to be forced to join an association. An individual could not be considered to have renounced his negative right where, in the knowledge that trade union membership was a precondition of employment, he had accepted an offer of employment notwithstanding his opposition to that condition. Thus, a distinction between pre-entry and post-entry closed shop agreements was not tenable. Moreover, while the essential object of Article 11 ECHR is to protect the individual against arbitrary interference by public authorities with exercise of the rights protected, the authorities may in certain circumstances be obliged to intervene in the relationship between private individuals by taking reasonable and appropriate measures to secure the effective enjoyment of those rights. Consequently, the State's responsibility will be engaged if it fails to secure the negative right of association under domestic law. In that respect, whether the State has a positive or a negative obligation, the applicable principles are similar: a fair balance must be struck between the competing interests of the individual and of the community. In the area of trade union freedom, the State enjoys a wide margin of appreciation but that margin is reduced considerably if the domestic law permits closed shop agreements which run counter to the individual's freedom of choice. In that connection, particular weight must be attached to the justifications advanced by the authorities and account must be taken of changing perceptions of the relevance of closed shop agreements.

In the case at issue, the fact that the applicants had accepted membership of the union as a condition of employment did not significantly alter the element of compulsion inherent in having to join a trade union against their will. Although it was not in dispute that the first applicant could have found similar employment with an employer who had not entered into a closed shop agreement, he was nevertheless dismissed without notice as a direct result of his

refusal to comply with the requirement to join SID, a requirement which had no connection with his ability to perform the job. In the Court's opinion, such a consequence could be considered serious and capable of striking at the very substance of the freedom of choice inherent in the negative right to freedom of association. As to the second applicant, it was speculative whether he could have found employment elsewhere but it was certain that if he had resigned his membership of SID he would have been dismissed without any possibility of reinstatement or compensation. The Court was therefore satisfied that he was individually and substantially affected by the application of the closed shop agreement to him. Both applicants were thus compelled to join SID and that compulsion struck at the very substance of their freedom of association. The Court considered that legislative attempts to eliminate the use of closed shop agreements in Denmark reflected the trend in Contracting States not to regard such agreements as an essential means of securing the interests of trade unions and to give due weight to the right of individuals to join a union of their choice, without fear of prejudice to their livelihood. These attempts were furthermore consistent with developments on the international level, notably pursuant to the European Social Charter. Taking all the circumstances into account, the Court found that the respondent State had failed to protect the applicants' negative right to trade union freedom. There had therefore been a violation of Article 11 ECHR in respect of both applicants.

Cross-references:

- *Swedish Engine Drivers' Union v. Sweden*, Judgment of 06.02.1976, Series A, no. 20;
- *Young, James and Webster v. the United Kingdom*, Judgment of 13.08.1981, Series A, no. 44; *Special Bulletin ECHR* [ECH-1981-S-002];
- *Siguður Sigurjónsson v. Iceland*, Judgment of 30.06.1993, Series A, no. 264; *Special Bulletin ECHR* [ECH-1993-S-005];
- *Gustafsson v. Sweden*, Judgment of 25.04.1996, *Reports of Judgments and Decisions* 1996-II; *Bulletin* 1996/2 [ECH-1996-2-008];
- *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];
- *Schettini and Others v. Italy* (dec.), no. 29529/95, 09.11.2000;
- *Wilson, National Union of Journalists and others v. the United Kingdom*, nos. 30668/96, 30671/96 and 30678/96, *Reports of Judgments and Decisions* 2002-V;

- *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, *Reports of Judgments and Decisions* 2003-VIII;
- *Broniowski v. Poland* [GC], no. 31443/96, *Reports of Judgments and Decisions* 2004-V.

Languages:

English, French.



Identification: ECH-2006-1-002

a) Council of Europe / **b)** European Court of Human Rights / **c)** Chamber / **d)** 21.02.2006 / **e)** 28602/95 / **f)** *Tüm Haber Sen and Çınar v. Turkey* / **g)** *Reports of Judgments and Decisions* of the Court / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

- 2.1.1.4.6 **Sources of Constitutional Law** – Categories – Written rules – International instruments – European Social Charter of 1961.
- 5.3.27 **Fundamental Rights** – Civil and political rights – Freedom of association.
- 5.4.11 **Fundamental Rights** – Economic, social and cultural rights – Freedom of trade unions.

Keywords of the alphabetical index:

Trade union, civil servants, dissolution / Association, dissolution / Civil servant, rights and obligations / Civil servant, right to form trade union.

Headnotes:

In the absence of any concrete evidence to show that the formation or activities of a trade union represent a threat to society or the State, the dissolution of the union on the sole ground that its members are civil servants cannot be regarded as necessary in a democratic society.

Summary:

I. In 1992 *Tüm Haber Sen* was founded by 851 public sector contract staff. Its constitution provided among other things for the right to enter into collective

agreements. A few days later, the Istanbul Governor's Office called upon the appropriate prosecutor to seek the suspension of activity and dissolution of Tüm Haber Sen on the ground that civil servants were not entitled to form trade unions. The District Court allowed the prosecutor's application and ordered the applicant's dissolution. However, the Court of Cassation, considering that the organisation was not a "union" in the technical sense of that term, quashed the order and remitted the case to the District Court. Before that court the representatives of Tüm Haber Sen argued that it should be regarded as a union empowered to call strikes and enter into collective agreements. Having examined their arguments, the District Court decided to maintain its initial judgment. The representatives of Tüm Haber Sen again appealed on points of law and the Court of Cassation, at a plenary sitting of the civil divisions, ordered at final instance the dissolution of the applicant organisation on the ground that, in the absence of any statutory provisions of Turkish law governing the legal status of trade unions for civil servants and public sector contract workers, the applicant trade union could not claim to have any legal basis. Nor could it be regarded as a professional association or organisation because it had been explicitly presented by its leaders as a trade union in its own right. Moreover, the Court of Cassation found that Tüm Haber Sen was not entitled to rely on the international labour conventions that it had invoked, as those instruments were not directly applicable in domestic law and implementing legislation had not yet been enacted. On 8 June 1995, a few days after notice of that judgment had been served on the representatives of Tüm Haber Sen, all the branches and divisions of the union were dissolved by order of the Ministry of the Interior.

In their application lodged with the Court, the applicants complained that the dissolution of the applicant association violated their freedom to form and join trade unions. They relied on Article 11 ECHR.

II. The Court recalled that whilst Article 11 ECHR presented trade union freedom as one form or particular aspect of freedom of association, it did not provide trade unions or their members with a guarantee of specific treatment by the State and left to the State the choice of the means to be utilised so that their right to be heard would be upheld. However, Article 11 ECHR was binding on the State, whether the latter's relations with its employees were governed by public or private law. In this case, at the material time, civil servants had not been entitled to form or join trade unions, as the Court of Cassation had construed as a prohibition the fact that Turkish law admitted of no legal status for such organisations and that there were no statutory instruments

providing for the application in domestic law of the international labour conventions to which Turkey was a party. It accordingly appeared that Tüm Haber Sen had been dissolved solely on the ground that it had been founded by civil servants and its members were civil servants.

The interference was consistent with domestic law, as construed by the plenary sitting of the civil divisions, with the aim of preventing disorder. As to its necessity, the Court reiterated that the exceptions set out in Article 11 ECHR had to be construed strictly and only convincing and compelling reasons could justify restrictions on freedom of association. In the present case, however, the Government had failed to provide any explanation as to how the absolute prohibition on forming trade unions, imposed at the time by Turkish law on civil servants and public sector contract workers, had met a "pressing social need". Moreover, at the material time there had been two elements that supported a narrow interpretation of the restriction of civil servants' rights to form trade unions. Firstly, Turkey had already ratified International Labour Organisation Convention no. 87, which secured to all workers the unrestricted right to form and join trade unions and, secondly, the European Social Charter's Committee of Independent Experts had construed Article 5 of the Charter, affording all workers the right to form trade unions, as applying to civil servants as well. Accordingly, in the absence of any concrete evidence to show that the formation or activities of Tüm Haber Sen had represented a threat to Turkish society or the Turkish State, it could not be said that the statutory prohibition was sufficient in itself to ensure that the union's dissolution satisfied the conditions in which freedom of association might be restricted. The respondent State had thus failed to comply, at the material time, with its positive obligation to secure enjoyment of the rights protected under Article 11 ECHR. There had therefore been a violation of that provision.

Cross-references:

- *National Union of Belgian Police v. Belgium*, Judgment of 27.10.1975, Series A, no. 19; *Special Bulletin ECHR* [ECH-1975-S-002];
- *Swedish Transport Workers' Union v. Sweden*, Judgment of 06.02.1976, Series A, no. 20;
- *Schmidt and Dahlström v. Sweden*, Judgment of 06.02.1976, Series A, no. 21;
- *Sidiropoulos and Others v. Greece*, Judgment of 10.07.1998, *Reports of Judgments and Decisions* 1998-IV; *Bulletin* 1998/2 [ECH-1998-2-010];
- *Wilson and the National Union of Journalists and Others v. the United Kingdom*, nos. 30668/96, 30671/96 and 30678/96, *Reports of Judgments and Decisions* 2002-V.

Languages:

English, French.

**Identification:** ECH-2006-1-003

a) Council of Europe / **b)** European Court of Human Rights / **c)** Grand Chamber / **d)** 16.03.2006 / **e)** 58278/00 / **f)** *Ždanoka v. Latvia* / **g)** *Reports of Judgments and Decisions of the Court* / **h)** CODICES (English, French).

Keywords of the systematic thesaurus:

2.1.1.4.3 **Sources of Constitutional Law** – Categories – Written rules – International instruments – Geneva Conventions of 1949.

3.16 **General Principles** – Proportionality.

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

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

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

Keywords of the alphabetical index:

Election, candidacy, restriction / Democracy, defence.

Headnotes:

The standards to be applied for establishing compliance with Article 3 Protocol 1 ECHR are less stringent than those applied under Articles 8 to 11 ECHR. Moreover, States are free to rely on aims other than those contained in the latter provisions to justify a restriction, provided that the aim is compatible with the principle of the rule of law and the general objectives of the Convention.

Any restriction on the rights guaranteed by Article 3 Protocol 1 ECHR must be free from arbitrariness and proportionate and must not interfere with the free expression of the opinion of the people. Stricter requirements may be imposed on the right to stand for election than on the right to vote. However, the procedures leading to disqualification must be free from arbitrariness.

Summary:

I. The applicant joined the Communist Party of Latvia (CPL) – the Latvian branch of the now-defunct Communist Party of the Soviet Union – in 1971 and remained a member even after the emergence in April 1990 of a breakaway faction favouring Latvian independence and a multi-party political system. The Latvian Parliament, of which at that time the applicant was a member, voted in May 1990 to seek Latvia's independence from the USSR.

On 13 January 1991 an unsuccessful *coup d'état* took place; the CPL was involved. On 3 March 1991 a plebiscite resulted in a vote in favour of independence. Latvia declared full independence on 21 August 1991; the CPL was declared unlawful two days later and officially dissolved the following month. The applicant, however, continued to sit in parliament until elections were held in June 1993. In March 1997 she was elected to the Riga City Council. In July 1998 she presented herself as a candidate for election to parliament, but withdrew after the Central Electoral Commission decided that her candidacy did not meet the legal requirements.

In January 1999 the Office of the Prosecutor General applied to the Riga Regional Court for a finding that the applicant had participated in the CPL after the 1991 *coup* attempt. On 15 February 1999 the Riga Regional Court so found. An appeal by the applicant was dismissed by the Supreme Court in December 1999. Thereafter, the applicant was disqualified from elective office; she lost her seat as a member of Riga City Council. She applied unsuccessfully to the Senate of the Supreme Court for the judgment to be quashed.

The applicant attempted to stand as an independent candidate in the 2002 parliamentary elections but was refused registration. Latvia became a member State of the European Union on 1 May 2004. The applicant was allowed to stand as a candidate in the elections to the European Parliament, which were held on 12 June 2004, and was elected.

In her application, the applicant complained that her disqualification from standing as a candidate in parliamentary elections violated Article 3 Protocol 1 ECHR.

II. The Court observed that the standards to be applied for establishing compliance with Article 3 Protocol 1 ECHR must be considered to be less stringent than those applied under Articles 8 to 11 ECHR. Moreover, given that the provision is not limited by a specific list of "legitimate aims", the Contracting States are free to rely on an aim not contained in that list to justify a restriction, provided

that the compatibility of that aim with the principle of the rule of law and the general objectives of the Convention was proved in the particular circumstances of a case. In examining compliance with Article 3 Protocol 1 ECHR, the Court has focused mainly on two criteria: whether there had been arbitrariness or a lack of proportionality, and whether the restriction had interfered with the free expression of the opinion of the people. In this connection, the wide margin of appreciation enjoyed by the Contracting States had always been underlined. In addition, the Court had stressed the need to assess any electoral legislation in the light of the political evolution of the country concerned, with the result that features unacceptable in the context of one system may be justified in the context of another.

The Court further observed that the need for individualisation of a legislative measure alleged by an individual to be in breach of the Convention, and the degree of that individualisation where it was required by the Convention depended on the circumstances of each particular case. Finally, as regards the right to stand as a candidate for election, stricter requirements might be imposed on eligibility to stand for election to parliament than was the case for eligibility to vote. The Court's test in this respect had been limited largely to a check on the absence of arbitrariness in the domestic procedures leading to disqualification of an individual from standing as a candidate.

Applying these principles to the case before it, the Court pointed out in the first place that the criterion of "political neutrality" could not be applied to members of parliament in the same way as it pertained to other State officials, given that the former could not be "politically neutral" by definition. It further found that the impugned restriction pursued aims compatible with the principle of the rule of law and the general objectives of the Convention, namely the protection of the State's independence, democratic order and national security.

As regards proportionality, the applicant had submitted that the CPL's political programme showed that the CPL had chosen the path to democratisation since 1990; however, the intentions of a party had to be judged, above all, by the actions of its leaders and members rather than by its official slogans and the applicant had never distanced herself from the attempted *coup d'état* of 13 January 1991.

The disqualification imposed on the applicant constituted a special public law measure regulating access to the political process at the highest level. In the context of such a procedure, doubts could be interpreted against a person wishing to be a candidate, the burden of proof could be shifted

against him or her, and appearances could be considered of importance. The Latvian authorities were entitled, within their margin of appreciation, to presume that a person in the applicant's position had held opinions incompatible with the need to ensure the integrity of the democratic process, and to declare that person ineligible to stand for election. The applicant had not disproved the validity of those appearances before the domestic courts, nor had she done so in the context of the proceedings before the Court. The Court's task was essentially to evaluate whether the measure defined by parliament was proportionate from the standpoint of Article 3 Protocol 1 ECHR, and not to find fault with the measure simply on the ground that the domestic courts were not empowered to "fully individualise" the application of the measure in the light of an individual's specific situation and circumstances.

Individuals in the applicant's position had effective access to a court to have determined the issue of whether they belonged to the category defined by the legislature; the procedures could not be considered arbitrary. The legislation was clear and precise as to the definition of the category of persons affected by it, and it was also sufficiently flexible to allow the domestic courts to examine whether or not a particular person belonged to that category.

It was not of central importance that the applicant was never prosecuted and was not stripped of her seat in parliament after the events of January 1991 and it did not appear crucial that the impugned measure was introduced only in 1995; a newly-established democratic legislature needed time for reflection in a period of political turmoil.

The Latvian authorities' view that the applicant's exclusion from standing as a candidate to the national parliament was warranted even today could be considered to be in line with the requirements of Article 3 Protocol 1 ECHR. The applicant's current or recent conduct was not a material consideration, given that the statutory restriction in question related only to her political stance during the crucial period of Latvia's struggle for "democracy through independence" in 1991. While such a measure might scarcely be considered acceptable in the context of one political system, for example in a country which had an established framework of democratic institutions going back many decades or centuries, it might nonetheless be considered acceptable in Latvia in view of the historico-political context which led to its adoption and given the threat to the new democratic order posed by the resurgence of ideas which, if allowed to gain ground, might appear capable of restoring the former regime.

The Court also attached weight to the fact that the Latvian Parliament had periodically reviewed the legislation in question and, even more importantly, the Constitutional Court had carefully examined in 2000 the historical and political circumstances which had given rise to the enactment of the law, finding the restriction to be neither arbitrary nor disproportionate at that point in time, but requiring it to be kept under review by the Latvian Parliament with a view to bringing it to an early end. In conclusion, there had therefore been no violation of Article 3 Protocol 1 ECHR.

Cross-references:

- *X. v. the Netherlands*, no. 6573/74, Commission Decision of 19.12.1974, *Decisions and Reports* 1, p. 88;
- *Glimmerveen and Hagenbeek v. the Netherlands*, nos. 8348/78 and 8406/78, Commission Decision of 11.10.1979, *Decisions and Reports* 18, p. 187;
- *X. v. Belgium*, no. 8701/79, Commission decision of 03.12.1979, *Decisions and Reports* 18, p. 250;
- *Mathieu-Mohin and Clerfayt v. Belgium*, Judgment of 02.03.1987, Series A, no. 113; *Special Bulletin ECHR* [ECH-1987-S-001];
- *Van Wambeke v. Belgium*, no. 16692/90, Commission Decision of 12.04.1991;
- *Vogt v. Germany*, Judgment of 26.09.1995, Series A, no. 323; *Bulletin* 1995/3 [ECH-1995-3-014];
- *Marais v. France*, no. 31159/96, Commission Decision of 24.06.1996, *Decisions and Reports* 86, p. 184;
- *Gitonas and Others v. Greece*, Judgment of 01.07.1997, *Reports of Judgments and Decisions* 1997-IV; *Bulletin* 1997/2 [ECH-1997-2-013];
- *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];
- *Socialist Party and Others v. Turkey*, Judgment of 25.05.1998, *Reports of Judgments and Decisions* 1998-III;
- *Ahmed and Others v. the United Kingdom*, Judgment of 02.09.1998, *Reports* 1998-VI; *Bulletin* 1998/2 [ECH-1998-2-011];
- *Matthews v. the United Kingdom* [GC], no. 24833/94, *Reports of Judgments and Decisions* 1999-I; *Bulletin* 1999/1 [ECH-1999-1-004];
- *Rekvényi v. Hungary* [GC], no. 25390/94, *Reports of Judgments and Decisions* 1999-III;
- *Freedom and Democracy Party (ÖZDEP) v. Turkey* [GC], no. 23885/94, *Reports of Judgments and Decisions* 1999-VIII;
- *Labita v. Italy* [GC], no. 26772/95, *Reports of Judgments and Decisions* 2000-IV; *Bulletin* 2000/1 [ECH-2000-1-002];
- *Briķe v. Latvia* (dec.), no. 47135/99, 29.06.2000;
- *Podkolzina v. Latvia*, no. 46726/99, *Reports of Judgments and Decisions* 2002-II;
- *Refah Partisi (The Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, *Reports of Judgments and Decisions* 2003-II; *Bulletin* 2003/1 [ECH-2003-1-003];
- *Garaudy v. France* (dec.), no. 65831/01, *Reports of Judgments and Decisions* 2003-IX;
- *Socialist Party of Turkey (STP) and Others v. Turkey*, no. 26482/95, 12.11.2003;
- *Gorzelik and Others v. Poland* [GC], no. 44158/98, *Reports of Judgments and Decisions* 2004-I; *Bulletin* 2004/1 [ECH-2004-1-001];
- *Maestri v. Italy* [GC], no. 39748/98, *Reports of Judgments and Decisions* 2004-I.

Languages:

English, French.



Systematic thesaurus (V17) *

* Page numbers of the systematic thesaurus refer to the page showing the identification of the decision rather than the keyword itself.

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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.

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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.

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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).
As understood in private international law.

²² Including constitutional laws.

²³ For example, organic laws.

²⁴ Local authorities, municipalities, provinces, departments, etc.

²⁵ Or: functional decentralisation (public bodies exercising delegated powers).

²⁶ Political questions.

²⁷ Unconstitutionality by omission.

²⁸ For the withdrawal of proceedings, see also 1.4.10.4.

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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.

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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.

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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.

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⁴⁵ Prohibition of punishment without proper legal base.

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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.

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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.

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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.

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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.

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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.

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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.

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¹⁰⁰ Positive and negative aspects.

¹⁰¹ For rights of the child, see 5.3.44.

¹⁰² The criteria of the limitation of human rights (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.

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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.

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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.

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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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